BY HENRY E. SEATON

COMPLIANCE AND COMPETITIVE ADVANTAGE

Approximately five years ago – my how time flies – the Federal Motor Carrier Safety Administration (FMCSA) unleashed Safety Measurement System (SMS) methodology on the public to mixed reviews. I am happy to say I was part of a small group who recognized not only the flaws in SMS methodology but also the insidious effect that publication of flawed data and percentile rankings would have on the marketplace as "competition for scores" quickly became a key factor in procuring insurance and competing for customers.

The resulting suit in NASTC et al. v. FMCSA produced the settlement in which the agency acknowledged the basic principle of federal transportation law that "fit to operate" is "fit to use" and that a carrier is deemed safe if the agency permits it to operate on the nation's roadways. Yet, consider how far we have come from this basic principle of federal transportation law since March 2011.

Now the General Accounting Office, the Department of Transportation Inspector General, both houses of Congress and all segments of the industry acknowledge that FMCSA's SMS methodology is not fit for the agency to use in deciding safety. And yet, publication and use of SMS data by shippers, brokers and insurers threatens the very viability of small carriers and there is no sign of improvement. It is a constant battle to explain to shippers and brokers that their best defense to up-supply chain liability for accidents is to posture themselves as consumers and carriers as vendors who are certified by the FMCSA as fit to use.

The second-guessing and use of SMS methodology to credential carriers only reduces carrier and broker selection and deems perfectly safe carriers to economic ruin based upon misleading data – data the agency cannot demonstrate is even fit for its own use in making a safety fitness determination. Unfortunately, this issue will not go away anytime soon. It remains a critical issue that affects the 95 percent of the industry that the Small Business Administration characterizes as small businesses.

The goal of the National Transportation Policy passed when deregulation came in 25 years ago was to allow small-town entrepreneurs to grow and prosper in a free, competitive environment that resulted in the family surnames of guys who started with one truck being dominant among today's mega fleet.

Yet, that spirit of entrepreneurship has changed and the rhetoric of a "culture of safety" and a "stakeholder" mentality masks riffs within our industry with devastating effects. Make

no mistake, the plaintiff's bar, so-called safety advocates and the labor movement all view a dynamic, competitive and productive trucking industry as nothing more than a group of "bad actors" that needs to be pruned by any means available with no concern for due process. Unfortunately, industry's response has been neither firm nor consistent.

From the outset, large carriers who are best able to "manage their compliance scores" have endorsed CSA/SMS methodology as a way to get competitive advantage. While trying to hold to the line of "licensed, authorized and insured" many shippers and brokers have crammed SMS scoring into contracts.

This legislative cycle and the behind-closed-doors maneuvering of the highway bill has only confused the issues and at best kicked the issue "of who certifies carriers as safe to use" down the road for another two years. In an attempt to get a "red light/green light" system, intermediaries pushed a go-it-alone measure in the House, resulting in an "interim hiring standard" that to plaintiff's bar's delight would make use of any carrier with a conditional or unrated safety rating too toxic to use. Hopefully, a crisis can be avoided and this language will be removed altogether by the conferees in any final bill.

In this context, Lane Kidd, the spokesman for The Trucking Alliance, composed of six mega carriers, recently said that these companies not only want a competitive advantage but that they also support both increasing the insurance requirements to $4.5 million per accident and supported financial investment minimums for new entrants.

Since deregulation, I have not seen the industry so divided between the haves and have nots, nor have I seen a more overt fracture in our industry with large carriers supporting anti-competitive regulations.

Adding to the chaos and misinformation surrounding SMS/CSA methodology is the position of major insurers and the cottage industry of data miners who serve them. At a recent seminar, a representative of a major truck insurer stated, "We want publication of SMS scores because without it, how could we possibly rate carriers?"

The answer to that question is really pretty simple – you rate them the way you did before 2010, based upon loss runs and hard data, not flakey and unreliable scores that change from month to month.

for its original purpose – to help the agency make its ultimate safety fitness determination – if plaintiff's bar, insurers and those seeking competitive advantage have their way, CSA flu can onset quickly and be hard to shake and lethal.

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Meanwhile, the American Trucking Associations' nuanced provisions would take down the scores for the time being but allow the agency the possibility of ultimately certifying SMS methodology as fit for use. This provision is in both the Senate and the House bills and has a good chance of passing, but SMS reform was not on ATA's agenda for its state trucking association's recent fly-ins.

An editorial in Transport Topics, which is ATA's news magazine, states, "From the very beginning of the Federal Government's CSA program the overwhelming majority of trucking has supported the idea of giving the public a way to compare one carrier against another." One has to ask, who is the ATA listening to to come up with this conclusion? The average trucker does not view safety as a game for eliminating competition or believe in demonizing the industry as a whole to gain competitive advantage.

Everyone agrees that SMS is not an accurate predictor of crashes and that for small carriers in particular there is not enough crash data – even when preventability is considered – to make an accurate safety fitness determination. Using SMS scores for underwriting is like using a broken thermometer to determine if a patient as a fever when you know the temperature will not read accurately.

Probably a better analogy is that CSA/SMS methodology is a virus, not a measuring device. Use of CSA scores by plaintiff's bar is the root cause of increased broker and shipper liability and crippling mid-policy-term insurance adjustments by insurers that use it.

Under CSA/SMS methodology, a small carrier can have a high degree of "yellow triangle fever" based on a single incident that has enduring consequences to its gross revenue and insurance costs. Until the virus is contained and used

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