

Broker Busting “B.A.S.I.C.s”

Making Our Highways Safer By Taking “Trucking Cases” Beyond The Driver And Motor Carrier To The
Negligent Brokers Who Hire Them

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Broker Busting “B.A.S.I.C.s”—5 Steps

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1. Learning To Read The Alphabet Soup

The first step in becoming a “Broker Buster” is to become familiar with the “Alphabet Soup” involved in a trucking/broker case. A whole book could be written about the various terminology and acronyms involved in the trucking/broker industry, and a thorough understanding of the most important of these is an essential first step in the process. While no means exhaustive, here are some of the more important and more common terms you will need to know.

BASICS Short for Behavior Analysis and Safety Improvement Categories. These are the safety categories for which carriers are assigned a score between 0 and 100 by the SMS (0=Best/100=Worst Safety Record). The BASIC categories are Unsafe Driving; Hours of Service Compliance (HOS); Driver Fitness; Controlled Substances/Alcohol; Vehicle Maintenance; Hazardous Materials (HM) Compliance; and, Crash Indicator.

Broker An entity who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier.

Carrier An entity providing motor vehicle transportation for compensation.

Compliance Review (CR) A detailed, resource-intensive on-site review of carriers to ensure compliance with the Federal Motor Carrier Safety Regulations.

CSA Short for Compliance, Safety, Accountability. It is the FMCSA initiative to improve large truck and bus safety and ultimately reduce crashes, injuries and fatalities related to commercial motor vehicles.

FMCSA This stands for the Federal Motor Carrier Safety Administration, which is the federal agency in charge of the federal motor safety regulations applicable to the trucking industry.

SafeStat The old system used to score carriers for safety, prior to CSA 2010 and the new SMS/BASIC categories.

Safety Rating A rating given to a carrier after a full compliance review is performed by the regulatory agency. The ratings include Satisfactory, Conditional, and Unsatisfactory. Once a carrier’s safety rating is final, it does not change until another full compliance review is performed on that carrier.

SMS This term is short for the Safety Measurement System, which is the system used by the FMCSA to quantify on-road safety performance of carriers and drivers.

USDOT Short for the U.S. Department of Transportation.

As part of that “Alphabet Soup,” it is also important to have a general understanding of what is going on in the Transportation Industry, who are the typical parties involved in “hauling a load,” and some of the alternative potential claims to look for where a broker is involved. Again, the parties involved, their relationships, and the potential claims to be asserted can be very complicated factual and legal issues. Here is a brief, general background to get your feet wet:

Common causes of action in truck broker liability cases

Respondeat Superior One potential avenue for broker liability is through theories of vicarious liability to hold the broker liable for the negligence of the trucking carrier and its employees. These causes of action typically center on theories of agency, partnership, and joint venture between the broker (sometimes also called a “third party logistics company” or 3PL) and the carrier. These theories are usually difficult to prove, however, as brokers have gone to exhaustive lengths to draft their contracts and structure their relationships to avoid respondeat superior situations. Broker agreements with the carriers typically are replete with language asserting that the carrier is an “independent contractor” and that no employment relationship exists between the broker and carrier or its drivers.

In order to prove a respondeat superior theory of liability, the key issue typically is the issue of control by the broker. Again, though not impossible, this is often difficult to prove. In fact, some of the most significant recent broker liability cases on the plaintiff side actually saw the plaintiffs’ vicarious liability causes of action dismissed. For example, in Schramm v. Foster, 341 F. Supp. 2d 536 (D. Md. 2004), the Plaintiffs alleged the driver of the tractor-trailer was acting as the agent of the 3PL company. The court, however, disagreed and dismissed the vicarious liability claim. First, the court said that the contract between the carrier and broker expressly stated that it was one of an independent contractor, that the carrier was to employ and pay all drivers, that such persons are not employees of the broker or its customers, that the carrier was to provide all equipment and fuel required, and that the carrier was solely responsible for operating the equipment necessary to transport commodities under the contract. The court likewise found no evidence that the broker was controlling the driver’s actual performance, even though it coordinated the shipment, required the driver to call the broker directly for dispatch information, provided driving directions and special loading instructions, and required the driver to inspect the load upon pick up, use load locks, and arrange for the shipment to be unloaded. Likewise, the fact that the broker provided the driver with a number to call if he experienced any problems while transporting the load and desired for the driver to call periodically to check in did not demonstrate that the broker exercised sufficient control over the driver’s movements to make him their agent. The court further noted that even if he were an agent, there was insufficient evidence that the broker controlled the driver with respect to the manner in which he conducted his work.

