

DEBATE OVER THE FEDERAL MEXICAN LONG-HAUL PROGRAM INTENSIFIES

Trucking & Transportation Practice Group

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Proponents and critics of the U.S./Mexico Border Long Haul Trucking Demonstration Program (Demo-Program) have recently stepped up the public discourse over this controversial program while a federal appellate court prepares to issue its ruling on the program's future.

As reviewed in the inaugural edition of "The Dispatch," tensions between various governmental/private organizations, including the U.S. Senate, U.S. House of Representatives, International Brotherhood of Teamsters, Sierra Club, Public Citizen, Environmental Law Foundation, Owner-Operator Independent Drivers Association and the U.S. Department of Transportation (DOT) reached a climatic high earlier this year, as the 9th Circuit Court of Appeals was set to hear oral arguments regarding the DOT's continued implementation of its Demo-Program.

The 9th Circuit ordered the parties to have their respective legal briefs filed toward the end of last year and set the oral argument hearing for Feb. 12. Although the court record indicates that the February hearing was held, the court has not yet formally entered an order regarding its decision. The court has confirmed to Plunkett Cooney, that the matter is still pending a final determination.

Status of the Demo-Program

As the year long Demo-Program enters its ninth month, proponents of the Demo-Program have cited its impressive safety and economic success as evidence that the program is on track and should continue as scheduled. However, critics of the Demo-Program have taken the position that the data received from the Demo-Program thus far, does not represent a reliable source of information in which to enable congress to make any meaningful conclusions regarding the Demo-Program's safety.

Secretary Peters

At the Senate Commerce Committee's Cross-Border Trucking Oversight Hearing held on March 11, DOT Secretary, Mary Peters was proud to testify that the Demo-Program's "out-of-service rate for trucks in this program ... is less than half that of the U.S. trucking fleet." She also testified that, "we have yet to experience a single safety incident."

Secretary Peters also informed the committee that "[A]s of March 3rd, U.S. drivers have made over 680 trips into Mexico . Meanwhile, drivers from Mexico have made fewer than 325 trips beyond the commercial zones as part of this project." According to the DOT and the businesses currently benefiting from the Demo-Program, U.S. based shippers/producers have been spared the larger overhead costs of exporting their products into Mexico because the relay-type system that predated the Demo-Program, cost shippers millions of dollars in unnecessary "transfer of

goods” fees and delayed shipment dates.

Specifically, U.S. shippers were forced to ship their goods to the commercial zone located just outside the U.S./Mexican Border using trucks owned by U.S. domiciled trucking firms just to have their products unloaded and reloaded into trucks owned by Mexican domiciled trucking firms, which would then transport the goods to their ultimate destination point within Mexico. Under the Demo-Program, the U.S. goods are shipped from the shipper directly to the receiver in a U.S. truck, by a U.S. driver. The inverse is true for goods imported from Mexico .

A coalition of 69 U.S. business organizations, including the American Trucking Associations, Caterpillar, Cessna Aircraft Company, Eastman Kodak Company, Hormel Foods Corporation, National Association of Manufacturers, Nestle ASA, Nestle Purina PetCare Company, Tyson Foods and the Washington Apple Commission, has formally sent a letter to Congress urging it to “not only” allow the Demo-Program to run its course, but to also allow the full implementation of the NAFTA long haul trucking provisions with Mexico at the close of the Demo-Program. The one-year Demo-Program is set to self-terminate in early September 2008.

In the same letter, Congress was urged to consider the potential retaliatory action, Mexico may implement if the Demo-Program is halted. Pursuant to the 2001 NAFTA dispute resolution ruling, Mexico was given the right to retaliate by implementing a tariff on U.S. products entering Mexico (totaling \$2 billion per year) in the event the United States did not honor its NAFTA obligations. The letter explains:

Based on a draft retaliation list obtained in Mexico from a reliable and confidential source, economist Dermot Hayes of Iowa State University has analyzed the potential impact of Mexican retaliation on the U.S. economy. Hayes found that up to 40,909 U.S. jobs in 17 states could be lost as a result of the failure of the United States to honor its commitments on trucking.

