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Federal Agency Backs Off - Operators of Farm Vehicles Not Subject to CDL Requirements

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Overview

On May 31, 2011, the Federal Motor Carrier Safety Administration (FMCSA), a sub-agency of the Federal Department of Transportation (DOT), issued a Notice seeking public comment on three issues relating to the applicability of the Federal Motor Carrier Safety Regulations (FMCSRs) to operators of farm vehicles.[1] Many farm operators and agricultural groups interpreted the Notice as an attempt to require Commercial Driver's Licenses (CDLs) for operators of ag equipment.

> **Note:** Under the Commercial Motor Vehicle Safety Act of 1986, states have the authority to waive the CDL requirements for agricultural producers who drive farm equipment on public roads for short-distance trips.

In response to input from several farm organizations and state governments and other interested persons, the FMCSA extended the initial comment period from June 30, 2011, to August 1, 2011. During that time, FMCSA received an overwhelming response from the ag community, including 1,700 comments on the Notice.[2]

Background

In 1935, Congress passed the Federal Motor Carrier Act (ACT).[3] The Act allows the U.S. Secretary of Transportation to issue rules governing a motor carrier's operating equipment. The Act was intended to establish qualification requirements, maximum hours of operation by employees, and rules governing safety and operation of the equipment. In 1984, Congress adopted the Motor Safety Act of 1984 (MSA '84)[4] which required the Secretary to adopt regulations ensuring that "commercial motor vehicles" could be operated safely and were maintained and equipped adequately. Under the MSA '84, the Secretary is granted "broad powers" to carry out the requirements of the law. In 1986, under the Commercial Motor Vehicle Safety Act,[5] Congress directed the Secretary to regulate minimum state standards for testing and ensure that operators of *commercial motor vehicles* are fit to operate. Thus, each state had to comply with the federal minimum standards and could adopt additional regulations.

The Issues

The FMCSA issued the May 31 Notice seeking public comment on three areas applicable to farmers.[6] In the Notice, the FMCSA asked whether it needed to provide "additional guidance" to explain:

- The distinction between intrastate and interstate commerce in the ag industry;
- The distinction between indirect and direct compensation in deciding whether the operator of a farm vehicle is eligible for the exception for CDL's;[7] and
- Whether "implements of husbandry" should remain potentially exempt from safety regulations.

Comments Received

In response to the request for comments, commenters overwhelmingly responded that the movement of grain or other commodities from a farm to elevator is *not* interstate commerce because the farmer has no knowledge of the final destination of the commodity-whether or not it will move out of the state. Other commenters noted that CDL's are only available to those above a certain age. Thus, requiring a CDL for an operator of ag equipment would limit the involvement of younger family members in the farming operation.

The responding agricultural organizations also took a dim view of the May 31 Notice. Some organizations argued that Federal DOT was attempting "legislation through regulation." Some groups believed that the federal government was attempting to reclassify farm vehicles and implements of husbandry as commercial vehicles, thus requiring a CDL for all drivers. The National Farmers Union, for instance, pointed out that attempts to regulate the transportation of farm products as interstate commerce is inappropriate and an "overly burdensome interpretation of the statute."

Guidance of August 10, 2011

On Aug. 10, 2011, the FMCSA issued further regulatory guidance.[8] In the Guidance, the FMCSA stated that it had determined that no further guidance was necessary on interpreting "interstate commerce" and "implements of husbandry." But, the FMCSA did issue further guidance clarifying that farmers operating under share-cropping or similar arrangements are *not* common or contract carriers and are, thus, eligible for the CDL exemption if allowed by state law.

Interstate commerce. On the interstate commerce issue, the FMCSA reiterated that "interstate commerce is determined by the essential character of the movement." That seems to comport with a 1975 U.S. Department of Transportation Federal Highway Safety Administration guidance for enforcement agencies, which provided that agricultural products are not considered interstate commerce. As a result, FMSCA determined that clarification of the distinction between intrastate and interstate commerce was not necessary,[9] and that further guidance would not be helpful to the ag industry insomuch as the farm exemption from the CDL requirements was not linked to intrastate or interstate commerce as some commenters had argued.

