CLIENT ALERTS & INSIGHTS

Chameleon Carriers-FMCSA's "Reincarnated" Rule and Enforcement

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As the U.S. DOT and its FMCSA ramp up certain elements of domestic enforcement, regulators are utilizing existing laws and regulations that previously were not often invoked. Enforcement of the English language proficiency requirement is one great example. Another more recent example is telegraphing by the FMCSA that it intends to step up enforcement against so-called chameleon carriers. This article focuses on the chameleon carrier issue by clearing up some misunderstandings about what is and is not prohibited, outlining the FMCSA's approach to identifying chameleon carriers, and describing consequences available to the agency. The key takeaway for motor carriers is that there is never a shortcut to compliance.

The concept of a chameleon carrier, or more properly a reincarnated carrier, has existed for some time, particularly after the highway bill known as MAP-21 increased the availability of enforcement options in 2012. To date, however, actual enforcement of the prohibition has been essentially nonexistent. That may be changing.

Reincarnated Carrier Legal History - Reincarnated carrier enforcement developed in stages as Congress and FMCSA worked to meaningfully enforce compliance history. A motor carrier found unfit was historically barred from interstate operations after the applicable waiting period by statute at 49 USC 31144 and by regulation at 49 CFR Part 385. These protective rules for enforcing safety fitness did not expressly prevent companies from winding down an unfit entity, forming a new company, obtaining a new U.S. DOT number and operating authority, and then returning to service with a "clean" record.

Congress first addressed this "reincarnation" problem in the highway bill known as SAFETEA-LU by adding a subsection authorizing the Secretary, upon finding "a pattern or practice of avoiding compliance, or masking or otherwise concealing noncompliance," to withhold, suspend, amend or revoke registration, and to account for that conduct when setting civil penalties. [49 USC 31135.] The SAFETEA-LU update was aimed at intentional "pattern or practice" behavior and marked a clear policy judgment that evasion tactics undermined safety oversight and targeted federal intervention.

FMCSA's next step in strengthening enforcement came in April 2012, when it issued a final rule addressing out-of-service issues and record consolidation proceedings to help target reincarnated carriers. [49 CFR 386.73.] Congress strengthened the statutory mandate in its MAP-21 legislation only a few weeks later after the final rule publication. MAP-21 amended 49 USC 31135 to prohibit motor carriers, employers or persons from using common ownership, management, control or

familial relationships to avoid compliance, mask or conceal noncompliance, or hide a history of noncompliance with safety regulations or DOT orders. Together, these changes form the modern legislative and regulatory foundation for identifying reincarnated carriers and consolidating safety records to prevent “new name, same operation” type evasions.

Reincarnated Carrier Prohibition - The term “reincarnated carrier” refers to “motor carriers with common ownership, common management, common control or common familial relationship.” [49 CFR 385.1003.] The FMCSA prohibits two or more motor carriers from using ownership and control structures to “avoid compliance, or mask or otherwise conceal non-compliance, or a history of non-compliance, with statutory or regulatory requirements.” [49 CFR 385.1003.] Specific actions that trigger possible FMCSA findings of a reincarnated carrier are structures and activities that avoid: (1) complying with an FMCSA order; (2) complying with a legal or regulatory requirement; (3) paying a civil penalty; (4) responding to an enforcement action; or (5) being linked to a negative compliance history. [49 CFR 385.1007.]

Reincarnated Carrier Determinations - The FMCSA applies a factor test to determine whether a group of companies comprises a reincarnated carrier operation. The nonexclusive list of factors is found in regulation at Section 386.73. The 13 factors are generally: (1) whether entities were created for the purpose of evading requirements; (2) safety performance history; (3) consideration exchanged for assets purchased; (4) dates of creation and dissolution of operations; (5) commonality of ownership; (6) commonality of officers and management; (7) identity of contact information; (8) identity of equipment; (9) continuity of insurance policies; (10) commonality of drivers and employees; (11) continuation of carrier facilities and physical assets; (12) continuity or commonality of operations; and (13) advertising, corporate name, and how the company holds itself out to the public.

Reincarnated Carrier Consequences - A finding of reincarnated carrier status can lead to out-of-service (OOS) orders, suspension of operating authority, or revocation of operating authority. [49 CFR 385.1009, 385.1011, 386.73.] Civil and criminal penalties are possible in addition to administrative consequences. [49 CFR 385.1017.]

The FMCSA of course has other tools available if it chooses to enforce against similar safety-related fact patterns with compliance violations. The most basic statutory tool is the requirement that all motor carrier applicants are “willing and able” to comply with all applicable safety regulations and security fitness requirements. [49 USC 13902.] In seeking operating authority, applicants must also identify common ownership, control, or even familial relationships with other motor carriers. [Id.] Failure in these elements, including the disclosure of relationships, may also lead to the FMCSA withholding, suspending, amending or revoking operating authority pursuant to 49 USC 13905.

Government Enforcement Process - If the FMCSA suspects a carrier is operating under a new identity or through an affiliate for an improper purpose, it may initiate action by issuing an order (including an OOS order or a Records Consolidation Order) that sets out the factual and legal basis together with an effective date. [49 CFR 386.73(f).] The targeted carrier may then request administrative review by filing a timely petition that generally stays the order unless FMCSA lifts the stay for good cause.

The administrative review process typically focuses on alleged factual or procedural errors in issuing the order (not post-order corrective measures). [49 CFR 386.73(g).] The Administration issues written

decisions that constitutes the final agency order. [49 CFR 386.73(g)(9).] This process is in addition to other available procedures available for carriers to challenge operating authority suspension or revocation decisions with timely filed petitions. [49 CFR 385.1009; 49 CFR 385.1009.] A carrier that operates in violation of an order issued may be subject to civil penalties. The penalties go up to $29,980 for each day the operation continues after the effective date of the out-of-service order. [49 CFR Pt. 386, App. A.]

Compliance obligations are mission-critical for all motor carriers large and small. All filings with the FMCSA must be truthful, and all federal motor carrier safety regulations must be observed as best as possible. Doing so keeps professional drivers and the families using our roadways safe. Going forward, the risk of government enforcement, including possible criminal penalties, may be higher than the transportation industry experienced in the past.

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