United States Senate

Before the

Committee on Commerce,

Science and Transportation

U.S. DEPARTMENT OF TRANSPORTATION'S CROSS-BORDER PILOT PROGRAM

TESTIMONY OF PAUL D. CULLEN, SR.

General Counsel
Owner-Operator Independent Drivers Association, Inc.

Owner-Operator Independent Drivers Association, Inc.
1 N.W. OOIDA Drive
Grain Valley, MO 64029

Paul D. Cullen, Sr.
The Cullen Law Firm, PLLC
1101 30th Street, N.W.
Suite 300
Washington, D.C. 20007
(202) 944-8600
General Counsel,
Owner-Operator Independent Drivers Association, Inc.

March 11, 2008

Introduction

My name is Paul D. Cullen, Sr. I am Managing Partner of The Cullen Law Firm, PLLC of Washington, D.C. This testimony is submitted in my capacity as General Counsel to the Owner Operator Independent Drivers Association, Inc. (OOIDA) of Grain Valley, Missouri. OOIDA is a trade association representing the interests of owner-operators and small-business truckers throughout the United States and Canada. OOIDA currently has in excesses of 161,000 members.

OOIDA applauds the efforts of this Committee to withhold funding for FMCSA's Cross-Border Pilot Program under Section 136 of the Consolidated Appropriations Act, 2008 (Pub.L. 110-161). The action of the Bush Administration in thwarting the clear intent of the Congress by continuing this program is both shocking and lamentable. The administration's contempt for the rule of law in this matter goes well beyond its brazen disregard for the provisions of Section 136. In prior litigation challenging the authority of the Secretary of Transportation and the Federal Motor Carrier Safety Administration (FMCSA) to allow Mexican trucks into the United States without complying with the National Environmental Policy Act, the Solicitor General of the United States specifically renounced the existence of the authority that the Secretary of Transportation and FMCSA assert here today. FMCSA has arrogated unto itself authority to alter the

terms and conditions for entry by Mexico-domiciled motor carriers into the U.S. market for transportation services – the very authority that the Solicitor General told the Supreme Court that the agency did not have. FMCSA is authorized to issue operating authority to Mexico-domiciled motor carriers only if they are willing and able to obey all of our laws and regulations. Restricting operating authority to those who satisfy these conditions is completely compatible with our nation's obligations under NAFTA.

OOIDA is a petitioner in a proceeding now pending before the United States Court of Appeals for the Ninth Circuit in which it challenges the legal authority of the Secretary and the FMCSA to issue federal operating authority to Mexico-domiciled motor carriers under its Cross-Border Pilot Program.[1] Specifically, OOIDA challenges the legal authority of the Secretary and FMCSA to accept compliance with Mexican regulations covering commercial drivers licenses, drug testing and medical standards in lieu of compliance with corresponding U.S. statutes and regulations.

---

[1] *Owner-Operator Independent Drivers Ass'n, Inc. v. U.S. Department of Transportation, et al.*, No. 07-73987 (9th Cir. filed Oct. 15, 2007). Another challenge based on separate grounds is also pending before the Ninth Circuit. *Sierra Club, et al.*, *v. U.S. Department of Transportation*, *et al.*, No. 07-73415, (9th Cir. filed April 23, 2007). Both cases were consolidated for oral argument which was held on February 12, 2008. As of this date, no decision has been reached.

In this testimony, I will show that:

(1) FMCSA's Cross-Border Pilot Program is neither authorized nor required by any obligation of the United States under the North American Free Trade Agreement (NAFTA);

(2) FMCSA has no authority to issue operating authority to motor carriers unless they are "willing and able" to obey all applicable U.S. laws and regulations; and

(3) FMCSA has no authority to alter the statutory terms and conditions under which Mexico-domiciled motor carriers may provide trucking services within the continental United States.

