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Update

Department of Transportation and Related Agencies Appropriations Act of 2002

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INTRODUCTION

On December 18, 2001, President Bush signed the Department of Transportation and Related Agencies Appropriations Act of 2002 (Act).¹ The Act provides funds for the implementation of the motor carrier provision of the NAFTA,² but also contains a stringent set of regulations that precede the processing of applications for Mexican motor carriers' U.S. permits.³ The Act appears to be a definitive step toward NAFTA compliance, but the difficulty of conforming to the regulations and the mixed reaction it is receiving indicate continuing potential for problems along the border.

I. STRINGENT NEW TRUCKING REGULATIONS

The Federal Motor Carrier Safety Administration (FMCSA), is the administrative body in charge of enforcing and interpreting the Act, and must require safety reviews of all motor carriers before granting the carrier conditional operating authority

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1. Press Release, The White House, President Signs Transportation Appropriations Act (Dec. 18, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/12/20011218-4.html>.

2. Department of Transportation and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-87, 115 Stat. 833 (2001).

3. § 350, 115 Stat. at 864-68.

beyond the border.⁴ The safety review verifies compliance with hours of service rules, proof of insurance, safety management programs and driver qualifications.⁵ It also reviews the carrier's history, evaluates the carrier's facilities, and reviews safety management.⁶ At least half of the carriers that have more than three vehicles must have on-site inspections.⁷ The FMCSA also requires full safety compliance review of all Mexican motor carriers with at least a satisfactory rating before they are granted permanent operating authority.⁸

The FMCSA requires electronic verification of Mexican motor carrier driver's licenses before processing an application.⁹ Each incoming truck must be inspected at least every ninety days,¹⁰ and Mexican trucks can cross the border only at commercial border crossings where inspectors are on duty.¹¹ State inspectors are under mandate to enforce Federal laws or notify Federal authorities of violations.¹² The Act also disallows the processing of applications until all border crossings are equipped with scales.¹³ The five busiest crossings must have weigh-in-motion scales and five more must be constructed within the year.¹⁴ Finally, the FMCSA must implement a policy requiring the carrier provide proof of valid insurance with an insurance company licensed in the United States.¹⁵

Before a Mexican carrier may operate beyond the commercial zone the Inspector General of the Department of Transportation (DOT) must conduct a comprehensive review of the border operations within 180 days of the bill's enactment.¹⁶ Then

4. § 350(a)(1)(A).

5. § 350(a)(1)(B).

6. *Id.*

7. § 350(a)(1)(C).

8. § 350(a)(2). Any motor carrier that did not have an on-site review prior to conditional authority must submit to an on-site safety compliance review within eighteen months of receiving permanent authority. *Id.*

9. § 350(a)(3). All driving vehicles containing hazardous material must be inspected and at least half of all others must be randomly checked. *Id.*

10. § 350(a)(5). A motor carrier given permanent authority to operate beyond the border for three consecutive years will not be subject. After the inspection, a decimal is given and no inspection is required for another 90 days. *Id.*

11. § 350(a)(9).

12. § 350(a)(6).

13. § 350(a)(7).

14. *Id.*

15. § 350(a)(8).

16. § 350(c)(1). The IG must verify (1) that new inspectors have been hired and fully trained; (2) that a policy to ensure compliance with hours-of-service has been implemented; (3) that adequate capacity exists at each border crossing to conduct a

the Secretary of Transportation must address the findings of the IG and certify in writing that the opening of the border will not pose an unacceptable safety risk to the public.¹⁷

II. REACTIONS TO THE ACT

A. A MIXED RESPONSE IN THE UNITED STATES

After the bill's enactment, all sides claimed victory.¹⁸ Those who favor opening the border feel they have achieved victory because the long-standing moratorium may finally be lifted.¹⁹ Businesses, including the American Trucking Association, were relieved because the border became one step closer to opening while maintaining safe standards.²⁰ Opponents to cross-border trade with Mexico have good reason to claim victory as well. Unions representing U.S. truck drivers celebrated because "the core elements of the Murray-Shelby legislation [were] intact,"²¹ and claimed it to be "a clear victory for highway safety."²²

