

**Statement of Joan Claybrook
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Concerning Cross-Border Truck and Bus Operations
to the
United States Senate Committee on Commerce, Science, and Transportation
July 18, 2001**

Mr. Chairman and Members of the Committee:

I am pleased to offer this testimony on the United States' and Mexico's lack of preparedness for the opening of the southern border of the U.S. to commercial carrier traffic, under the short-sighted timetable set out in the North American Free Trade Agreement (NAFTA). I am President of Public Citizen, a national public interest organization with 150,000 members nationwide that represents consumer interests through lobbying, litigation, regulatory oversight, research and public education. My comments today will focus on the inadequacy of the Bush Administration's proposed rules for the admission of Mexican carriers and the dire need for further steps by Congress to assure the safety of American motorists, before the border is opened to nationwide commercial traffic.

The Committee is addressing a critical safety issue. Under the current system in the U.S., 5,000 people are killed and 101,000 injured every year in crashes involving large trucks. Large truck crashes also cause disasters on the highway, including hazardous materials spills and costly traffic delays. The Congress, government and safety advocates have worked for many years to improve this record,

enhancing U.S. safety regulations and establishing enforcement mechanisms with teeth. Now we may see these accomplishments, and the areas where additional work is needed, imperiled by an influx of dangerous large trucks. I urge this Committee to look closely at our recommendations and at the recent actions taken by the Senate Appropriations Committee and to delay opening the border until safety is assured.

NAFTA Failed to Provide Safety Incentives With Teeth, Creating a False Double Bind

I will first address the reason that a trade agreement has put us in a false double bind, in which it appears that we must choose between domestic safety and the imperatives of trade. In short, the problem is that NAFTA was drafted with a fatal flaw. NAFTA required the United States to open its border to Mexican trucks in phases beginning in 1995. While the agreement also required Mexico to draft and implement trucking safety regulations commensurate to those in the United States and Canada, the agreement failed to link these required Mexican domestic safety improvements to the timetable for the U.S. to open the border to Mexican commercial trucks.

Without acting at all on its domestic obligations, almost three years ago the Mexican government brought a dispute before a NAFTA arbitration panel to open the southern U.S. border to nationwide commercial traffic. Last summer, the Mexican government finally issued a fledgling set of very basic rules for commercial carrier safety. Public Citizen's analysis of the rules shows that they are deficient in many ways and do not compare favorably to U.S. law.

These new Mexican commercial carrier inspection standards are far weaker than those of the

U.S. Among other flaws, the new laws require roadside inspections to be done within an unreasonably short time period. For hazardous materials carriers, inspections must be completed within a mere 20 minutes. They also merely require a fine and warning letter for a number of violations that would cause a truck to be placed out of service in the U.S. In addition, the rules, which were just issued last summer, are voluntary for the first year, and are to be phased in over two years.

Other difficulties show the still-considerable gaps between Mexico's new rules and the absence of any practical consequences for infractions. While Mexico has agreed to implement a drug and alcohol testing program, it has no laboratories that are U.S.-certified for drug testing. In addition, while Mexico has enacted a law requiring driver logbooks, U.S. border officials admitted that they have yet to see a single Mexican logbook.

Most importantly, despite a promise to establish comprehensive domestic safety systems, Mexico has not limited its drivers' hours of service. Mexican officials claim that the general labor laws applying to every workplace provide for an 8-hour workday, but there is no evidence that any general limitation on working hours is enforced as to commercial drivers, and anecdotal evidence in news stories suggests that working hours are very long indeed. Fatigue is a significant cause of often-catastrophic truck crashes. Although Mexican drivers crossing the border will ostensibly be bound by U.S. hours-of-service limits, it will be impossible to enforce U.S. laws without both meaningful enforcement of Mexico's new logbook requirements and enactment of hours-of-service laws in Mexico.

In short, little has changed since the Clinton Administration, prompted by safety concerns, refused to take steps to open the border in 1995. Mexico has not yet put in place a regulatory system comparable to that of the U.S. and Canada. The out-of-service rate for Mexico-domiciled trucks that

cross the border is a significantly higher rate – 36 percent – than the out-of-service rate for trucks in the U.S., which is 24 percent. Border areas are still woefully short on federal inspectors, who numbered a mere 50 in March 2001, and lack the resources to ensure that unsafe trucks are not admitted.