The North American Free Trade Agreement

On December 17, 1992, the leaders of the United States of America, Canada, and the United Mexican States gathered to sign the North American Free Trade Agreement ("NAFTA"), a treaty regulating trade in goods and services between and among the parties to that treaty.[2] On November 20, 1993, the U.S. Senate officially ratified the NAFTA treaty.[3] Transborder trucking services are

[2] North American Free Trade Agreement, U.S.-Can-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

[3] H.R. 3450, 103d Cong. (1st. Sess. 1993) (Vote No. 395, passed 61-38-1).

governed by NAFTA Article 1202(1) which provides that "[e]ach Party shall accord to service providers of another Party treatment no less favorable than it accords, in like circumstances, to its own service providers." The obligation described in Article 1202(1) is known as "national treatment." Simply stated, the United States has agreed to treat Mexico-domiciled motor carriers exactly the same as it treats U.S.-domiciled motor carriers, no better, no worse. The United States has undertaken no obligation under NAFTA to provide exemptions or waivers from the application of U.S. trucking laws or regulations to Mexico-domiciled motor carriers.

NAFTA's "national treatment" provision covers trucking services in which a tractor and trailer provide service from a point in Mexico to a point in the United States as well as transit of Mexican trucks from Mexico through the United States to Canada. Those who provide such services are called service providers. Service providers of the United States are U.S.-domiciled trucking firms.[4] The treatment given to U.S. domestic trucking service providers under U.S. laws and regulations establishes a base line for determining whether the United States is providing

[4] *In the Matter of Cross Border Trucking Services*, See File No USA-MEX-98-2008-01 at 74-75, ¶ 253 (NAFTA Arbitration Panel Feb. 6, 2001).

national treatment to service providers from Mexico or Canada.[5]

Implementation of this commitment is really rather simple. The only thing that FMCSA must do to fulfill the national treatment obligation under NAFTA is to entertain and process applications for motor carrier operating authority by Mexico-domiciled motor carriers under the same terms and conditions as it entertains and processes similar applications by U.S.-domiciled applicants.

On February 6, 2001, an International Arbitral Panel (IAP) issued its final decision from a challenge by the Government of Mexico alleging that a blanket refusal by the United States to process applications by Mexico-domiciled motor carriers for operating authority violated its NAFTA obligation to afford national treatment to such carriers. The IAP decision sets forth the contentions of the parties, the legal and factual basis for those contentions and the conclusions of the IAP itself. Of particular interest is this passage from the Government of Mexico's brief as quoted in the IAP's final decision:

> Rather, the governments contemplated that motor carriers would have to comply fully with the standards of the country in which they were providing service. In other words, there was a clear expectation that a Mexican motor carrier applying for operating authority in the United States would have to demonstrate that it could comply with all

[5] *Id.* See also *id.* at 25-26, ¶ 125.

requirements imposed on U.S. motor carriers.[6]

A unanimous five member panel found that the "U.S. blanket refusal to review requests for operating authority . . . is inconsistent with . . . U.S. treatment of U.S. domestic service providers."[7] Because of this inconsistency, the IAP concluded that "the U.S. refusal to consider applications is not consistent with the obligation to provide national treatment."[8]

Following its findings, the IAP took pains to point out that nothing in its decision should be interpreted as in any way inhibiting the ability of a Party to implement its own legitimate safety objections:

---

[6] *Id.* See also *id*. at 25-26, ¶ 125.

[7] *Id.* at 68, ¶ 256.

[8] *Id.* at 74, ¶ 278. See also *id*. at 81, ¶ 259.

> It is important to note what the Panel is not determining. It is not making a determination that the Parties to NAFTA may not set the level of protection that they consider appropriate in pursuit of legitimate regulatory objectives. It is not disagreeing that the safety of trucking services is a legitimate regulatory objective. Nor is the panel imposing a limitation on the application of safety standards properly established and applied pursuant to applicable obligations of the Parties under NAFTA.

The IAP also held that a Party may be permitted to implement additional procedures with respect to service providers domiciled within the territory of another Party, provided that such procedures were imposed in good faith with respect to a legitimate safety concern and that such requirements did not conflict with other provisions of NAFTA. [9]

Two conclusions follow from this analysis. First, the United States would bring its policies in complete harmony with its NAFTA obligations by simply making operating authority available to Mexico-domiciled motor carriers under precisely the same terms and conditions as it applies to U.S.-domiciled motor carriers. Second, attempts to harmonize U.S. and Mexican truck regulatory regimes, while advancing potentially beneficial safety goals, has nothing to do with complying with the obligation of the United States to provide *national treatment*.

---

[9] *Id.* at 82 ¶ 301.

