



*A bold voice for transportation workers*

April 21, 2014

Mr. Juan Moya  
Office of Enforcement and Program Delivery  
Federal Motor Carrier Safety Administration  
1200 New Jersey Avenue SE  
Washington, DC 20590

**RE: Commercial Driver's License Drug and Alcohol Clearinghouse  
Notice of Proposed Rulemaking  
Federal Motor Carrier Safety Administration  
Docket No. FMCSA-2011-0031  
RIN 2126-AB18**

Dear Mr. Moya:

On behalf of the Transportation Trades Department, AFL-CIO (TTD), I write to comment on the Federal Motor Carrier Safety Administration's (FMCSA) Notice of Proposed Rulemaking (NPRM) that would implement section 32402 of MAP-21 to establish a commercial driver's license (CDL) drug and alcohol clearinghouse. This clearinghouse would act as a repository of records of drivers' drug and alcohol violations, which employers must query annually and before hiring employees. By way of background, TTD includes a number of unions that represent workers who are required to hold CDLs for their jobs, especially in the motorcoach, city bus and school bus sectors. We thus have a direct and vested interest in this rulemaking.<sup>1</sup>

TTD strongly agrees with efforts to ensure that CDL holders who violate DOT's drug and alcohol policies are not allowed to continue to operate commercial motor vehicles as mandated by agency rules. And we recognize that a national clearinghouse as envisioned by Congress and outlined in this proposed rulemaking is an important component of this effort. At the same, we must ensure that workers are not unduly harmed by inaccurate or out-of-date information and that violators who have completed all return-to-duty procedures are not unnecessarily prevented from working in this sector. We must also ensure that the privacy of sensitive information is protected and that any negative, albeit unintended, consequences of creating a national clearinghouse of drug and alcohol offenders are addressed to the extent possible.

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<sup>1</sup> Attached is a complete list of TTD's 32 affiliated unions.

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Edward Wytkind, President / Larry I. Willis, Secretary-Treasurer



As the agency begins work creating this clearinghouse, we ask that it strengthen this rulemaking by taking into consideration the following issues:

**Section 382.717, Procedures for Correcting Information in the Database**

FMCSA proposes a dispute resolution process by which drivers may challenge and remedy administrative errors in their clearinghouse records, such as results that are reported to the wrong driver's record or a misidentified CDL number. This process would also be used to remove records of employers' "actual knowledge" of citations for driving under the influence that do not result in convictions.

As proposed, after receiving a driver's dispute petition, FMCSA would have 90 days to issue a decision on less critical errors, or 30 days for an expedited review of mistakes that affect a driver's ability to perform safety-sensitive functions. Drivers may also file requests for administrative review of FMCSA's disposition of a petition, in which the Associate Administrator would be required to issue a decision within 60 days. TTD believes that each of these timeframes, even the 30 day expedited review window, is too long.

It is highly likely that drivers who are barred from driving due to mistakes in clearinghouse records would be sidelined by their employer and prevented from collecting a paycheck until the agency can correct the errors. It is also probable that even after drivers return to the job, they will not be able to collect back pay for their time lost. For many workers in this economic climate, missing an entire month's pay is the difference between paying rent and losing their home, let alone the effects of 60 days or an additional 90 days without pay.

For some, these waiting periods will represent additional months of lost income as a result of someone else's mistakes. For instance, under this NPRM, drivers are forbidden from operating a CMV after an employer reports a record of "actual knowledge" that the driver has received a citation for operating a CMV while under the influence. If the citation does not result in a conviction, the driver is responsible for having the incorrect record removed and must use the proposed dispute procedure to do so. In such case, the driver would lose income while adjudicating the citation and continue to lose pay during the additional 30 days it takes for the agency to review the driver's petition.