Despite this well-demonstrated lack of progress on safety standards for commercial carriers in Mexico, the NAFTA panel ruled on February 6, 2001 in Mexico's favor and found that the U.S. was in violation of its treaty obligations under NAFTA. While this has been depicted in the press as meaning that the U.S. must either open the border or face trade sanctions, the panel's ruling was actually far more solicitous of Clinton Administration's demonstrated concern for safety than has been explained.

The NAFTA arbitration panel found that the United States may implement different admission procedures for Mexican carriers than apply to U.S. or Canadian carriers, in order to ensure that Mexican carriers will be able to comply with U.S. regulations. Furthermore, the U.S. may impose requirements on Mexican carriers that differ from those imposed on domestic or Canadian carriers, so long as the decision to impose such requirements is made in good faith and with respect to a legitimate safety concern. Therefore, although the panel ruled that the U.S. could not maintain its ban on all Mexican carriers, under the ruling the U.S. can evaluate Mexico-domiciled carriers on a case-by case basis and can refuse to issue them operating authority if a particular carrier will not be compliance with U.S. safety regulations.

In the aftermath of this ruling, the Bush Administration has adopted the course of action that is least likely to protect public safety, and is the most subservient to the over-arching goal of free trade. Despite five years of U.S. government documentation of major safety problems by such neutral parties as the General Accounting Office and the Department of Transportation's Office of Inspector General,

the Bush Administration has rushed to propose a set of three totally inadequate regulations for monitoring and oversight of Mexican carriers and the processing of applications for operating authority in the border zones and beyond. The Administration's new proposals fail to hold Mexican carriers even to the same standards U.S. carriers must meet.

This course of action by the U.S. DOT is particularly disgraceful given that there are other options available that are far more likely to protect public safety. These include both trade mechanisms and opportunities contained in the implementation of the panel decision. I will address the trade options first.

When governments involved in a trade dispute are truly concerned about the disagreement underlying the dispute, and seek to maintain their own laws in the face of a hostile ruling, the countries frequently engage in a process of negotiation called compensation. In this process, countries will trade off concessions to satisfy outstanding trade rulings. Thus, the United States could exchange its victory in the World Trade Organization case against Mexico on high fructose corn syrup to maintain U.S. domestic highway safety rules. Comparable amounts of revenue can also be exchanged as compensation to balance accounts between countries. Alternatively, the United States could simply award Mexico additional trade benefits to compensate for maintaining our safety rules and restrictions upon U.S. access for Mexican trucks.

Instead, as I will explain, the Bush Administration's proposed rules fail even to require that Mexican carriers fully comply with existing U.S. law. Because the NAFTA panel ruling expressly provided permission for U.S. authorities to establish case-by-case review of applications for operating authority as well as inspection and licensing requirements that are not "like" those already in place for

U.S. or Canadian carriers, the U.S. could establish a program which requires Mexican trucks to meet more stringent standards than is the case under for U.S. and Canadian carriers under current U.S. law. This type of accommodation by the panel is highly unusual in a trade ruling, and is an open invitation for the U.S. to act responsibly to fulfill its safety obligations to the American public.

Despite such considerations by the panel, FMCSA has proposed rules which achieve the opposite of what is permitted under the ruling. The agency's proposals actually allow greater latitude in several key areas for Mexican-domiciled carriers and drivers than apply to U.S. and Canadian trucking companies and drivers. The Administration's proposed rules create an 18-month "safe harbor" for Mexican carriers by limiting their penalties for infractions, undercutting any incentive for Mexican carriers to follow U.S. law and misleading new Mexican entrants as to the seriousness of their infractions.

For example, under the proposed rules, the agency's 18-month safety review of newly admitted Mexican carriers need not be performed on-site. Compliance reviews for U.S. carriers, however, must occur on-site. In addition, during a Mexican carriers' 18-month "safe harbor," for the following offenses carriers will be sanctioned only by a deficiency letter or an expedited safety review — a review which they presumably would have received within 18 months regardless of the offense:

- using a driver without a valid Commercial Driver's license or its equivalent;
- operating without insurance,
- using drivers who have tested positive for drugs and alcohol; and
- using a vehicle that has been placed out of service without correcting the violation incurring the penalty.

For U.S. carriers, these violations would incur fines for the driver or the carrier, and could even trigger criminal penalties, including jail time.