Negligent Hiring While respondeat superior theories have proven difficult to win in many cases, negligent hiring is a developing area of Broker Liability that continues to gain traction—it is the essence of “Broker Busting ‘B.A.S.I.C.s’”. The basic theory underlying the negligent hiring cause of action is that the broker had a duty to exercise reasonable care when selecting the carrier it contracted with for delivery of the load. This cause of action has become an increasingly powerful one as technology has advanced. Brokers now have real-time access to the most up-to-date safety statistics available from the

Federal Government, yet many large brokers are fighting against the use of those statistics by brokers. It is easy to see, however, the power of this cause of action where, for example, a broker selects a carrier that has poor Hours of Service Safety Scores without checking the latest safety statistics, and the carrier's driver then falls asleep and causes a wreck. Because this is such a powerful cause of action in such situations, the Broker Industry is fighting these cases and use of the safety statistics with guns blazing.

What is a Freight Broker and Who Else Is Involved?—the “Shipping Shell Game”

Broker

Federal regulations define a broker as follows:

- (a) Broker means a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.
- (b) Bona fide agents are persons who are part of the normal organization of a motor carrier and perform duties under the carrier's directions pursuant to a preexisting agreement which provides for a continuing relationship, precluding the exercise of discretion on the part of the agent in allocating traffic between the carrier and others.
- (c) Brokerage or brokerage service is the arranging of transportation or the physical movement of a motor carrier, consignor, or consignee. (49. C.F.R. § 371.2)

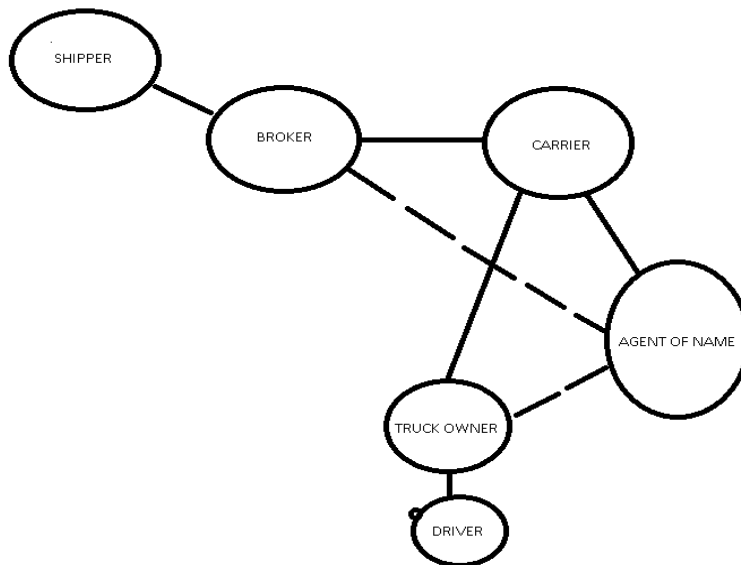
While the term “broker” typically brings to mind a mere middleman who gets paid for bringing two sides together to consummate a transaction—like a stock broker or real estate broker—a freight broker's role typically involves more than that. Generally, a freight broker takes on the responsibility for getting a load delivered. The broker is not operating the tractor trailers themselves to deliver the loads, however. Instead, the broker is contracting with a shipper to arrange for delivery of the load. As a matter of practice, this is usually very different from other types of “brokers,” such as real estate brokers. In a real estate situation, typically the broker finds a buyer for the seller, but the broker never takes any “ownership” of the sale itself. In other words, a buyer's broker does not tell the buyer “You agree to pay \$100,000 to buy this house, and I agree to get it for you, regardless of what price the seller will agree to. If I can then get the seller to take less than \$100,000.00 I get to keep the difference.” However, that is often precisely what happens when a freight broker agrees to arrange for a shipment. Typically, the broker has an established shipping client that needs to ship a load. Based on various factors, they will typically come to an agreed price for that shipment. The broker will then try to find a carrier that will agree to ship the load for an amount that is lower than what the shipper is paying the broker. This difference is commonly called the “spread” and represents the profit a broker will make on a particular load. Sometimes, however, the broker will not be able to find a carrier to haul the load for less than what the shipper paid. In that event, the broker is still contractually bound by the contract

with the shipper to get the load delivered, so the broker will make no money or even have to take a loss on that shipment.