We question whether this burden could not be alleviated by creating a more automated system in which the state licensing agency that issued a driver's CDL is required to send information to the clearinghouse indicating that the driver's citation did not result in a conviction. If these agencies update their own databases to mark or clear a driver's record of citations and convictions, then they should be able to transmit this information in real time to the clearinghouse, thereby eliminating the need for drivers to pursue the lengthy dispute process.

For the clearinghouse to serve as a reliable and trusted tool to combat alcohol and drug use in CDL operations, workers must be provided with a fair and expeditious process to address inaccurate information as outlined above. Without such a mechanism in place, the credibility of the clearinghouse could be questioned and the purpose of the program will be undermined.



## **Section 382.719, Availability and Removal of Information**

### **382.719(4)**

Under this section, FMCSA would allow employers to access within a specified timeframe, information about a violation for which a driver has successfully completed the return-to-duty (RTD) process. The agency states that the statute is unclear as to whether employers should have access to this information for a period of three or five years from the date of the violation, and FMCSA requests comments on setting this timeframe.

Section 31306(a)(f)(3) is clear that employers are required to query the clearinghouse to determine whether potential employees have had violations in the preceding three years. As such, violations occurring prior to this period for which an employee has completed the required corrective actions and follow-up testing should not be included in this rulemaking.

Completing the RTD process is difficult, as well it should be, requiring drivers who have violated the drug and alcohol regulations to meet with a substance abuse professional, complete the prescribed education and/or treatment program, and then pass a RTD drug and/or alcohol testing. Even after returning to the job, drivers must complete follow-up tests to prove they are fit to drive.

Federal regulations permit drivers who have successfully completed all the prescribed steps to return to driving, as they no longer present specific safety risks. If FMCSA allowed employers access to two years of superfluous information, the agency may unnecessarily subject drivers to unfair scrutiny, potentially hampering or costing employment opportunities, despite the drivers' successful completion of the RTD process as prescribed by the agency's own regulations. To address these concerns and consistent with the statute, FMCSA must establish a hard three year limitation on employers' access to driver violation records.

### **382.719(c)**

Under this subsection, information about an employer's "actual knowledge" that a driver received a traffic citation for driving a CMV while under the influence would be removed from the clearinghouse within two business days of FMCSA granting a driver's dispute petition. While we strongly agree and support the removal of this erroneous information from the clearinghouse, we believe that it should be removed as quickly as employers are required to report it: one business day. There is no reason why a driver who was wrongly cited for driving under the influence should be prevented from working one day more than necessary.

## **Section 382.703 Driver Consent to Permit Access to Information in the Clearinghouse**

We appreciate that FMCSA includes some protections for workers in accordance to the statute, such as requirements that employers must have drivers' consent, in some cases written permission, to query the clearinghouse and access their records. Driver consent requirements are critical elements to maintaining individuals' privacy, and we urge FMCSA to include strong standards in its final rule.

### **Section 382.723 Unauthorized Access or Use Prohibited**

#### **382.723(b)**

We are concerned that employers authorized to access the clearinghouse would be able to query information about prospective employees who have previously held a CDL even when they are not applying for a position that requires the credential. Without clear language prohibiting this, the NPRM could have the unintended consequence of preventing an individual from gaining employment in a non-CDL position.

Under proposed section 382.719, records of a drug or alcohol violation for which a driver never completes the return-to-duty process will remain indefinitely in the clearinghouse. Given this, a worker who previously committed a violation as a CDL holder could decide not to complete the return-to-duty process, but instead seek a position in the industry for which a CDL is not required. If the company to which he applies knows that he previously worked as a driver, it could query the clearinghouse to check for records of unresolved violations and bar that worker from a position that under federal rules he or she is otherwise qualified to hold.

It appears that proposed section 382.723(b) seeks to address this situation by limiting employers' queries to only those seeking driving positions. However, without clarification by the agency, this section could be used by employers to acquire information on all types of applicants, potentially hampering the ability of individuals to obtain employment. To prevent this unintended consequence, FMCSA must clarify this section by including objective language that clearly restricts employers' queries to only those seeking or holding a position requiring a CDL.

