

No. 19-3595 & No. 19-3562

IN THE
United States Court of Appeals
FOR THE SIXTH CIRCUIT

BARRY CREAGAN JR., ET AL.,

Plaintiffs-Appellants,

v.

WAL-MART TRANSPORTATION, LLC, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Ohio
Case No. 3:16-cv-02788

**AMICUS CURIAE BRIEF OF
THE NATIONAL ASSOCIATION OF MANUFACTURERS
IN SUPPORT OF DEFENDANTS-APPELLEES
AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1, and 29(a)(4)(A) of the Federal Rules of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for *amicus curiae* hereby state that the National Association of Manufacturers is a nonprofit 501(c)(6) association and has no parent corporations and has issued no stock.

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Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, counsel for *amicus curiae* hereby states that (1) no party's counsel authored the brief in whole or in part; (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person — other than the *amicus curiae*, its members, or its counsel — contributed money that was intended to fund the preparation or submission of the brief. Pursuant to Rule 29(a)(2), all parties have consented to the filing of this brief.

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INTEREST OF AMICUS CURIAE

The National Association of Manufacturers (“NAM”) is the largest manufacturing association in the United States, representing more than 14,000 member companies ranging from small businesses to global leaders in every industrial sector and in all 50 states. Manufacturing employs more than 12.8 million men and women in the United States, contributes \$2.25 trillion to the United States economy each year, and has the largest economic impact of any major sector. NAM is committed to ensuring that the manufacturing sector continues to grow and provide more Americans with jobs, and to remain a leading contributor to our Nation’s economy.

Transporting the goods NAM’s members make from the factory to the store or consumer is essential. NAM’s members need safe and efficient roads to deliver their goods throughout the United States. NAM submits this brief to explain that the way to ensure the safety of the nation’s roads is through the well-established federal-state division of uniform laws that govern the safe operation of trucks and effective federal-state administration of those laws, and not through an ad hoc patchwork of state negligence law imposed on brokers and shippers.

INTRODUCTION AND SUMMARY OF ARGUMENT

The shipper and broker in this case explain why, under the plain reading of the Federal Aviation Administration Authorization Act, state-law negligence claims against brokers and shippers are clearly preempted. NAM submits this brief to provide the court with two important points of context to make clear why the District Court's decision finding preemption should be upheld on appeal:

- 1.) The trucking industry is highly regulated through joint federal and state efforts; that regulation focuses on drivers and carriers because they are most immediately responsible for safety. Negligence claims against shippers and brokers are not necessary to protect the safety of the roads.
- 2.) Even if carriers and brokers were responsible, there is no effective tool by which they can evaluate carriers and drivers; the database maintained by the Federal Motor Carrier Safety Administration ("FMCSA") is not a reliable tool to use. Third parties, inspectors general, and Congress all recognize the short-comings of the Compliance, Safety, Accountability system. In fact, Congress has mandated that FMCSA include a disclaimer on the data saying that it

is not to be used to select drivers. There is no simple and accurate way for a broker or shipper to determine whether a carrier or specific driver is safe or not.

ARGUMENT

I. Congress has carefully created a federal-state partnership to regulate the safety of drivers and carriers.

Truck safety is a joint effort between federal and state governments. Congress has crafted a system where the federal government works in partnership with state governments to ensure that unsafe drivers and carriers are identified and removed from the road. While the federal government largely focuses on regulating interstate commerce, states have adopted laws that incorporate the federal standards for commercial trucks into their state laws, so that there is a uniform set of rules that applies to most trucks on the road. In Ohio, for example, motor carrier regulations are overseen by the Public Utilities Commission. The Public Utilities Commission regulations governing trucks incorporate by reference specific parts of the Federal Motor Carrier Safety Regulations (“FMCSR”). The regulations incorporated by reference include:

- Drug and alcohol testing programs, 49 C.F.R. parts 40 and

382;