A recent U.S. General Accounting Office (GAO) report found the DOT unprepared to implement the Act.²³ FMCSA has not

meaningful number of safety inspections and to accommodate vehicles placed out of service; and (4) that the information infrastructure of the Mexican government is accessible and integrated with that of the United States within a data base; and (5) that the Mexican and U.S database contains sufficient data to allow safety monitoring of all Mexican motor carriers. § 350(c)(1)(A)-(G). The Inspector General is also required to perform another comprehensive review 180 days after the first and annually thereafter. § 350(d).

17. § 350(c)(2).

18. Senator Murray stated that the compromise was a "victory for safety, for trade, and for both our countries." *U.S. Congress & Bush Administration Reach Compromise on Regulation to Allow Entry of Mexican Trucks*, SOURCEMEX ECON. NEWS & ANALYSIS ON MEX, Dec. 5, 2001, 2001 WL 10229601. Although Senator McCain voted against the bill, he praised the bill for promoting safety and protecting trade. *Farm*, *supra* note 9. President Bush called the compromise "an important victory for safety and free trade." Kathryn A. Wolfe, *Senate OKs Stricter Trucking Rules*, HOUS. CHRON., Dec. 5, 2001, at A5.

19. Press Release, Sonny Hall, President of Transportation Trades Department, AFL-CIO, Safe Highways Prevail in Compromise Truck and Bus Safety Deal, *at* http://www.ttd.org/pressrel/dec01/pr120401_print.htm.

20. *Mexican Truck Agreement Frees DOT Spending Bill*, HAZMAT TRANS. NEWS, Dec. 1, 2001, 2001 WL 15811273.

21. Hall, *supra* note 19.

22. *House OKs Compromise Standards on Mexican Trucks in U.S.*, SAN DIEGO UNION & TRIB., Dec. 1, 2001, at A16 (quoting Rob Black, spokesman for the Teamsters union).

23. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, North American Free Trade Agreement: *Coordinated Operational Plan Needed to*

taken the steps necessary to secure space to conduct inspections and only two of the twenty-five ports have permanent inspection facilities.²⁴ The report also criticizes the agency for not integrating or coordinating efforts with state inspectors.²⁵ It concluded that improvement is needed before Mexican commercial trucks will safely operate on U.S. roads.²⁶ Supporters of the Act's stringent safety requirements cite the report as evidence that the requirements were justified.²⁷

B. RUMBLES SOUTH OF THE BORDER

Initially, the Mexican government reacted positively to the Act.²⁸ After a closer look at the stringent requirements placed on them, they quickly criticized the enacted law and promised to impose identical stringent standards on U.S. motor carriers traveling to Mexico.²⁹ Mexico awaits the release of the operating regulations, and if the regulations discriminate against Mexican truckers, Mexico promises to challenge them under NAFTA.³⁰ The recent GAO report found that when the border does open, very few Mexican motor carriers would actually operate beyond the commercial zone due to the awesome financial obligations resulting in part from the stringent safety requirements.³¹

Mexican truckers, however, would prefer that the border remain closed. One Mexican trucking leader said they are unprepared for the opening of the border, fearing that U.S. competitors "will finish us in five minutes."³² Other Mexican truck-

Ensure Mexican Trucks' Compliance with U.S. Standards, GAO-02-238 (2001), at 12 [hereinafter GAO Report].

24. *Id.*

25. *Id.* at 17.

26. *Id.* at 27.

27. Carter Dougherty, *GAO Rips DOT on Mexican Trucking*, WASH. TIMES (D.C.), Jan. 9, 2002, at C1.

28. *Mexican Trucks to Cross U.S. Border in New Year*: Derbez, CORP. MEX.: REFORMA, Dec. 4, 2001 at 2001 WL 26760962.

29. *Mexico Will Apply U.S. Rules to U.S. Trucks*, AGENCIE FR.-PRESSE, Dec. 5, 2001 at 2001 WL 25078698.

