

SBA TRANSPORTATION ROUNDTABLE
“Vicarious Liability and CSA 2010”
September 15, 2010

Vicarious liability as it applies to interstate trucking is the argument that pursuant to state law the users of a motor carrier licensed and authorized and insured pursuant to federal regulation should nonetheless be liable for the carrier's negligence in a highway accident for negligent selection or use of the carrier.

Based on arguably aberrant precedent, plaintiff's bar contends that shippers and brokers must second guess the FMCSA's decision of who is safe to operate by examining the safety record of each carrier before use. See *Schramm v. Foster, Jones v. D'Souza et al.*

This argument is inconsistent with public utility law and the law of regulated entities in general which holds that the public is entitled to rely upon the Agency's determination of who is fit and willing to operate (whether the license is a truck, a bus company, an airline, taxicab or a lawyer).

The FMCSA through its intended release of CSA 2010 data to the public in December threatens to undermine the principles of federal preemption and the ability of the shipping public to effectively use a competitive motor carrier industry. Release of this data will have a substantial anti-competitive effect on 220,000 motor carriers which are small businessmen by depriving them of access to customers and financing. (See Appendix A, Fig. 1.)

In brief, CSA 2010 is a data statistical analysis system developed by the FMCSA for purposes of determining private and for-hire carriers in need of progressive investigation and intervention leading up to an out-of-service order.

Data is accumulated on carriers of every citation, warning, and crash, regardless of causation from data entered by federal, state and local police (without scrubbing). Based upon as yet unvetted statistical analysis and peer groupings, this data is placed into 7 statistical fields (BASICS), points are assessed, and based upon a weighted formula for trucks and mileage or for out-of-service ratios, carriers are ranked by peer groups and percentiles.

The FMCSA proposes to show not only the record of every citation and warning for every for-hire trucking company on its website, it proposes to list each carrier which exceeds various percentiles established as "marginal" or "deficient" in each of the 7 BASIC areas. (See Appendix A, Fig. 2.) These limbo bars will vary from the 50th to the 80th percentile and will show an estimated 68% of the for-hire motor carriers are "marginal" or "deficient" in at least one area.

Last year the FMCSA audited less than 17,000 motor carriers, choosing only the statistically worst for audit and found less than 6,500 unsatisfactory or conditional (62% were satisfactory). Yet, release of this data will malign an estimated 150,000 small carriers as "marginal" or "deficient" in at least one BASIC area. (See Appendix A, Fig. 3.)

Release of this data as currently proposed will have a catastrophic effect on small carriers and the shippers and brokers who use them. Major shippers, brokers and intermodal carriers have already indicated they feel compelled by the threat of vicarious liability to bar use of any carrier shown to be marginal in any of the 7 BASIC areas! Major Fortune 500 companies are contractually embargoing use of any carrier with a marginal rating for any BASIC in anticipation of the Agency's release. The Agency has been made aware of this trend, and has been asked to affirm its duty as a sole determiner of highway safety fitness. It has been beseeched to eliminate from publication any suggestion that its internal enforcement thresholds indicate to the public that a carrier is marginal or not fit for use. Thus far, the Agency has declined to issue the needed clarification. (See Ferro reply to Minnesota Trucking Association.)

As part of the Agency's CSA 2010 rollout, neither the science nor the math which supports its statistical analysis has been subject to rulemaking or scrutiny under OMB or Daubert Guidelines. See Office of Management and Budget (OMB), "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by Federal Agencies; Republication," 67 FR 8452 (February 22, 2002). The cost of compliance, the tangible benefits and the effects on small carriers' ability to compete for freight has not been subject to Reg Flex or Paperwork Reduction Act analysis.

Inherent in the Agency's flawed methodology is bad science and fuzzy math which prejudices small carriers. Among these issues are:

(1) Lack of due process – Points are accumulated based on warnings and citations (not convictions) and crashes are included regardless of fault (2 out of 3 truck/car crashes are caused by the car).

(2) Under-reporting – Key BASIC percentiles are based on ratios of good versus bad roadside inspections. There are no control mechanisms to ensure that inspections without violations are entered in the MCMIS system.

(3) Geographical anomalies – Peer groups are established nationwide. Yet "probable cause" states issue more citations per mile than other states. A small regional carrier may be 5 to 10 times more likely to accumulate speeding warnings in Indiana than in other states.

(4) Profiling – Roadside inspections are not random but are targeted based on ISS values. Small carriers selected by closer scrutiny by non-preventable accidents are more liable to accumulate points invalidating the Agency's cause/effect analysis, and moving them into elevated peer groups with more dissimilar carriers.

(5) EOBR/100 mile exemption – Carriers using EOBRs and the 100 mile exception distort peer groups for small carriers which use paper logs.

(6) Law of large numbers – Statistical anomalies such as accidents based on number of trucks or driver HOS based on number of inspections are magnified

by compression and low number of incidents. One or two warnings or citations can affect small carriers disproportionately.

(7) Peer group anomalies – Peer groupings are by size or number of incidents without reference to nature of operations. In August, the Agency made peer group changes which dropped or raised percentile ratings by 30 to 50. (See Appendix B.)

Unless the FMCSA redacts any pejorative labeling of carriers based on threshold percentiles and otherwise affirms its duty as the sole determiner of highway safety, release of CSA 2010 data will have catastrophic effects on small businesses and their owner-operator partners. Those labeled as marginal or deficient will not be allowed to compete because of vicarious liability fears of the shipping public. Those initially under the established limbo bar will be progressively squeezed out of business as the percentage bar is lowered by small carrier bankruptcies.