- Consumer protection rules related to transporting household items, 49 C.F.R. part 375;
- Special training for driving certain kinds of trucks, 49 C.F.R. part 380;
- Commercial Drivers License standards, 49 C.F.R. parts 383 and 384;
- Safety and fitness determinations, inspections, and processes and procedures for those inspections and determinations, 49 C.F.R. parts 385 and 386;
- Minimum levels of insurance coverage for carriers, 49 C.F.R. part 387;
- A variety of general safety regulations, standards, and processes, 49 C.F.R. part 390;
- Specific rules for larger trucks, 49 C.F.R. part 391;
- Lengthy rules governing driving of trucks, such as use of equipment, speeds, use of alcohol, railroad crossing procedures, use of hand-held devices and texting, and a bevy of similar rules, 49 C.F.R. part 392;

- Requirements for equipment safety, such as lights, brakes, windows, fuel systems, tires, and virtually every other important part of a truck, 49 C.F.R. part 393;
- Limitations on hours of service, 49 C.F.R. part 395;
- Inspection, repair, and processes for placing vehicles out of service for violation of the rules, 49 C.F.R. part 396;
- Specific requirements for transporting hazardous materials, 49 C.F.R. part 397; and
- Restrictions on transporting migrant workers, 49 C.F.R. part 398.

Ohio Admin Code § 4901:2-5-03.

By incorporating these federal regulations into state regulations, Ohio law enforcement and regulators can enforce the federal law, conduct inspections for compliance with federal law, and ensure that trucks meet a uniform national standard for safe operation.¹ They can also enforce state law standards that exist on top of these rules (such as speed limits and other unsafe driving rules).

¹ David Randall Peterman, *Commercial Truck Safety: Overview*, U.S. Congressional Research Service 1 (2017).

While Ohio incorporates the FMCSRs into state regulations, other states accomplish the same thing by using state law. *See, e.g.,* Indiana Code § 8-2.1-24-18(a). Regardless of the exact legal mechanism, states can regulate both inter-and intrastate trucks using consistent standards across the country. 49 C.F.R. § 355.25. Simply put, these safety standards are the “safety regulatory authority of a State with respect to motor vehicles” contemplated by the savings clause in the Federal Aviation Administration Authorization Act. 49 U.S.C. § 14501(c)(2)(A).

This state and federal partnership is the front line to protect the safety of the roads. In Ohio, for example, the State Highway Patrol and the Public Utilities Commission of Ohio work together to ensure safety.² The Public Utilities Commission conducts roadside inspections to make certain that the drivers and the vehicles comply with state and federal law.

When conducting those inspections, the inspectors check for compliance with the FMCSRs that have been incorporated into the Ohio

² Ohio Public Utilities Commission, *Commercial Vehicle Inspection Process*, <https://www.puco.ohio.gov/be-informed/consumer-topics/commercial-motor-vehicle-inspection-process/> (last visited Nov. 6, 2019).

regulations. In addition, they use the extensive Out of Service Criteria that the Commercial Vehicle Safety Alliance has created to determine whether a violation is severe enough to require the truck or driver to be placed immediately out of service.³

The Ohio State Highway Patrol also enforces safety standards. Ohio Revised Code § 5503.02(A). Troopers can pull trucks over for driving violations such as speeding or using a handheld phone, which is illegal under both state law, Ohio Revised Code § 4511.204, and under the FMCSRs incorporated into Ohio law. 49 C.F.R. § 392.82.

Thus, if this Court upholds the district court's decision that the FAAAA preempts the state negligence claims brought against the carrier and broker, there will still be ample protection for motorists on the road. In fact, as appellee Kirsch Transportation Services notes, federal law imposes specific insurance requirements on carriers to make certain that they are responsible for their actions and the actions of their drivers. Appellee's Br. at 27, 32. There are no federal or state laws that impose specific hiring standards or practices on brokers or shippers within this carefully crafted safety framework (the FMCSRs that deal with brokers

³ *Id.*

focus on consumer protection issues, not selection of drivers or safety, 49 C.F.R. part 371).