Comparisons Between Mexico and Canada on Commercial Carriers Are Inappropriate and Misleading

Some commentators have misleadingly compared the U.S.-Mexico relationship regarding commercial carrier access to that of the United States and Canada. But this is comparing apples and oranges, because Canadian domestic safety standards are very similar to those in the U.S. and unlike Mexico, Canada maintains up-to-date databases on Canadian trucking companies and drivers that are accessible to U.S. authorities. Canadian databases, like those in the U.S. and unlike Mexico's, include driver conviction records and carrier out-of-service records. As proof of Canadian success in these areas, the out-of-service rate for Canadian trucks traveling in the U.S. is even lower than the out-of-service rate for U.S. trucks. In sum, the United States can rely on Canada to enforce its own, comprehensive safety regulations with respect to Canadian carriers. The United States does not have such a relationship with Mexico.

The Administration's Proposed Rules Are A Safety Scandal

In its latest series of three proposed rules, the Federal Motor Carrier Safety Administration (FMCSA) contemplates granting operating authority to Mexican carriers without creating a process that

will assure the safety of American drivers. Despite the clear lack of preparedness, the agency's proposed rules are scheduled to be implemented before the end of the year — in less than six months. To evaluate the safety fitness of Mexican carriers, the agency intends to rely heavily on an unpopulated — that is, an empty — database that currently lacks the basic information necessary to process Mexican applications or to perform a safety review.

The agency also allows 18 months to pass before a safety audit is completed, while carriers are permitted to cross the border and roam throughout the United States. Eighteen months is far too long to wait for verification of a company's compliance and safety record. In addition, it is likely that FMCSA will not perform the audits in an expeditious fashion. The proposed rules provide that the agency's "safety oversight program" will continue indefinitely after the 18-month period has expired if the agency fails to conduct a safety review within the allotted time. During this time unaudited Mexican carriers can continue to operate throughout the U.S.

How the Proposed Rules Fail to Assure Safety

In the paper-based universe created by the proposed new DOT rules, operating authority is granted by U.S. officials if the application from a carrier is complete. This approach falls far short of the assurances that are needed for safety. For example, the application asks carriers to certify their knowledge of, and intention to follow, U.S. regulations by checking boxes indicating the answer is "yes," yet fails to provide a box to check "no"! Although applicants must describe their plans to monitor employee logbooks and implement an accident monitoring system, the FMCSA has no process

in place to verify this or any other information provided the application. The Department of Transportation has never implemented a verification process for Mexican truck registration information, and as a result, according to DOT's own Inspector General, much of the information that the DOT currently has in its databases regarding Mexican-domiciled carriers is outdated or unverified.

Indeed, the instructions on the proposed applications contained in the rule suggest that applicants' business information *cannot* be compared or cross-checked, because the application forms instruct applicants to enter the name of the carrier exactly the same way each time a name is required, or, the form implies, the department's data system may list two slightly different names as two different companies. This instruction suggests that the DOT has no way to cross-check the owners, addresses, and other information of a company to ensure that a company is not counted twice. A simple typographical error in the name of a carrier for an entry of inspection or crash data into the database, then, could prevent the agency from matching negative safety data with that carrier. In addition, carriers with a poor safety record could re-register under a new name to get a second "chance" in the DOT database.

According to the proposed rules, for the agency's 18-month Mexican carrier safety review, FMCSA will examine "performance-based safety information" in its Motor Carrier Management Information System (MCMIS), as well as the documents that must be maintained by motor carriers under the rules. FMCSA officials have stated that the purpose of the 18-month interval is to allow U.S. officials to compile inspection and truck crash information on a carrier during its operation in the United States. At the same time, it is undisputed that the Mexican carriers will face a "learning curve" similar to that of other new entrant carriers — indicating that these new carriers will necessarily be more

dangerous in the beginning of their operations. Using the public highways as a testing ground for the safety of inexperienced foreign carriers is outrageous and completely unnecessary.

Mexico is supposed to maintain its own database of inspections and crash information. If Mexico were conducting regular roadside inspections and compiling crash data consistently and reliably, this database would be useful in evaluating the safety fitness of Mexican carriers before they are granted operating authority in the U.S. Unfortunately, members of the Land Transportation Standards Subcommittee, a group assembled under NAFTA to achieve comparable safety standards among the treaty's countries, admitted that this database is not yet populated with any meaningful data, such as inspection and crash data. There is no evidence of the level of access that Mexican authorities on the road have to the database, nor do we know whether the information being added has any assurance of reliability. And even if the information is being added, it may not be representative of a Mexican carrier's safety fitness on U.S. roads because Mexican inspection standards are considerably weaker than those in the U.S.