#### **Section 382.723(a),(c)**

We support the inclusion of strong confidentiality and release standards to protect workers from improper disclosure of their personal information that could be misused if obtained by the wrong party. While we appreciate that employers and service agents would remain subject to the confidentiality and release of information requirements contained in 49 CFR part 40 subpart P, we encourage the agency to include mechanisms in its systems to ensure that those requesting clearinghouse records are legitimate employers and that the information released is actually being sent to those individuals directly.

### **382.707 Notice to Drivers and Employers of Placement, Revision, Removal, or Release of Information**

We agree with the inclusion of 382.707 which helps keep drivers apprised of changes made to their clearinghouse records. Specifically, drivers will be notified when information about them has been added, revised or removed from the clearinghouse, and when their information has been released from the clearinghouse and the reason for the release.

This information would help drivers understand where they stand in the process of completing the return-to-duty process or removing actual knowledge information about citations, and returning to work. Coupled with section 382.709 which allows drivers to review their clearinghouse information, drivers would be better equipped to identify errors in their records and seek the dispute process as quickly as possible.

We encourage the agency to allow drivers to access the same information available to employers, and that FMCSA set a specific timeframe in section 382.707 within which drivers must be notified of changes to their records. Drivers should be notified of changes to their information as quickly as possible.

While violations of drug and alcohol regulations do occur, we know that the majority of bus drivers are law-abiding individuals working to earn a living for themselves and their families. We believe the issues raised above will help mitigate the impact the clearinghouse will have on these workers, and we hope FMCSA will take our views into consideration.

Sincerely,

A handwritten signature in black ink, appearing to read 'Edward Wytkind', with a stylized, looping flourish at the end.

Edward Wytkind  
President





**Transportation Trades Department, AFL-CIO**  
*A bold voice for transportation workers*

***TTD MEMBER UNIONS***

Air Line Pilots Association (**ALPA**)  
Amalgamated Transit Union (**ATU**)  
American Federation of Government Employees (**AFGE**)  
American Federation of State, County and Municipal Employees (**AFSCME**)  
American Federation of Teachers (**AFT**)  
Association of Flight Attendants-CWA (**AFA-CWA**)  
American Train Dispatchers Association (**ATDA**)  
Brotherhood of Railroad Signalmen (**BRS**)  
Communications Workers of America (**CWA**)  
International Association of Fire Fighters (**IAFF**)  
International Association of Machinists and Aerospace Workers (**IAM**)  
International Brotherhood of Boilermakers, Iron Ship Builders,  
Blacksmiths, Forgers and Helpers (**IBB**)  
International Brotherhood of Electrical Workers (**IBEW**)  
International Longshoremen's Association (**ILA**)  
International Organization of Masters, Mates & Pilots, ILA (**MM&P**)  
International Union of Operating Engineers (**IUOE**)  
Laborers' International Union of North America (**LIUNA**)  
Marine Engineers' Beneficial Association (**MEBA**)  
National Air Traffic Controllers Association (**NATCA**)  
National Association of Letter Carriers (**NALC**)  
National Conference of Firemen and Oilers, SEIU (**NCFO, SEIU**)  
National Federation of Public and Private Employees (**NFOPAPE**)  
Office and Professional Employees International Union (**OPEIU**)  
Professional Aviation Safety Specialists (**PASS**)  
Sailors' Union of the Pacific (**SUP**)  
Sheet Metal, Air, Rail and Transportation Workers (**SMART**)  
SMART-Transportation Division  
Transportation Communications Union/ IAM (**TCU**)  
Transport Workers Union of America (**TWU**)  
UNITE HERE!  
United Mine Workers of America (**UMWA**)  
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service  
Workers International Union (**USW**)

*These 32 labor organizations are members of and represented by the TTD*