30. John Nagel, *NAFTA: Wary of Discrimination, Mexico to Inspect Coming Rules on Cross-Border Truck Safety*, BNA INT'L TRADE DAILY, Dec. 13, 2001, WL 12/13/2001 BTD d4.

31. GAO Report, *supra* note 23, at 7. The report predicts that initially few Mexican motor carriers will operate beyond the commercial zone, for reasons including:(1) lack of established business relationships in the U.S.; (2) the high cost of insurance and fees; and (3) the added operating costs of congestion and delays at the border. *Id.*

32. John Nagel, *Transportation: Mexico's Trucking Rules Will Mirror U.S.*

ers object to opening the border because the Act discriminates against Mexican trucks.³³ Despite the apparent consensus among Mexican drivers to keep the border closed, a class-action lawsuit was filed against the Department of Transportation in U.S. Federal Court on behalf of Mexican truckers, claiming \$4 billion in damages.³⁴

III. THE NEW LEGISLATION MAKES PROMISES, BUT IS THE UNITED STATES STILL IN VIOLATION?

A. THE POSSIBILITY OF AVOIDING A VIOLATION USING THE GOOD FAITH EXCEPTION

The new Act is a blanket restriction on Mexican trucks and is per se a violation of NAFTA. The NAFTA Panel specifically stated that the United States need not treat Mexican trucks exactly the same as U.S. or Canadian trucks, but it qualified its statement by saying the United States must review the applicants on a case-by-case basis.³⁵ The Panel stated the United States would be justified in implementing different procedures to ensure Mexican motor carriers complied with its law.³⁶ However, those differences must be made with respect to safety concerns and they must be made in good faith.³⁷

The requirements under the Act to have inspectors at the border facilities at all times, to have scales at every crossing and weigh-in-motion scales at the busiest five crossings, and to electronically verify at least half of the Mexican drivers' documentation would most likely comply with the NAFTA Panel decision, as long as they are in good faith. However, the Act requires the FMCSA and the DOT meet certain conditions before Mexican trucks are granted authority to operate beyond the commercial

Cross-Border Regulations, Minister Says, BNA INT'L TRADE DAILY, Dec. 6, 2001, WL 12/6/2001 BTD d5 (quoting Elias Dip Rame, President of the Confederation of Mexican Transporters).

33. Nagel, *supra* note 30 (citing Manuel Gomez Garcia, president of the National Cargo Chamber).

34. Karen Brooks, *Mexican Truckers Sue U.S. Agency*, KNIGHT-RIDDER TRIB. BUS. NEWS-KRTBN, Dec. 19, 2001 at 2001 WL 31599556.

35. In re *Cross-Border Trucking Services*, N.A.F.T.A. Binat. Panel, USA-MEX-98-2008-01, (Feb. 6, 2001), 2001 FTAPD Lexis 2, para. 300 [hereinafter NAFTA Panel].

36. *Id.*, para. 301.

37. *Id.*

zone.³⁸ Since the conditions do not go to merits and qualifications of the individual motor carrier, the United States probably continues to violate NAFTA.

B. DISCRIMINATORY CONDUCT COULD TRUMP THE GOOD FAITH EXCEPTION

Even if the FMCSA manages to fulfill every requirement under the Act and Mexican applications are processed, there is a valid argument by Mexico claiming unfair treatment under NAFTA due to a constructive blanket ban. Very stringent requirements permit only the very affluent and ambitious Mexican motor carriers to apply for authority to operate beyond the border.³⁹ Delays, expensive U.S. insurance, and maintenance on current fleets serve as powerful deterrents from operating outside the current commercial zone.⁴⁰ Mexican motor carriers would also be subject to competition in their own country. Once the U.S. border opens to Mexican trucks, U.S. companies will have full access to Mexico, which is what Mexican trucking organizations fear the most.⁴¹ The U.S. companies will expend very little to gain access to Mexico and will have, what some consider, an economic advantage that will financially destroy Mexican truck companies in their own market.⁴²