II. There is not a viable source of information for shippers or brokers to use when evaluating carriers.

Making reference to the “Compliance, Safety, Accountability” (“CSA”) program, the appellants assert that there were easy ways for the shipper or broker to evaluate the carrier selected. *See* Appellants’ Br. at 1-2, 6-7. Unfortunately, this is not actually a realistic option for several reasons. At the outset, brokers and shippers generally cannot pick the specific driver they want (unless the carrier chosen is an individual owner-operator). More importantly, as explained below, the data does not provide as useful of framework as appellants suggest. And finally, there are serious questions about the data, as recognized by inspectors general, the Government Accountability Office, third parties, and Congress.

A. The CSA System is Designed for Law Enforcement, Not Brokers and Shippers.

FMCSA has worked to develop a comprehensive system to aid law enforcement to identify problematic carriers. While that system is helpful to government officials, it is less helpful to brokers and shippers when it comes to selecting their carriers. That system includes the CSA program,

which has three core components: (1) The Safety Measurement System; (2) Interventions; and (3) The Safety Fitness Determination rating system to determine the safety fitness of motor carriers.⁴

The Safety Measurement System (“SMS”) uses roadside traffic enforcement inspections and crash investigations to identify motor carriers with serious safety problems. This allows motor carriers with bad safety ratings to be prioritized for interventions such as warning letters and investigations. This information is organized into seven Behavior Analysis and Safety Improvement Categories (“BASIC”).⁵

Using the seven BASICs, SMS calculates performance for each of these categories, and assigns carriers a score between zero and 100, where a higher percentile indicates a higher risk of safety issues. 49 C.F.R. § 385, Appendix B.⁶ Based on that score, FMCSA then prioritizes

⁴ FMCSA, *Compliance, Safety, Accountability (CSA)*, <https://csa.fmcsa.dot.gov/About> (last visited Nov. 6, 2019).

⁵ FMCSA, *The Safety Measure System (SMS)*, <https://csa.fmcsa.dot.gov/About/Measure> (last visited Nov. 6, 2019).

⁶ See also Department of Transportation & FMCSA, *Safety Measurement System (SMS) Methodology: Behavior Analysis and Safety Improvement Category (BASIC) Prioritization Status, Compliance, Safety, Accountability*, (2019), available at <https://csa.fmcsa.dot.gov/Documents/SMSMethodology.pdf>.

carriers for intervention.

FMCSA has a variety of intervention tools at its disposal, ranging from warnings, to additional inspections, to more fulsome investigations, to notifications of fines and penalties, and ultimately, placing an operator out of service.⁷

Based on the scores and interventions, carriers receive ratings of “satisfactory,” “conditional” or “unsatisfactory.” A carrier is identified as “unsatisfactory” when a determination has been made that the carrier is unfit to continue operating. 49 C.F.R. § 385.11. Without improvements it can be placed out of service, and the operating authority of the owner or operator revoked. 49 C.F.R. § 385.13.

Satisfactory scores are only generated after an onsite comprehensive investigation is done. Typically, such an investigation is done only in response to a BASIC SMS score that suggests there is a safety concern. As such, many carriers operate without any rating assigned to them and a satisfactory rating does not mean that that a

⁷ FMCSA, *CSA Interventions*, <https://csa.fmcsa.dot.gov/About/Intervene> (last visited Nov. 6, 2019).

carrier is safer than a carrier without a rating.⁸

Thus, the suggestion that only a carrier with a satisfactory safety rating is an acceptable carrier is simply not a valid assertion. Even if a shipper or broker were to try to use the SMS data and BASIC percentiles, there would still be a major problem with such reliance.