Landlord-tenant relationships. As to whether a crop-share tenant is a "contract carrier" susceptible to regulation under the federal rules, the FMCSA agreed that most tenants should *not* be considered contract carriers. As noted above, in the May 31 Notice, the FMCSA asked whether they should distinguish between indirect and direct compensation (i.e., crop-share vs. indirect losses) in deciding whether a farm vehicle driver is eligible for the exception to the CDL requirements. The FMCSA had referenced the "principal business" test to determine that a tenant may be required to obtain a CDL. If the driver's principal business is not transportation, the driver should qualify for the federal exemption.[10] In the Guidance, FMCSA clarified that farmers operating share-crop or similar arrangements are not common or contract carriers. As a result, such tenants are eligible for the CDL exemption if a state adopts such an exemption.[11]

> **Note:** When a tenant transports the crop (including the landlord's share), the transport and delivery is part of the tenant's labor, with such labor factored into the rental arrangement with the landlord. The tenant is not a "for hire" commercial carrier.

Implements of husbandry. Finally, the FMCSA addressed the "implements of husbandry" issue and whether tractors, cultivators, etc., should be considered commercial motor vehicles. The agency took the defensive, once again, and stated that they never intended to extend the definition of "commercial motor vehicles" to ag implements. Essentially, the agency found that uniform guidance on the definition of ag implements would be hard to regulate and should be left to the states.[12]

Summary

Clearly, the FMCSA received an education on certain aspects of agricultural transportation issues, and noted that the comments helped the agency better understand the "complexity of today's farm lease arrangements" and the use of ag equipment on public roads.

FMCSA seemed to try to cover its tracks by arguing that they initiated the review process "to make sure states don't go overboard in enforcing regulations on agriculture operators, and to ensure consistent access to exemptions for farmers." The FMCSA added that they never issued the Guidance rules to further regulate the transport of farm supplies to or from a farm.[13] Whether that is true in a political environment that has markedly increased the regulation of numerous sectors of the economy remains to be seen. But, the vigilance of farm operators and groups seems to have paid off for the present time.

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[1] 76 Fed. Reg. 31,279 (May 31, 2011).
[2] Of the comments, 155 came from farm organizations and 13 from state governments.
[3] 99 U.S.C. §31502
[4] 49 U.S.C. 31133
[5] 49 U.S.C. 31311
[6] The Notice is strangely worded and could be interpreted as seeking to expand the federal government's authority over intrastate commerce.
[7] In other words, is a tenant under a crop-share lease actually a "contract carrier" that should be regulated under the statute?
[8] Docket No. FMCSA-2011-0146 (Aug. 10, 2011).
[9] According to FMSCA, most farm groups "misinterpreted" the request for input on the issue. Basically, the FMCSA blamed others for confusing and misinterpreting their efforts and claimed that they were merely trying to protect farmers from additional regulation by the states.
[10] It appears from the comments that the agency did not have a good understanding of modern farm lease arrangements.
[11] Also, under the Commercial Motor Vehicle Safety Act of 1986, the states have the authority to waive the CDL requirements for agricultural producers who drive farm equipment on public roads for short-distance trips.
[12] In any event, farm implements are exempt because they do not carry passengers and are not operated in interstate commerce. Likewise, the Commercial Motor Vehicle Safety Act of 1986 gives the states the authority to waive the CDL requirements for agricultural producers who drive farm equipment on public roads for short-distance trips.
[13] This statement is hard to justify. FMCSA Administrator Anne Ferro openly admitted the American Farm Bureau Federation on June 23, 2011 that, "It's very important that we understand the perspective of the agricultural community *and help us refine it.* [emphasis added] That's the purpose of this request for input on these three questions we've raised." So, the FMCSA, even though it was unfamiliar with agriculture's perspective on the regulations and the existing exemptions applicable to agriculture, knew that the perspective had to be "refined." That indicates that the FMCSA was not interested in the status quo with respect to the applicable regulations.