The small carrier who is not initially defined as “marginal” or “deficient” may not initially lose market access but must pass under the 7 limbo bars each month to keep its business. Is a prudent businessman or lender going to invest in new equipment at \$120,000 per truck with this variable?

The FMCSA, and only the Agency, is charged by Congress with determining safety fitness of motor carriers to operate in interstate commerce. The scheme of federal regulation has a preemptive effect and places the non-delegable safety duty solely and squarely on the authorized, licensed and insured motor carrier. Shippers and brokers as members of the shipping and traveling public have no such duty or obligation to second guess the Agency’s ultimate findings. Although truck-involved fatalities fell 20% last year to the lowest level in 60 years, the Agency vows to reduce truck related deaths to zero, apparently at any cost to the industry. (See App. C.)

In sum, publication of CSA 2010 data labeling carriers as deficient or marginal based on percentile rankings is without due process or scientific and mathematical warrant. A coalition of carriers, brokers, shippers and factors is forming to urge the Agency through administrative (and judicial and legislative action if necessary) to redact labeling carriers as deficient or marginal based on enforcement thresholds and to affirm the Agency’s ultimate responsibility for determining which carriers are safe to operate under uniform out-of-service criteria on which the public can rely.

Industry support from all segments is welcome.

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APPENDIX A

Fig. 1

Number of requested for-hire motor carriers	234,335
Percent with 50 trucks or less (approx. 95%)	.95
Number of small businesses (<\$10m/yr)	222,618
Number of employees affected (times 10)	2,226,183

Fig. 2

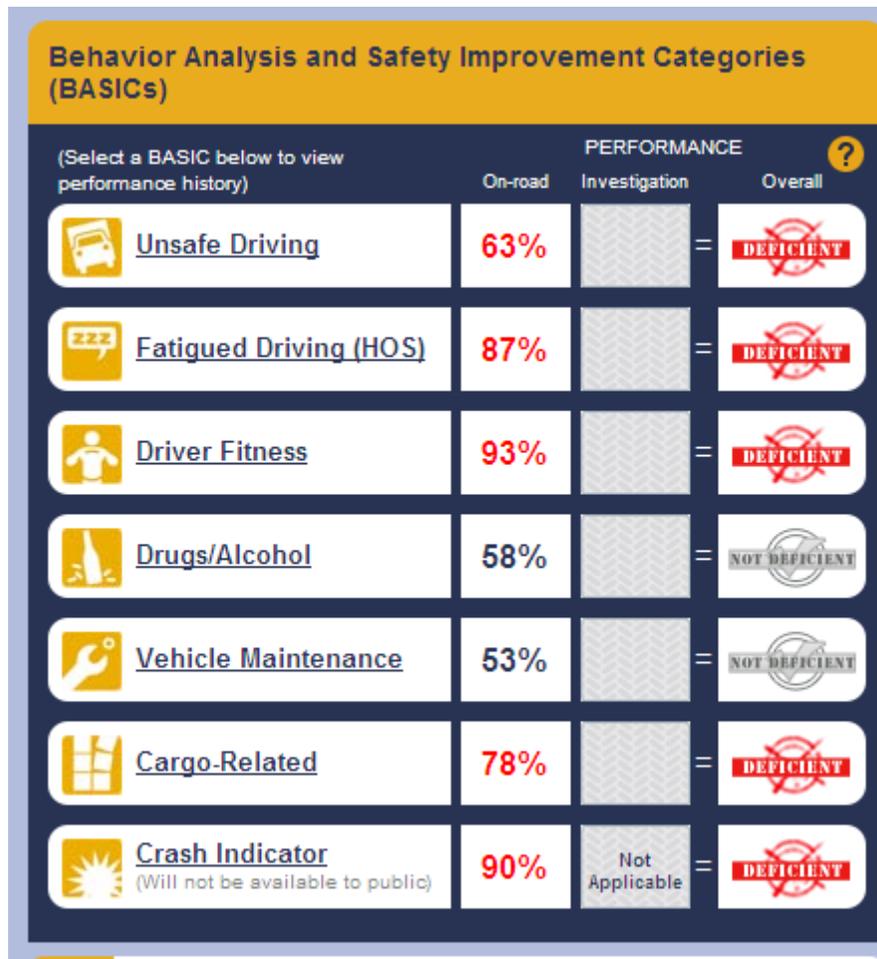


Fig. 3

Number of Small Businesses	222,618
Percent estimated over thresholds in one or more BASIC	.68
Number of carriers labeled "marginal" or deficient"	150,960

APPENDIX B

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 C

Traffic Deaths Plummet in 2009

Truckinginfo.com; Friday, September 10, 2010

The number of truck-involved traffic fatalities fell 20 percent in 2009, to the lowest level since the Department of Transportation started keeping records, while overall highway deaths fell to the lowest number since 1950.



Highway deaths fell to 33,808 for the year. The record-breaking decline in traffic fatalities occurred even while estimated vehicle miles traveled in 2009 increased by 0.2 percent over 2008 levels. In addition, 2009 saw the lowest fatality and injury rates ever recorded: 1.13 deaths per 100 million vehicle miles traveled in 2009, compared to 1.26 deaths for 2008.

According to the latest Fatality Analysis Reporting System (FARS) and related NHTSA data, the number of truck occupant deaths fell 26 percent in 2009, from 682 in 2008 to 503 in 2009. The number of truck occupants injured in truck-related crashes also declined 26 percent. Those are the largest declines among all vehicle categories.

"This significant gain in commercial truck safety shows that ongoing enforcement efforts and our partnerships with state and local law enforcement are making a difference," said FMCSA Administrator Anne S. Ferro. "Yet, FMCSA will not rest until there are zero commercial truck-related fatalities on our roads. We are committed to using every resource available to strengthen commercial truck safety and save lives."