B. There are Serious Flaws with the Data that Make it an Unreliable Tool.

The Government Accountability Office, Department of Transportation Inspector General, the National Academy of Science, and Congress have all recognized that the FMCSA's data tools are seriously flawed. Thus, the information available to the shipper and broker would not be an accurate or a fair basis for excluding drivers and carriers.

The GAO has explained that “for SMS to be effective in identifying carriers more likely to crash, the violations that FMCSA uses to calculate SMS scores should have a strong predictive relationship with crashes.”⁹ Unfortunately, GAO has found that “most regulations used to calculate

⁸ FMCSA, *Get the Facts. Get Road Smart.*, https://csa.fmcsa.dot.gov/Documents/Safety_Ratings_Factsheet_GRS_M.pdf (last visited Nov. 6, 2019).

⁹ U.S. Gov't Accountability Office, GAO-14-114, *Federal Motor Carrier Safety: Modifying the Compliance, Safety, Accountability Program Would Improve the Ability to Identify High Risk Carriers* (2014).

SMS scores are not violated often enough to strongly associate them with crash risk for individual carriers.”¹⁰ Moreover, GAO has observed that “[t]he relationship between violation of most regulations FMCSA included in the SMS methodology and crash risk is unclear, potentially limiting the effectiveness of SMS in identifying carriers that are likely to crash.”¹¹ Two years after making those observations, the GAO found that “We recommended that FMCSA revise the SMS methodology to better account for limitations in drawing comparisons of safety performance information across carriers...FMCSA has not implemented our recommendation.”¹²

The Department of Transportation Inspector General has repeatedly criticized CSA, most recently in September of this year. It stated that “FMCSA’s corrective action plan addresses carrier safety interventions, but lacks implementation details for improving SMS

¹⁰ *Id.*

¹¹ *Id.* at 15.

¹² U.S. Gov’t Accountability Office, GAO-17-132, *Motor Carriers: Establishing System for Self-Reporting Equipment Problems Appears Feasible, but Safety Benefits Questionable and Costs Unknown* 9 (2016).

transparency and its assessment of carrier safety rankings.”¹³

Specifically, the Inspector General noted that:

- FMCSA’s plan for collecting more accurate and complete Data lacks implementation details;
- FMCSA’s plan to make SMS more transparent lacks clarity;
- FMCSA’s plan to better understand percentile ranks lacks specificity; and
- FMCSA’s plan to improve absolute and relative safety measures lacks timely actions.¹⁴

The National Academy of Sciences has found that although the SMS “is structured in a reasonable way, and its method of identifying motor carriers for alert status is defensible[,]...much of what is now done is ad hoc and based on subject-matter expertise that has not been sufficiently empirically validated.”¹⁵ The Academy found that these flaws suggest that FMCSA should adopt “a more statistically principled

¹³ Office of Inspector General, U.S. Dept of Transportation, Report No. ST2019084, *FMCSA’s Plan Addresses Recommendations on Prioritizing Safety interventions but Lacks Implementation Details* (2019).

¹⁴ *See id.*

¹⁵ National Academy of Science, *Improving Motor Carrier Safety Measurement 3* (2017).

approach that can include the expert opinion that is implicit in SMS in a natural way.”¹⁶ Some of the specific criticisms the Academy found were:

- Not all BASICS are predictive
- There are data sufficiency standards
- Using an absolute versus a relative metric would produce better results
- Using data from nonpreventable crashes results in poor statistics
- Better measures of exposure
- Lack of quality in crash data
- Appropriateness of severity weights and violation coding
- Transparency of the SMS algorithm
- Making percentile ranks public.¹⁷

Congress has repeatedly heard about these flaws as well. Senator Deb Fisher of Nebraska, the Chair of a Transportation subcommittee noted that “the FAST Act also included measures to correct FMCSA's flawed truck safety scoring system, known as the Compliance, Safety,

¹⁶ *Id.*

¹⁷ *See id.* at 16-21.