The Cross-Border Pilot Program

On May 1, 2007, FMCSA announced the initiation of a demonstration project as "part of FMCSA's implementation of . . . [NAFTA's] cross-border trucking provisions."[10] FMCSA has called its demonstration project "a critical step in the process of moving forward with the Nation's obligations under NAFTA."[11] FMCSA's characterization of its demonstration project is simply incorrect. Moreover, as we now demonstrate, NAFTA's requirement to afford national treatment is also the only approach that is compatible with FMCSA's statutory and regulatory responsibilities under U.S. law.

FMCSA Exceeds Its Statutory Authority When Registering Mexico-Domiciled Motor Carriers Under the Cross-Border Pilot Program

Statutory requirements for issuing motor carrier operating authority are in complete harmony with NAFTA's national treatment requirement. Under 49 U.S.C. § 13902(a)(1), FMCSA is authorized to issue motor carrier operating authority *only* if it finds that the applicant is willing and able to comply with any

---

[10] 72 Fed. Reg. 23,883 (Col. 1) (May 1, 2007). This statement was repeated in FMCSA's Federal Register Announcement of June 8, 2007 (72 Fed. Reg. 31,877 (Col. 1)) and of August 17, 2007 (72 Fed. Reg. 46,263 (Col. 3)).

[11] Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 46,263, 46,266 (Col. 1) (August 17, 2007) (FMCSA Docket No. 2007-28055-2396).

safety regulations promulgated by FMCSA, safety fitness requirements established by FMCSA under Section 31144, minimum financial responsibility requirements established under Sections 13906 and 31138, and the duties of employers and employees under Section 31135.[12] Section 13902(a)(4) mandates that the Secretary "shall withhold registration" if she determines that a registrant "does not meet, or is not able to meet" any of the aforementioned requirements.

In *Department of Transportation v. Public Citizen,*[13] the Supreme Court addressed FMCSA's responsibilities under Section 13902(a)(1) holding that the Agency had "no discretion" under this provision[14] to prevent entry of Mexican trucks operated by motor carriers that satisfied the conditions in this section.[15] By necessary implication, FMCSA would also have no discretion under Section 13902(a)(4), but to deny operating authority to a motor carrier who "does not meet, or is unable to meet the requirements in Section 13902(a)(1)." This would

---

[12] A motor carrier must also be willing and able to comply with regulations referred to in Section 13902(a)(1)(A), the scope of which was left open to further interpretation by FMCSA in *Peter Pan Bus Lines v. FMCSA*, 471 F.3d 1350, 1354-55 (D.C. Cir. 2006).

[13] *U.S. Department of Transportation v. Public Citizen,* 541 U.S. 752, 766 (2004).

[14] *Id.* at 770.

[15] *Id.* at 767.

be true whether the motor carrier was domiciled in Canada, Mexico, or the United States.

FMCSA's demonstration project completely ignored the statutory mandate imposed under Sections 13902(a)(1) & (4). Rather than addressing the question of whether Mexico-domiciled motor carriers are willing and able to comply with U.S. safety regulations, FMCSA is implementing a policy of issuing operating authority on the basis of compliance with Mexican laws and regulations governing commercial drivers licenses, physical qualifications of drivers and drug testing.[16] Under *Public Citizen*, FMCSA has no authority to depart from the mandate of Section 13902(a) requiring that all motor carriers demonstrate that they are willing and able to comply with U.S. laws and regulations.[17] FMCSA's decision to issue operating authority based upon compliance with Mexico's laws and regulations is, very simply, not in accordance with law and exceeds the statutory limits on the agency's authority to grant operating authority.

In *Public Citizen*, petitioners (Sierra Club, Public Citizen and International Brotherhood of Teamsters) argued that FMCSA should not authorize the entry of

---

[16] Demonstration Project on NAFTA Trucking Provisions, 72 Fed. Reg. 31,877, 31,884 (June 8, 2007) (FMCSA Docket No. 2007-28055-1547).

[17] 541 U.S. at 766-767.

