



# The Transportation Brief®

## *The Transportation Brief*

A quarterly newsletter of legal news for the clients and friends of Scopelitis, Garvin, Light & Hanson.

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## *Changes Lead to Regulatory Minefield for Motor Carriers*

2004 has already produced a number of new federal regulations that will have a substantial impact on the transportation industry. From the new hours of service rule that went into effect in January to the new driver training requirements effective July 20, the FMCSA has made it difficult for motor carriers to keep up with the ever-changing regulatory environment. This edition of *The Transportation Brief* focuses on some of the most recent developments.

Regulatory compliance is important to motor carriers for a number of reasons. Most obviously, harsh civil penalties can be assessed against a motor carrier by the FMCSA or other government agency. Earlier this year, for example, a \$500,000 penalty was imposed on a small Midwestern carrier for alleged violations of the hours of service rule. Perhaps more devastating than a large monetary penalty, the FMCSA also has the power to revoke the authority of a motor carrier found to be in substantial non-compliance with its regulations. Carriers that receive an unsatisfactory safety rating as a result of such non-compliance will automatically be placed out-of-service by the FMCSA within 60 days after the proposed rating.

The mandatory record retention requirements applicable to carriers can also provide a goldmine of damaging evidence to plaintiffs' attorneys. Violations of the hours of service rule by the driver or of the driver qualification or new training rules by the carrier may support an award of punitive damages in truck accident litigation or, at the very least, increase the settlement value of the case. Punitive damages claims are particularly problematic because many states, as a matter of public policy, prohibit carriers from insuring against such claims.

Shippers, logistics providers, and other consumers of transportation services are also growing more concerned about carrier regulatory compliance. A number of courts across the country have imposed liability on shippers and other third parties for using carriers that they knew or should have known have a substantial safety or compliance problem. The new hazardous materials regulations may increase shipper concerns over such potential liability.

Simply put, the regulatory "minefield" is fraught with potential legal hazards. Carriers can thus ill afford to ignore, or delay implementation of, any of the new regulatory initiatives of the FMCSA or other government agency.

*Timothy W. Wiseman,  
Indianapolis*

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# Briefly...

## *New Hazmat Procedures Go Into Effect January 2005*

The FMCSA has published final rules establishing a special permit program for carriers transporting certain hazardous materials. The regulations, 49 C.F.R. 381.1 *et seq.*, will take effect on January 1, 2005.

The new regulations require carriers to obtain a permit if they transport (1) toxic inhalants, (2) compressed or refrigerated liquid methane or liquefied natural gas or other liquefied gas with a methane content of at least 85% in quantities greater than 3,500 water gallons, (3) explosives, or (4) radioactive material.

Carriers must satisfy the FMCSA requirements which include (1) a satisfactory safety rating, (2) a safety security program, (3) registration with the Research and Special Projects Administration of the DOT, (4) acceptable crash and out-of-service ratios, and (5) a driver security training program. In addition, the carrier must have in place a communication system with the driver of its trucks and written route plans to transport explosives and radioactive materials. The application form is MCS-150(B), and there is no filing fee.

*Norman R. Garvin,  
Indianapolis*

## *New Driver Training Regulations May Lead to New Accident Litigation Strategies*

New federal regulations at 49 C.F.R. 380-500 *et seq.* now mandate that entry-level drivers required to hold CDLs must

receive training in four specific areas. Those areas include driver qualification, the hours of service rule, driver wellness, and whistleblower protection. The new requirement went into effect July 20, 2004.

Plaintiffs' attorneys in accident lawsuits may seize upon the training regulations to create a new theory of liability — negligent training. Typically, motor carriers have defeated negligent training claims because federal law did not impose a duty to train drivers. Although it remains to be seen whether juries will be deciding if motor carriers have properly trained entry-level drivers, sound accident defense strategies should now include an early determination of whether any violation of the training regulations may have contributed to the accident.

*Michael B. Langford,  
Indianapolis*

## *DOT Amends Driver Qualification Requirements*

The DOT has amended Parts 390 and 391 of the FMCSR to require a heightened inquiry into the safety performance history of new drivers. The new rule went into effect on April 29, 2004, and identifies the minimum safety information that carriers are required to obtain from prospective drivers and their former employers. To aid in the collection of this information, the new rule also mandates that former employers provide certain categories of driver safety performance information within 30 days of a request by a prospective employer. This new response

requirement becomes effective on October 29, 2004. These rule changes should cause all carriers to examine their pre-employment screening procedure as well as the manner in which they respond to inquiries regarding former drivers.

*David D. Robinson,  
Indianapolis*

## *Hours of Service Rule in Flux After Court Decision*

In a surprising development on July 16, a federal court threw out the new hours of service rule implemented in January of this year. The court found that the new rule was arbitrary and capricious because the FMCSA failed to adequately address the impact the rule would have on driver health. In addition, the court raised concerns with the FMCSA's rationale for increasing driving time from 10 to 11 hours, retaining the sleeper berth exemption for single operators, allowing a 34-hour "restart" exception from the 70-hour rule, and abandoning a proposal to require electronic on-board recorders in all commercial vehicles. The FMCSA has 45 days to decide whether to appeal this decision or rewrite its rule addressing the court's concerns. Unfortunately for motor carriers, the court's decision may ultimately force companies to once again retrain their drivers and reconfigure their log auditing systems to comport with whatever final rule is established. In the meantime, the FMCSA is advising motor carriers to continue complying with the January 2004 rule.