and Accountability Program.”¹⁸ She explained that “in January 2015 in Cincinnati, Ohio, there was an incident where a bridge collapsed on a truck. The CSA system counted this event as the fault of the truck driver. Obviously, the carrier was not at fault in this instance.”¹⁹

In 2015, Congress made changes to the CSA requirements as part of the FAST Act. Notably, in addition to mandating that FMCSA make substantive changes, Congress required the FMCSA website to provide users with the following warning:

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 has received an UNSATISFACTORY safety rating under part 385 of title 49, Code of Federal Regulations, or has otherwise been ordered to discontinue operations by the Federal Motor Carrier Safety Administration, it is authorized to operate on the Nation’s roadways.

The FAST Act, Pub. L. 114-94, 129 Stat. 1312 (2015)

The FAST Act therefore has specifically recognized that it is only when there has been an unsatisfactory rating issued that the public

¹⁸ *Continuing to Improve Truck Safety on Our Nation’s Highways: Hearing Before the Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety and Security of the Committee on Commerce, Science, and Transportation*, 115 Cong. (2017) (opening statement of Hon. Deb Fischer, U.S. Senator from Nebraska).

¹⁹ *Id.*

should draw a conclusion about the safety of a carrier. The language recognizes the enormity of FMCSA's task in rating all carriers on the roads. FMCSA focuses on identifying when a carrier is unfit to be on the roads, and therefore, instead of looking to those carriers with a satisfactory label, the FAST Act makes clear that the public should only draw a conclusion when they see that FMCSA has found a carrier unsafe to be on the road.

In their brief, appellants reference the SAFER website. Appellants' Br. at 6. Information from that website alone is insufficient for the public to draw meaningful conclusions regarding a carrier's safety. For instance, while SAFER indicates the number of crashes for the preceding 24 months, it also contains a note that the crashes "listed represent a motor carrier's involvement in reportable crashes, without any determination as to responsibility."²⁰ Further, while the website contains a safety rating for motor carriers, it also contains a disclaimer that "The Federal safety rating does not necessarily reflect the safety of the carrier when operating in intrastate commerce." Moreover, the SAFER website links

²⁰ See FMCSA, *Safety and Fitness Electronic Records (SAFER) System*, <https://safer.fmcsa.dot.gov/CompanySnapshot.aspx> (last visited Nov. 6, 2019).

to a SMS website that contains the mandatory FAST Act disclaimer reminding users that they should not draw conclusions about the overall safety of a carrier based on the data presented.²¹

There is thus no website or other database on which a shipper or a broker may rely in order to draw its own conclusion as to the overall safety of a carrier. FMCSA makes safety fitness determinations and issues an unsatisfactory rating to unsafe carriers and otherwise requests that unsafe carriers and drivers be removed from the roads. Congress has made it clear that it is only after FMCSA has determined a carrier is unsatisfactory, that a conclusion should be drawn about a carrier's safety. It would therefore be contradictory to federal law under the FAST Act and confusing for the public, if this court establishes a negligence standard where brokers and shippers are required to rely on the same data that the government also says the public should not draw conclusions from.

CONCLUSION

The plain text arguments for preemption of state law tort claims against brokers and shippers are clear, and the court should affirm the

²¹ *Id.*

decision of the District Court. It can do so knowing that preemption of tort claims against broker and shippers will not increase the risk to the driving public because there are extensive federal-state partnerships in enforcing safety standards for commercial vehicles. It can also do so knowing that there is no simple way for shippers and brokers to determine which carriers and drivers are safe. The FMCSA system suggested by the appellants is a long way from perfect, and Congress has mandated disclaimers to reduce the public's reliance on such data.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 2,884 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 6th Cir. R. 32(b)(1). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Century Schoolbook type style.

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CERTIFICATE OF SERVICE

I, Ronald M. Jacobs, counsel for amicus curiae and a member of the Bar of this Court, certify that on November 7, 2019, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Ronald M. Jacobs
Ronald M. Jacobs