Inspector General Reports on Program

At the March hearing, the Senate Committee also heard from the DOT Inspector General (IG), Calvin L. Scovel, III, who was there to report to the committee regarding his office’s audit of the Demo-Program. The IG’s office was charged with monitoring the Demo-Program and providing Congress with intermittent reports concerning three primary topics.

1. Federal Motor Carrier Safety Administration Inspections

Inspector Scovel was able to confirm that the Federal Motor Carrier Safety Administration (FMCSA) had developed 25 site-specific plans to conduct the required truck inspections with U.S. Customs Officials and Border Protection (CBP) personnel. However, he also reported that FMCSA did not acquire crossing data from the CBP to analyze any likely problems and implement a corresponding resolution plan, as it stated it would do.

2. Limited Data

Inspector Scovel also reported that the number of participants in the Demo-Program only amounted to 13 percent of the expected 100 Mexico domiciled trucking firms that initially applied to participate in the program. Accordingly, the IG's office concluded that this resulted in an unproportionate sample in which to reach a reliable conclusion regarding the safety performance of the Demo-Program participants.

3. FMCSA Safety Measures

Finally, Inspector Scovel assured the committee that his office would continue to monitor the steps taken by FMCSA to ensure the safety of U.S. motorists, including independent panel review, state training, insurance record keeping, conviction data recording, GPS truck tracking and carrier recordings.

Advocates for Highway and Auto Safety

Jacqueline S. Gillan, vice president of the Advocates for Highway and Auto Safety (AHAS) also testified at the same hearing. Gillan stated that AHAS's focus was to ensure that the Demo-Program's participants do not contribute to an already unacceptable level of truck-involved crashes and fatalities on U.S. roads. AHAS opposes the continuance of the Demo-Program based upon its contention that the DOT did not have a legal basis for continuing it after the Senate's mandate to halt the program, invalid statistical findings and junk science. The Senate issue is still pending in the 9th Circuit.

Owner-Operator Independent Drivers Association

Paul D. Cullen, Sr., general counsel for the Owner-Operator Independent Drivers Association (OOIDA), was the last to testify at the March 11 hearing. Cullen reiterated OOIDA's basis for filing suit to halt the Demo-Program. OOIDA's position is that the Demo-Program is neither authorized nor is it an obligation under NAFTA.

Furthermore, Cullen asserted that FMCSA did not have the authority to issue operating authority to foreign carriers who were not ready and able to comply with U.S. laws. Finally, he testified that FMCSA did not have the authority to alter statutory terms under which Mexican-domiciled carriers may operate in the United States .

Conclusion

Although the court's schedule would not permit a more definite resolution to the Feb. 12 hearing at the time of publishing this article, be sure to keep a look out for the next edition of the "The Dispatch" because we anticipate that the court will reach a decision by that time.

Resources

Secretary Peters Senate committee hearing testimony can be found at:

http://commerce.senate.gov/public/_files/FINALDOTCrossBorderTruckingTestimonySenateCommerceCommittee311

The letter to Congress can be found at: <http://www.dot.gov/affairs/cbtsip/lettertocongress.htm>

The Hayes' study can be found at <http://www.bus.iastate.edu/dhayes/>.

Inspector Scovel's testimony can be found at:

http://commerce.senate.gov/public/_files/OIGTestimonyForMarch11onDemonstrationProject.pdf.

Gillan's testimony can be found at:

http://commerce.senate.gov/public/_files/PilotProgramGillanTestimonySenCommerceCommitteeMar112008final.pdf.

Cullen's testimony can be found at:

http://commerce.senate.gov/public/_files/PDCSenateTestimonyFINAL.pdf.