According to FMCSA's proposed rules, the required 18-month safety review may be conducted within the United States or at the carrier's place of business in Mexico. This proposal is inadequate on its face. Any meaningful audit system should, without doubt, require an on-site evaluation and inspection of the carrier's place of business.

The integrity of the application and review process is critical because the high out-of-service rates and anecdotal evidence regarding the status of the Mexican trucking fleet show that tremendous improvement would be necessary to meet U.S. safety standards. This situation is nothing short of critical, given that U.S. border inspection facilities lack the resources and large number of new

inspectors that will be needed to pick up the slack created by weak Mexican regulations and enforcement.

Our Stretched Border Resources Will Not Protect the Public

The already inadequate inspection force at the border will be completely unprepared for the influx of newly admitted carriers. The number of federal inspectors at the border is less than half of the number that was estimated to be necessary in 1998, and that number did not include the investigators that will be necessary for the agency to conduct its 18-month safety reviews. Hiring and training a new FMCSA inspector requires at least six months — additional inspectors, even were they authorized today, would not be in place before the end of the year.

Most states, including the border states, are completely unprepared to deal with the increased traffic that will result from opening the border. Texas, which has the most border crossings and the highest traffic volume of Mexico-domiciled carriers, does not have permanent inspection facilities at any crossing point. The Texas legislature recently passed a resolution asking Congress to recognize the impact that further opening the border to Mexican trucks will have on Texas and its resources. The Texas legislature also asked Congress for increased funding, amounting to an amazing \$11 billion, to offset the costs of greater infrastructure needs for border crossings and trade corridors within its state.

In fact, most of the border crossings are sorely in need of infrastructure improvements. Most border states do not have full-time state inspectors at the border during all hours of operations. While plans for building projects have been made, no permanent inspection facilities have been built since

1998, and no permanent facilities exist outside the California border areas. A recent study documented that border crossings lack Internet connections, inspection space, and space to park out-of-service vehicles. In preparing a May 2001 DOT Inspector General report, investigators visited all 27 border crossings and found that at 20 crossings, FMCSA inspectors did not have dedicated phone lines to access databases, such as those for validating a driver's license; at 19 crossings, FMCSA inspectors had space to inspect only 1 or 2 trucks at a time; and at 14 crossings, FMCSA inspectors had only 1 or 2 spaces to park vehicles placed out of service. In addition, the sites' out-of-service space was shared with inspection space at a majority of the crossings. FMCSA must address these serious shortcomings before the volume of cross-border traffic increases or trucks crossing the border are operating throughout the United States.

Our research has also shown that once a truck gets beyond the border, it is not likely to face inspection or verification of operating authority, called registration, by either state or federal officials. This is truly a tragic impediment to enforcement, because the primary means of enforcing U.S. standards for Mexican carriers during the 18-month safety oversight program is for U.S. officials to suspend or revoke a carrier's registration. However, trucks crossing the border are only checked for registration when they are inspected, and only 1 percent of trucks crossing the border are inspected at all. Even at the border, it is unlikely that illegal trucks will ever get caught, because only federal inspectors and California's state inspectors routinely check for certificates of registration. U.S. customs officials and other state inspectors do not routinely check for valid registration.

Mexican Drivers Will Escape New Penalties for Dangerous U.S. Commercial Drivers

Another proposed rulemaking by FMCSA would disqualify the commercial drivers licenses of drivers who are convicted of serious driving violations, such as drunk driving, leaving the scene of an accident, violating railroad-highway grade crossing signs, excessive speed, and reckless driving, regardless of whether the offense was committed while driving a personal vehicle or a commercial vehicle. This new rule, a significant step toward insuring the safety of commercial vehicle traffic, cannot presently be enforced with respect to Mexican drivers, due to the lack of data in the shared Mexico-U.S. database about the personal driving records of Mexican truck drivers. Therefore, it appears that FMCSA will not be able to enforce this law for Mexican commercial drivers due to practical constraints, demonstrating once again that safety steps applicable to U.S. and Canadian commercial drivers will far less frequently be applied to Mexican drivers, and that the penalties for infractions committed by Mexican carriers and drivers will, for technical reasons, in practice be far less severe.