*Timothy W. Wiseman,  
Indianapolis*



# Mileposts

## *Full-Service Solutions Spring From Regulatory Roots*

A day rarely goes by at SGL&H – and a *Transportation Brief* is rarely published – that does not include responses to regulatory changes affecting motor carriers. This “Special Regulatory Edition” is noteworthy in that it devotes an entire issue to the shifting regulatory landscape of today’s trucking world.

Scopelitis, Garvin, Light & Hanson cut its teeth on trucking regulatory law. In the firm’s early years, co-founders Alki Scopelitis and Norm Garvin spent most of their time in Interstate Commerce Commission hearings fighting for authority for their trucking clients. Following deregulation in 1980, when others attorneys abandoned trucking law, Scopelitis and Garvin made a strategic decision to stay with their trucking clients and diversify their young firm’s services, adding practice groups including labor and employment, taxation, litigation, insurance law, and others.

What has evolved is today’s full-service transportation law firm. In this context, SGL&H views its regulatory practice as the roots for its other practice areas, all of which go far beyond compliance in terms of the services offered to members of the transportation industry.

Norm Garvin’s depth of industry knowledge gained through regulatory practice provides the foundation for his business advice to carriers across the country. Garvin and Andy Light, along with Jay Robinson, also bring their understanding of regulatory issues to corporate restructuring projects that assist trucking companies in limiting liability and reducing insurance costs. In addition, Light counsels carriers nationwide on how to achieve savings through his state-by-state knowledge of vehicle plating and registration fee requirements.

The rest of the firm’s lawyers follow suit. To name just a few, when Greg Feary develops a creative insurance program, Jim Hanson negotiates a Teamsters contract, Tim Wiseman conducts a mock safety audit, and Dan Barney leads an OOIDA class-action defense team, each draws upon a familiarity with the industry made complete by a clear understanding of the regulatory challenges motor carriers face every day.

The pattern is clear, and it runs back to the content of this “Special Regulatory Edition” of *The Transportation Brief*: SGL&H is a transportation law firm built on a foundation of regulatory law that provides full-service solutions for motor carriers nationwide.

## *For The Record*

**Thomas E. Schulte** joined the firm June 23, 2004, as an associate in the Indianapolis office. Schulte’s practice focuses upon accident defense litigation.

**Adam C. Smedstad** joined the firm August 16, 2004, as of counsel in the Chicago office. Smedstad’s practice focuses upon business and commercial litigation.

## *On The Road*

Dan Barney will present an “Owner-Operator Update” to the Truckload Carriers Association’s Independent Contractor Division Annual meeting in **Dallas** on September 9.

Kim Mann will attend the Canadian Transport Lawyers Association Conference in **Calgary**, Sept. 9-12.

Rich Clark will attend the American Moving and Storage Association’s National Safety Conference in **Long Beach, California**, September 13-14.

Carla Hounshel and Jack Finklea will present “Managing Aspects of Workers’ Compensation and its Interplay with ADA and FMLA” at the Indiana Motor Truck Association’s Safety Council meeting on September 17.

Steven Pletcher will address “Termination Issues” at the National Association of Professional Employer Organization’s Annual Conference, September 20-22, in **Phoenix**.

Dan Barney will be the guest speaker at the Truckload Carriers Association’s Audio Conference Series on “Lease-Purchase Agreements and Escrow Funds,” September 23.

Norm Garvin, Andy Light, Greg Feary, Jay Robinson, and Jerry Cooper will attend the American Trucking Associations’ Management Conference & Exhibition, October 3-5, in **Las Vegas**.

Tom Farrell and Mike Langford will participate in the Trucking Insurance Defense Association’s meeting to be held October 6-8, in **Baltimore**.

Jim Hanson will present “Neutrality Agreements” at the annual seminar of the North American Transportation Employee Relations Association, October 24-27, in **St. Petersburg Beach**. Jerry Cooper and David Robinson will also attend.

James Attridge and Don Vogel will attend the 37th Annual Transportation Law Institute, October 23-24, at the **University of Denver College of Law**.

Norm Garvin, Tim Wiseman, and Todd Metzger will join the Indiana Motor Truck Association’s annual meeting, November 3-5, in **Marco Island, Florida**.



SCOPELITIS, GARVIN, LIGHT & HANSON

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## Dispatches



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◆ **Jim Graves reports that, for purposes of the 100-mile radius limitation of a driver salesman, the “private carrier and driver-salesperson may determine the location of the on-duty reporting point.”** Under a recent letter ruling, the FMCSA sanctioned a practice of trade-show-salesmen moving linearly from town-to-town but spending each night off duty in a motel which became, each morning, a new on-duty reporting point establishing a new 100-mile radius.

◆ **Rich Clark observes that customers may begin presenting carriers with a version of the model transportation agreement form just released by the ATA and NIT League after nearly two years of effort.** As with any agreement, it emphasizes the need for carriers to closely review the contract terms and communicate clearly with customers on important issues such as limitations of liability, insurance requirements, and payment terms.

◆ **In a decision that may finally allow for cross-border operations under NAFTA, the U.S. Supreme Court held that the FMCSA is not required to conduct an environmental study on the impact of allowing Mexican trucks to operate in the U.S.** According to Tim Wiseman, the FMCSA announced that it will soon begin processing the operating authority applications previously filed by approximately 300 Mexican trucking companies. The decision will also pave the way for U.S. carriers to apply for authority to operate into Mexico.