U.S. Court Of Appeals For The District of Columbia Rules Against ASECTT In Its Attempt To Take The SMS Scores Off The Public Federal Motor Carrier Website

It seems strange that with so much media attention given to the issue of the SMS scores, that this case has received so little publicity. The Case is titled, "Alliance for Safe, Efficient and Competitive Truck Transportation, et. al. vs. Federal Motor Carrier Safety Administration, et. al., decided June 17, 2014, Case #12-1305.

Petitioners included trucking companies, transportation intermediaries and trade associations seeking review of the "Guidance" to shippers, brokers and insurers posted by the FMCSA on its website on May 16, 2012. Petitioners argued the website publication constituted a change in agency policy, the effect of which was to transfer safety credentialing responsibilities required by statute from the Agency to the shipping public, without notice and comment, as required by the Administrative Procedure Act. For technical reasons, the Court dismissed the Petition.

By way of background, the Court explained that in 2000 the Secretary (of Transportation) delegated responsibility for administering the Safety Fitness Rating System to the Federal Motor Carrier Safety Administration (FMCSA). The FMCSA became responsible for administering the data base that contains in-depth information about driver conduct and qualifications, vehicle maintenance and inspections, crashes and safety management systems and procedures. That database which the agency developed in the mid-1990's to help it select motor carriers for on-site inspections became available to the public on the agency's website in 1999 under the name of SAFESTAT. SAFESTAT was one of three relevant databases operated by FMCSA. The other two were the Safety and Fitness Electronic Records database (SAFER) which contains carrier's safety and fitness ratings and the Licensing and Insurance data base (L&I) which provides information about insurance and the operating authority status of carriers. In April 2010, FMCSA announced it would replace SAFESTAT with the Safety Management System (SMS). The Court stated that SMS collects a wider range of safety data used to assign safety scores to individual Carriers than under the Safestat System. The Court stated, "Safety Data Management System does not, however, affect Carrier fitness ratings which FMCSA is supposed to render under 49 USC 31144". In December of 2010, shortly before the new system was implemented, some of the Petitioners filed a petition seeking review of the SMS system attempting to impose an emergency delay of its implementation. After the Court denied the Petitioner's Motion for Stay of Implementation, the parties reached a

settlement. Under the Settlement Agreement, FMCSA agreed to add the following disclaimer to its website:

USE OF SMS DATA/INFORMATION

"The data in the Safety Measurement System (SMS) is performance data used by the Agency and Enforcement Community. A ▲ symbol, based on that data, indicates that FMCSA may prioritize a motor carrier for further monitoring. The ▲ symbol is 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.

Motor carrier safety ratings are available at http://safer.fmcsa.dot.gov and motor carrier licensing and insurance status are available at http://li-public.fmcsa.dot.gov/."

On May 16, 2012, the Agency posted its Guidance documents in the form of Power Point presentations on the FMCSA web site. It also included the disclaimer stated above.

On July 16, 2012 the Petitioners filed this action contending that the Power Point presentations constituted a new legislative rule and that the agency failed to subject it to the notice and comment required by the Administrative Procedure Act and to regulatory flexibility analysis as required by the Regulatory Flexibility Act. Petitioners contended that the FMCSA Power Point presentation was arbitrary and capricious, and inconsistent with the Secretary of Transportation's statutory obligations as well as unconstitutional.

Petitioners argued that one particular page of the Power Point was most offending. It stated the following:

"**Summary:**

Three public sources of FMCSA data to provide an informed, current, and comprehensive safety picture:

1. Safety and Fitness Electronic Records (SAFER), http://safer.fmcsa.dot.gov
2. Licensing & Insurance (L&I), http://li-public.fmcsa.dot.gov
3. CSA's Safety Measurement System (SMS), http://ai.fmcsa.dot.gov/SMS

FMCSA believes that an examination of a motor carrier's official safety rating in SAFER and their authority and insurance status on L&I, combined with their intervention prioritization status in CSA's SMS, provide users with an informed, current, and comprehensive picture of a motor

carrier's safety and compliance standing with FMCSA. FMCSA encourages the public to use the FMCSA information available to help make sound business judgments."

The Petitioners argued that this page violated the law in four significant ways:

First, Petitioners asserted that the Power Point page encouraged trucking customers to utilize public data filtered through the same SMS methodology that the agency had previously characterized as an internal "prioritization tool". The Court responded by taking the position that the Federal Register's notice did not say that the SMS System would function solely as an internal prioritization tool but rather indicated that it would provide information to the public as well, including providing motor carriers and safety stake holders with regularly updated safety performance assessments. The Court rejecting the Petitioner's argument posited that the data that preceded the SMS data was available in the form of the SAFESTAT records available on the website in 1999. The Court further stated, "thereafter motor carriers, insurance industry, shippers, safety advocates and other interested parties began routinely accessing SAFESTAT data online for use in their own safety analysis in business decisions". This argument seems to state that if the public was already using it, further use was justified.