Recommendations

We support the well-tailored proposals passed last week by the Senate Appropriations Committee. A plan for strengthening border oversight and crafting a reliable system for the admission of safe Mexican commercial carriers cannot be rushed or addressed in a piecemeal fashion. Only a comprehensive plan that addresses all of these safety concerns will insure the safety of U.S. highways and the public. Our recommendations are the minimum that should be required and are as follows:

- As the Senate Committee required, FMCSA must require on-site safety reviews of Mexican carriers prior to granting operating authority. FMCSA must not test the safety of Mexican

carriers on U.S. motorists. On-site safety reviews can evaluate factors indicating the ability of a carrier to comply with U.S. laws, while review of a paper application cannot. Safety compliance reviews, conducted at a carrier's place of business with independent federal verification of drivers' license validity, equipment safety, inspection and repair facilities, safety management controls, and interviews with on-site company officials, among other elements of a complete safety compliance effort, should be the primary basis for evaluating the safety of Mexico-domiciled carriers and should be a predicate of operating authority, as they are in the United States.

- As recommended by the Senate Committee, FMCSA should require Mexican carriers to complete a proficiency test to demonstrate their knowledge of U.S. laws and safety regulations. The Motor Carrier Safety Improvement Act of 1999 directs the Secretary of DOT to establish minimum requirements for applicant motor carriers to ensure that they are knowledgeable about federal motor carrier safety standards; it also directs the Secretary to consider the establishment of a safety proficiency examination for these applicants to test their knowledge of safety requirements. This requirement is supported by law and is reasonable prior to a grant of operating authority.
- As indicated by the Committee, FMCSA must increase the number of full-time federal inspectors at the border and help states to supply state inspectors so that inspectors are present at all border crossings during all hours of operation. According to the General Accounting Office, each of the 161 state and federal inspectors who were on the job in March 2000 would have to inspect an incredible 24,800 Mexican trucks annually to inspect those then crossing the border. The DOT Inspector General should be required to certify, as the Committee indicates, that an adequate number of inspectors have been hired and trained to perform meaningful border and on-site safety inspections. FMCSA must provide for the hiring and training of additional inspectors to conduct the on-site safety reviews. As the Committee required, DOT should require that trucks be permitted to cross the border only at times when inspectors are on duty.
- FMCSA must require that the licenses, certificates of registration, and proof of insurance of all drivers and trucks crossing the border are checked and verified, and that a far more substantial proportion of trucks crossing the border are inspected. In addition, the border should not be opened until DOT has assured Congress that Mexico's information infrastructure is established, accurate, functional and informative, as the Committee specified.
- As the Committee required, FMCSA must ensure that all border crossings have permanent inspection facilities that include weigh stations (Weigh-In-Motion systems), dedicated phone lines for accessing databases, and ample space to conduct inspections as well as parking places for out-of-service vehicles. Until all 27 border areas are upgraded, and until the Inspector General certifies that telephone connections and computer links exist at all border crossings and mobile enforcement units, commercial carriers should be limited to crossing where there are adequate inspection facilities. As the Committee required, DOT should be required to electronically verify the license of carriers crossing the border. In addition, DOT should be

required to electronically verify the registration information of carriers.

- As the Committee provided, the border should remain closed until DOT Inspector General certifies that FMCSA has put in place a plan to ensure compliance with U.S. hours-of-service rules. To assist with enforcement, the Inspector General should also certify that DOT has assigned Mexican trucks an operating number to allow state inspectors to track the carrier's movements.
- As the Committee required, state inspectors who receive federal funds should be made to check for violations of federal law, including the validity of registration and drivers' licenses. DOT should also implement, as the Committee required, a system similar to that for U.S. drivers that prevents Mexican drivers from being able to acquire a new license if their license has been lost as a penalty for legal infractions.
- As the Committee provided, prior to opening the border, DOT must issue rules regarding: 1) proficiency examinations; 2) improved training for domestic safety auditors; 3) staffing standards for inspection sites at the U.S.-Mexico border; 4) prohibitions on foreign motor carriers' leasing vehicles to another carrier while suspended for rule infractions; 5) disqualifications of carriers that have operated illegally in the U.S.

The border must not be opened until all of these conditions are met.