Mexican trucks into the United States unless it prepared an environmental impact statement as required by the National Environmental Policy Act[18] (NEPA). NEPA requires various federal departments and agencies to file environmental impact statements in connection with major federal action.[19] The U.S. Court of Appeals for the Ninth Circuit agreed with the petitioners and held that FMCSA violated NEPA by not filing an environmental impact statement in connection with its proposed approval for the operation of Mexican trucks within the continental United States.[20] The U.S. Supreme Court reversed holding that FMCSA had only ministerial authority to approve or disapprove applications for operating authority under 49 U.S.C. § 13902(a) and that the narrow range of discretion available to it in approving applications for operating authority could not be the cause of any adverse impact on the environment.[21] Under the Supreme Court's reasoning, the only one capable of undertaking major federal action was the President who had the authority to lift the embargo on Mexican trucks.[22] Since the President is

---

[18] *Public Citizen v. U.S. Department of Transportation*, 316 F.3d 1002 (9th Cir. 2003).

[19] 42 U.S.C. § 4332(2)(C).

[20] *Public Citizen*, 316 F.3d 1002 at 1032.

[21] *Public Citizen*, 541 U.S. at 766, 770, 772.

[22] *Id.* at 770.

exempt from the filing requirements under NEPA, Public Citizen presented the Court with no cognizable claim. The Supreme Court's holding in Public Citizen is the controlling word on this subject. Because FMCSA's responsibilities under Section 13902(a) have been found to be ministerial, providing it with no discretion to alter the terms or circumstances under which Mexican motor carriers may provide services within this country, it simply has no authority to accept compliance with Mexican regulations in lieu of compliance with its own regulations.

FMCSA welcomed the Supreme Court's ruling that it had only ministerial, non-discretionary functions with respect to the approval of operating authority for Mexican motor carriers. That ruling allowed it to defeat the petitioners in *Public Citizen* and sidestep responsibilities under NEPA. That status is, however, incompatible with the authority it now exercises in implementing its Cross-Border Pilot Program. By accepting compliance with Mexican laws and regulations covering commercial drivers licenses, drug testing and standards of medical qualifications in lieu of compliance with its own regulations, FMCSA has completely rewritten the conditions for entry into the U.S. market for trucking services.

The following statements by Solicitor General Olson in briefs to the

Supreme Court in *Public Citizen* set forth the official position of the United States with respect to the authority of the Secretary and FMCSA in this area. The authority claimed by the Secretary and FMCSA in *Public Citizen* is significantly more narrow than the breadth of authority claimed in connection with FMCSA's ongoing Cross-Border Pilot Program:

1. "FMCSA's relevant authority involves granting or refusing operating authority to particular Mexican motor carriers, based solely on whether they are 'willing and able to comply' with United States safety and financial-responsibility standards. 49 U.S.C. § 13902(a)(1)." Brief for Petitioners on Writ of Certiorari at 22.

2. "FMCSA's role in this context is the essentially ministerial one . . . . FMCSA's authorizing statute does not make it responsible . . . for opening or closing the border." Reply Brief for the Petitioners on Petition for a Writ of Certiorari at 10.

3. "Consistent with the legislative limitations on its powers, FMCSA has not claimed any power to determine whether or under what conditions Mexican carriers should be allowed to operate in the United States." Reply Brief for the Petitioners on Writ of Certiorari at 3.

4. "While Congress left FMCSA with a narrow range of discretion in fashioning the final registration procedures, Congress did not empower FMCSA to change the fundamental condition for entry." Reply Brief for the Petitioners on Writ of Certiorari at 5.

FMCSA's Cross-Border Pilot Program alters the fundamental conditions for entry of Mexico-domiciled motor carriers. It is contrary to its narrow authority to

act under Section 13902(a) and is neither authorized nor required by NAFTA. The legal gamesmanship exhibited by the agency – claiming only narrow ministerial authority in *Public Citizen* and broad authority to rewrite the conditions for issuing operating authority in the Cross-Border Pilot Program – is regrettable, and shows once again a rather incomplete appreciation for the rule of law.

OOIDA commends this Committee for its diligence in pursuing this matter. It is important to note that the legal defects identified here with respect to the Cross-Border Pilot Program would also apply to any permanent program implemented by the Secretary and FMCSA if such programs included accepting compliance with Mexican laws and regulations in place of compliance with U.S. laws and regulations. OOIDA looks forward to working with the Committee in the months ahead to help restore respect for the rule of law in this matter.