Carrier

A motor carrier is an entity “providing motor vehicle transportation for compensation.” 49 U.S.C § 13102(14). Similarly, federal regulations provide that a motor carrier is an entity “engaged in the transportation of goods for compensation.” 49 C.F.R. § 390.5 Motor carriers and their officers, agents, representatives and employees responsible for the management, maintenance, operation, and driving of commercial motor vehicles, as well as hiring, supervising, training, assigning and dispatching drivers, must comply with the Federal Regulations. Thus, motor carriers are required to comply with the Motor Carrier Safety Regulations. A motor carrier is assigned a USDOT number from the Department of Transportation, and safety information can be obtained regarding the carrier using its USDOT number.

In order to avoid liability in the event of a serious wreck, shift operating costs, etc. the parties in the “shipping shell game” often set up a house of cards operational shell. In this situation, the official “carrier” has no real assets and is essentially just a “paperwork” company that uses its operating authority from the Department of Transportation as a vessel for truckers to haul freight. Take for example the following diagram:



In this diagram, the “Carrier” is a company with official operating authority from the USDOT. It owns no actual trucks, though. See if you can follow the many and varied relationships in this “shipping shell game” example. The Carrier has a master agreement with the Broker that governs their business relationship generally. Thus, the Carrier is in the Broker’s “stable” of potential carriers it can use to ship loads for its shipper clients. The Carrier does not own trucks, but it needs tractors to haul loads, and loads for those trucks to haul. This is where the “Agent of Name” comes in. The Agent of Name is a separate company that acts as the Carrier’s agent to, among other things, find truck owners to haul

freight under the Carrier's authority, find loads for those trucks to haul, and dispatch the loads it finds for those trucks. When the "Agent of Name" finds a truck to haul for the Carrier, the truck owner leases the truck to the Carrier. Under the lease with the Carrier, the truck owner must provide the driver and is responsible for all operational costs and maintenance of the truck. The driver is considered an independent contractor of the truck owner, and receives a 1099 form at the end of the year. The Carrier qualifies the driver that is provided by the truck owner, and receives all operational paperwork from the truck owner as it completes its loads. The Agent of Name, however, obtains the loads that are given to the truck owner, deals directly with the broker (and other shippers/brokers) to obtain the loads, and communicates directly with the driver in dispatching the loads. All of this is done under the cloak of the Carrier's operating authority, even though other companies are in effect doing all the work. The Carrier is required by Federal Regulations to carry a minimum of \$750,000 in liability insurance (\$1,000,000 for Hazardous Materials). Often, this is the only source of recovery from the Carrier, since it has no assets. The Carrier has no real motivation in this situation to run a clean and safe operation. If it is involved in a serious accident and faces liability beyond its limits, the Carrier will simply shut down operations, and the people running it will then pop up later under a new company name with a new USDOT number.

Does your head hurt yet?

This demonstrates why Broker Negligence is so important! Brokers play a huge role in determining what carriers are hauling freight on our roads. The carriers have no incentive to be safe as long as brokers are still willing to put them on the road. They make more money by scrimping on safety and violating hours of safety regulations as their normal course of business. If something goes wrong, they just shut down, move on and reopen under a different name to continue doing the same thing. By holding brokers liable for negligently hiring unsafe carriers, we can force them to put only safe carriers on the road. As a result, the unsafe carriers are forced to either improve and become safe, or go out of business for good because they cannot get loads anymore.

2. Check Past The Broker's Safety Rating—Look At The "B.A.S.I.C" Scores

Once you have a sufficient understanding of the "Alphabet Soup" of Broker Busting B.A.S.I.C.'s and have done a little research to be confident your jurisdiction will support a negligent hiring cause of action, the next step is to determine whether your case factually falls within the box to do some B.A.S.I.C. busting. In order to do that, you need to understand what the safety rating vs. safety scores (B.A.S.I.C.s) are all about, and go beyond the carrier's "safety rating" to look at it's actual B.A.S.I.C. scores to see what kind of safety statistics were available about the carrier prior to the crash and whether the scores call into question the carrier's safety status at the time of hiring by the broker.