Secondly, the Petitioners argued that the Power Point page was a new rule because it advised transportation users to make their own business judgments about which carriers to utilize, instead of relying on the FMCSA's Safety Fitness Determinations and Licensing. The Petitioners argued that by the use of this language, the agency forfeited its statutory obligation to determine whether a carrier was safe, requiring the transportation user to be the new "arbiter" for safety fitness. According to this author's view, this was the very heart of the argument of ASECTT's case, i.e. that the publication of the SMS scores in effect forced the purchasers of motor carrier transportation to make the decision as to whether a carrier was "safe" to hire. The Court swept by this critical argument and took the position that the information on the web site did not encourage users to make their own business judgments instead of relying on safety fitness determinations of the FMCSA; rather, it assumed that "businesses make business judgments and it encourages them to use all available information to do so." (P. 10 of Opinion). Espousing the agency's position, the court stated that FMCSA "believes that an examination of a motor carrier's official safety rating in SAFER and their authority and insurance status on L&I combined with their intervention prioritization status in…SMS provides users with an informed current and comprehensive picture of a motor carrier safety and compliance standing." (P. 110 of Opinion). The Court went on to take the position that it required no leap of logic to expect that purchasers of motor carrier services would use

the SMS information to make their own business judgments, and using the argument previously stated, that this data had already been used in the SAFESTAT system since 1999.

Thirdly, the Petitioners argued that this particular Power Point page presented a new rule (which would require rulemaking under the Administrative Procedure Act) instead of being able to rely on the safety ratings found in SAFER and licenses granted to motor carriers found in L&I so that parties hiring motor carriers are now advised to consider SMS scores at least co-equally with safety ratings. The Court responded, "… stating, that nothing in the Power Point page precludes users from relying on the motor carrier safety ratings or license determinations…. "To the contrary, they are the first two sources of FMCSA data listed on the page. The page does not purport to rank the three sources of information, although if it read as ranking, it would appear to rank SMS database last… Nor does it advise the user to consider SMS scores co-equally. (Writer's Emphasis). It does encourage users to examine all three sources of information, and it is a fair inference that the agency believed that such an examination is needed to obtain an informed current and comprehensive picture of a motor carrier safety and compliance standing." (P. 11 of Opinion)

If there is any valuable guidance to be found in the Court's opinion, it is that SMS scores need not be considered "co-equally" with other FMCSA data. (Writer's emphasis.) That would suggest that the scores do not need to be given any value! The Court comment adds merit to those who argue that the use of, and a reliance on SMS Scores in the Carrier hiring selection process has serious negative evidentiary implications which may preclude the user from attacking the validity and accuracy of the SMS scores later at trial. Also noteworthy is the fact that the Court makes no comment on the validity of scores, which have been and still are subject to attack on multiple grounds since they first appeared on the FMCSA website. The most recent study by ATRI (August 2014) discloses the irregular, inconsistent reporting of alleged carrier violations by various states. Furthermore it should be noted that the Court did not comment on and let stand a critical part of the Settlement in *NASTC v. FMCSA,* which provides in relevant part, "…….. 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. (Writer's emphasis.)

Fourth, the Petitioners argued that the Power Point presentation used to promulgate the SMS system were a de facto "new safety fitness determination standard and derogation of the statute requiring the FMCSA to make the safety determination." 49 USC 31144(a). According to the Court, this complaint is contradicted by the settlement disclaimer which states that the SMS "triangle

symbol is not intended to imply any federal safety rating of the carrier pursuant to 49 USC 31144." (P. 12 of Opinion). Petitioners argue that the Power Point overwhelmed the quoted disclaimer message. The Court rejecting the argument stated (at page 12), "Nor is there anything on page 153 of the Joint Appendix that negates the disclaimer's message. To the contrary, that page identifies three public sources of FMCSA data expressly differentiating between the SMS web site which contains the safety measurement system scores, and the SAFER web site which contains the safety fitness determinations… Moreover on the same page as the disclaimer is the further language not required by the settlement and in larger font than the disclaimer that makes precisely the point upon which the Petitioners insist. The SMS data are not a Safety Fitness Determination, do not alter a carrier's safety rating, and do not impact a carrier's operating authority." Thus, the Court concluded that there was no basis for the Petitioner's claim that FMCSA used the Power Point presentation to effectively promulgate SMS as a new safety fitness determination standard.

Another way to view this case is to say the decision shows that FMCSA's defense was based upon the argument (which the Court accepted) that the Agency did not "intend the Guidance to be a new rule" and that its website "advice" did not trump *NASTC v. FMCSA* and the website disclaimer which affirmed the Agency's statutory duty to determine motor carrier safety fitness. It is noteworthy that following this decision in this case, the FMCSA subsequently removed the Guidance document from its website and has ceased touting SMS methodology as required or fit for shipper use.

Although the Agency continues to provide more and more SMS detail about carriers on its website in the name of "transparency and accountability" SMS methodology has come under winnowing criticism by all segments of the trucking industry.

Those Shippers who insist that SMS scores not exceed threshold numbers and that Carriers have either no "alerts" or not more than one or two alerts are in today's market especially, seriously reducing their ability to ship by reducing already diminished capacity and imposing questionable safety standards not required by law.

TIA continues to promulgate a legislative fix which if passed would reduce significantly the risk of parties who hire motor carriers from liability for personal injury and death based on the theory of negligent selection and its efforts are to be applauded. (See HR 4727).

In addition, Representative Lou Barletta (R-PA) has introduced HR 5532 which would prevent the SMS scores from being used as evidence in liability cases until the CSA system flaws have been fixed.

Stay tuned.

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