C. MEXICO'S OPTIONS POST-ENACTMENT

Mexico has several options in order to protect its interests. It can impose mirror regulations on incoming U.S. trucks,⁴³ assuming that the regulations are not in violation of its NAFTA obligations. This may seem a reasonable solution, but before acting, Mexico must not be in violation of its NAFTA obligations. The United States was granted permission from a NAFTA dispute panel to impose tougher restriction due to differences in the two countries' law governing motor carriers.⁴⁴ Mexico would most likely need similar authority to impose different safety requirements and procedures on motor carriers from a NAFTA member country, unless it imposed the same re-

38. See *supra* note 4-17 and accompanying text.

39. See *supra* note 31 and accompanying text.

40. *Id.*

41. See *supra* note 33-34 and accompanying text.

42. *Id.*

43. See *supra* note 29 and accompanying text.

44. See *supra* notes 35-37 and accompanying text.

strictions on its own motor carriers.

Mexico could also simply close its borders to incoming U.S. trucks. However, the United States would most likely respond with a renewed moratorium on Mexican trucks.⁴⁵ Progress on other issues between the United States and Mexico, such as immigration, could be effected, and NAFTA itself could come under question. The United States could also try to resolve the issue with a Chapter 20 NAFTA dispute panel ruling.⁴⁶

Although Mexico has stated that it recognizes the Act to be a positive step by the United States,⁴⁷ if the blanket restriction is not lifted soon Mexico may become weary and impose trade sanctions on the United States.⁴⁸ Mexico has the option of demanding compensation from the United States for its unwillingness to conform to the NAFTA Panel decision.⁴⁹ If Mexico elected to impose trade sanctions, it would most likely do so in the sugar fructose market.⁵⁰

CONCLUSION

The United States passed a law that opens the border to Mexican motor carriers, subject to stringent regulations.⁵¹ Until the United States opens the border and removes the blanket restriction, it will remain in violation of the NAFTA panel decision.⁵² Once border inspection compliance requirements are met and the United States conducts case-by-case reviews of appli-

45. The United States initially imposed the current moratorium because Mexico did not allow for reciprocal access. *See* NAFTA Panel, *supra* note 35, para. 37-38.

46. The United States alleged Mexico never opened its borders to U.S. motor carriers despite its obligation under NAFTA shortly before the panel was formed. NAFTA Panel, *supra* note 35, para. 22. The United States requested a meeting with the panel to consider a consolidation of the two cases, but never filed a formal complaint against Mexico. *Id.* para. 24.

47. Nagel, *supra* note 40.

48. According to Chapter 20, the aggrieved party must wait thirty days after a favorable opinion from a dispute panel decision. Then the party may, if it so elects, impose trade sanctions equal to the damages incurred from the violation. North American Free Trade Agreement, Dec. 18, 1992, art. 2019, 32 I.L.M. 605, 697.

49. *Id.*

50. Mexico has been imposing high duties on imported U.S. sugar fructose. A recent Chapter 19 dispute panel ruling found Mexico in violation of the NAFTA. John Nagel, *Dumping: Mexico Says it will not Remove Duties to Corn Syrup after NAFTA Decision*, BNA INT'L TRADE DAILY, Nov. 27, 2001, WL 11/27/2001 BTD d4. Mexico used the U.S. noncompliance with the motor carrier provision as a bargaining chip. *Id.*

51. *See supra* notes 3-17 and accompanying text.

52. *See supra* notes 35-37 and accompanying text.

cants, it will most likely comply with its obligations as defined by the Panel, unless Mexico can prove the discriminatory treatment is in bad faith.⁵³ Even in the absence of a U.S. violation, Mexican motor carriers will be greatly disadvantaged by the cost of complying.⁵⁴

Only time will tell whether the Act has solved the cross-border trade dispute leading to unprecedented cross-border trade between the United States and Mexico. Most likely, the United States will continue to impose the moratorium on Mexican trucks. The dispute has not gone away with the passage of the Act, and most likely will not be resolved in the near future.

53. *See supra* Part IV.B.

54. *See supra* note 31 and accompanying text.