The “Safety Rating” Assigned to Carriers

A carrier’s “safety rating” is given to a motor carrier by the FMCSA following a compliance review conducted by the FMCSA. The compliance review is a detailed review conducted by the FMCSA and state partners that results in one of three ratings: Satisfactory, Conditional, or Unsatisfactory.

A carrier’s “safety rating” is what the broker industry attempts to hold as the only determination of “safety” upon which brokers need rely when deciding what carriers to hire. In essence, their argument is that as long as the federal government has not taken away a carrier’s authority to be on the road by giving it an Unsatisfactory rating, the carrier is “safe” enough to be on the roads and therefore safe enough for the broker to hire to haul its customer’s loads.

Unfortunately, the broker industry’s argument ignores the reality that the “safety rating” becomes old and out-dated almost the instant it is assigned. This is because the safety rating is based on an actual on-site compliance review, in which the FMCSA actually goes to the carrier and reviews its files. These compliance reviews only take place on a very small number of carriers each year, and carriers can go years between compliance reviews.

In fact, the University of Michigan Transportation Research Institute (“UMTRI”) review of the CSA 2010 program that was sponsored and is disseminated by the FMCSA itself noted this essential flaw of the “safety rating”:

At current staffing levels, FMCSA and its State partners conduct about 16,000 CRs [Compliance Reviews] annually on the approximately 514,000 motor carriers nationwide that FMCSA considers to be active, based on recent activity. Approximately 10,000 of the annual CRs are conducted by FMCSA, while the remaining 6,000 are conducted by State partners. The CR program is resource-intensive and it may take a trained safety investigator several days to complete one CR. Therefore, the program requires considerable Agency and State partner resources and only reaches a small portion of the Nation’s motor carriers. After performing a CR, FMCSA issues a safety fitness determination and a corresponding safety rating. One of the limitations of this process is that the safety rating remains in effect until another CR is performed. As a result, a safety rating may not be an accurate indicator of a carrier’s current safety fitness.¹

This demonstrates the problem with relying on the “Safety Rating” to determine whether a carrier is currently a safe carrier. In 2011, only about 16,000 compliance reviews were done out of approximately 514,000 carriers—approximately 3% of the carriers. That left 97% of carriers with a safety rating that was at least a year, if not more, out of date. Even the study sponsored by the FMCSA itself warns that the safety rating should not be used as an indication of a carrier’s current safety fitness.

¹ Evaluation of the CSA 2010 Operational Model Test, U.S. Department of Transportation Federal Motor Carrier Safety Administration, August 2011 (emphasis added).

The FMCSA's Safety Measurement System (SMS)

A more up-to-date, current measure of a carrier's safety fitness comes from the FMCSA's Safety Measurement System ("SMS"), which quantifies on-road safety performance of carriers and drivers. Data is taken from a motor carrier's roadside inspections, including all safety-based violations, State-reported crashes, and the federal motor carrier census. The SMS uses this data to quantify carriers' safety in different Behavioral Analysis and Safety Improvement Categories ("BASICS"). The current BASIC categories for On-Road Safety Performance are:

- **Unsafe Driving**

This category deals with operation of commercial motor vehicles by drivers in a dangerous or careless manner. Examples include speeding, reckless driving, improper lane changes, and inattention.

- **Hours of Service (HOS) Compliance**

This category concerns drivers operating commercial motor vehicles when they are ill, fatigued, or in non-compliance with the HOS regulations. This includes violations of regulations regarding records of duty status in relation to HOS requirements and management of driver fatigue. Examples include violations of the records of duty status requirements, as well as operating a commercial motor vehicle while ill or fatigued.

- **Driver Fitness**

This category concerns operation of commercial motor vehicles by drivers who are unfit to operate a commercial motor vehicle because of lack of training, experience, or medical qualifications. Examples include Failing to have a valid and appropriate commercial driver's license, and being medically unqualified to operate a commercial motor vehicle.

- **Controlled Substances/Alcohol**

This category concerns operation of commercial motor vehicles by drivers impaired by alcohol, illegal drugs, and misuse of prescription or over the counter medications. Examples include the use or possession of controlled substances/alcohol.

- **Vehicle Maintenance**

This category concerns the failure to properly maintain commercial motor vehicles and/or to properly prevent shifting loads. Examples include brakes,

lights, and other mechanical defects, failure to make required repairs, and improper load securement.

● **Hazardous Materials (HM) Compliance**

This category concerns the unsafe handling of hazardous materials on a commercial motor vehicle. Examples include the release of hazardous materials from package, no shipping papers (shipper), and no placards/markings when required.

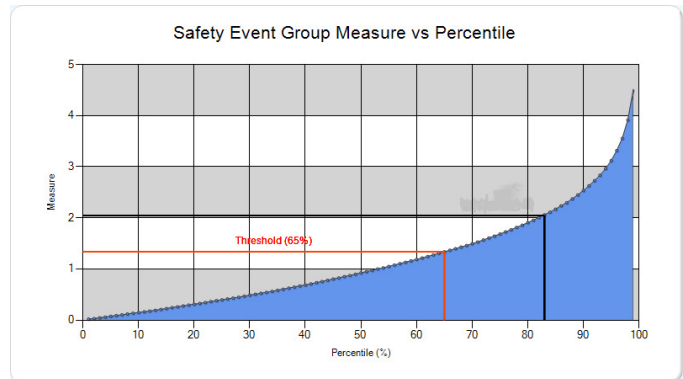
● **Crash Indicator**

This category deals with history of pattern of high crash involvement, including frequency and severity. It is based on information from state reported crashes.

The FMCSA uses the data to arrive at a measurement for the carrier in the various safety categories. That measurement depends on the number of adverse safety events (i.e., the number of violations in that category or crashes), the severity of the violations or crashes, and when those adverse safety events occurred (more recent events have a higher weight). Once the measurement is determined, a carrier is placed in a peer group and given a percentile score in comparison to the other carriers in the peer group on the various basic categories.



The scores within a BASIC category range from 0 to 100. This score is like golf, not school. In other words, the higher the score, the worse the carrier's safety score. A score of "0" means a carrier had the best score out of all the carriers in that peer group. A score of 100 is the worst. The BASIC score chart shown here demonstrates a carrier who scored 82.7 in a particular BASIC category. This means that 82.7% of the other carriers in its peer group scored better than it did in that category, and only 17.3% were worse.



The FMCSA uses the BASIC scores to identify carriers for further intervention on safety issues. It has therefore established "intervention thresholds" for the various BASICs. When a carrier's BASIC score in a particular category exceeds that

threshold, an alert status is indicated and the carrier is targeted for further intervention actions aimed at improving the safety issues.²

Potential interventions that can be taken include a warning letter, off-site investigation, on-site focused investigation, on-site comprehensive investigation, cooperative safety plan, notice of violation, notice of claim, and operations out-of-service order.

Part of the intervention process can also include targeted roadside inspections. In this way, the alert status acts to highlight a carrier for further inspections by law enforcement personnel across the country. As a result, a carrier with that has exceeded a threshold will now be highlighted for inspection by law enforcement personnel when they are stopped or go through an inspection location. This process helps place further scrutiny on a carrier by increasing the number of recent inspections. This, of course, can either help or hurt the carrier's scores. If they take action and improve safety, the increased scrutiny and number of "safe" inspections will help their scores improve. At the same time, if they are not improving, it will further highlight the safety issues and their scores will get worse.



BASIC scores are updated on a monthly basis, and are available to the public online through the FMCSA's website at <http://ai.fmcsa.dot.gov/SMS/Default.aspx>. Currently, however, the Hazardous Materials Compliance and Crash Indicator scores are not made available to the public.

<u>BASICs INTERVENTION THRESHOLD AMOUNTS</u>	
UNSAFE DRIVING	65
HOS COMPLIANCE	65
DRIVER FITNESS	80
CONTROLLED SUBSTANCE/ ALCOHOL	80
VEHICLE MAINTENANCE	80
HM COMPLIANCE	80
CRASH INDICATOR	65

3. Discover The Broker's Method Of Qualifying Carriers

Now that you know a little about the industry, have checked the carrier's B.A.S.I.C. scores, and satisfied yourself that it had bad safety scores, your next step is to find out exactly how the broker in your case goes about qualifying carriers, and in particular what it did to qualify the carrier in your case.

In other words, we know the BASIC scores are available, and in your case you now know what the carrier's BASIC scores were. But are the BASIC scores being used by brokers to make our roads safer? What process do brokers go through in selecting the carriers they hire to haul loads for their shipper clients?

² The FMCSA no longer officially refers to this as being on an "alert" status, but rather points to the  symbol that comes up when a BASIC score exceeds the intervention threshold and simply says that "the BASIC is  in a BASIC category as being an "alert" status.

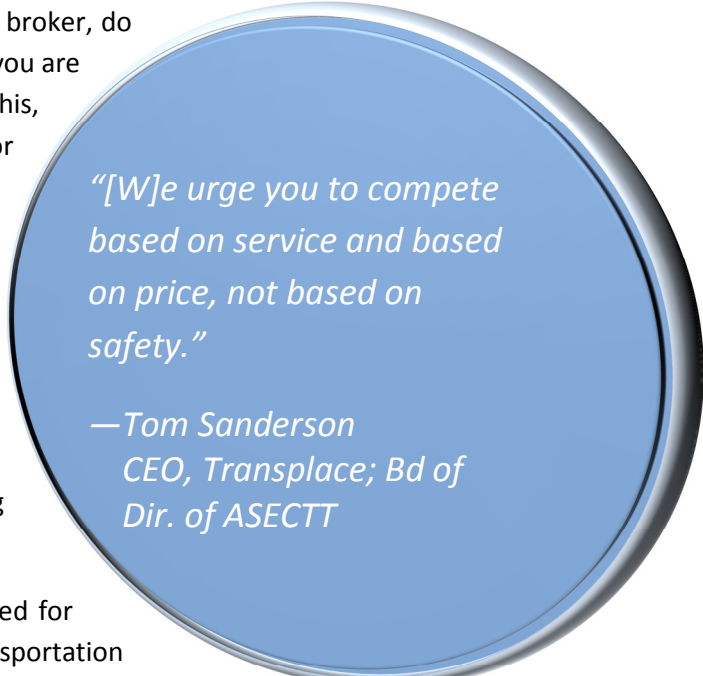
While there is no set procedure to which all brokers adhere, we know what the “Industry” powers-that-be say about using the SMS BASIC scores. This quote from Tom Sanderson, CEO of major 3PL company Transplace, and Board Member of Alliance for Safe, Efficient and Competitive Truck Transportation (“ASECTT”) gives some insight:

[W]e call you to action. If you are a shipper or a broker, do not use the CSA/SMS scores to select carriers. If you are a carrier—and some of the large carriers do this, thinking that this is a competitive advantage for them—we urge you to compete based on service and based on price, not based on safety....We think the FMCSA should stop publishing the scores and abandon the efforts to mathematically determine which carriers are safe to use.³

So what does a typical broker do to qualify a carrier if it does not look at the BASIC scores before hiring the carrier? Here is an example:

Pimp Daddy Broker Company (fictional name used for purposes of hypothetical example only) is like a transportation brothel and needs a plentiful stable of motor carriers available to service its clients (the shippers). It therefore enters into contractual relationships with a large number of carriers that it can potentially hire for loads in the future, and which it can use to bid against each other to obtain the lowest shipping price for each particular shipment. When Pimp Daddy Broker Company first takes in a new carrier, it enters into a master contract with that carrier to generally govern their relationship; this master contract requires the carrier to maintain DOT operating authority and not have an unsatisfactory safety rating from the DOT. However, it says nothing about the carrier’s BASIC scores.

Now, once the carrier is in Pimp Daddy Broker Company’s stable, it is eligible to be engaged by Pimp Daddy to haul Pimp Daddy’s loads so long as it maintains its DOT operational authority. Pimp Daddy likes to keep its clients happy, though, so it always makes sure the carrier has a good on-time performance history before hiring it for a particular load. In fact, Pimp Daddy uses modern technology to track certain aspects of the carrier’s service history with Pimp Daddy to ensure the carrier performs well for its shippers. For example, things like on-time pick-up and delivery rates and other non-safety related performance factors are plugged into a computer program and all carriers are given a performance related score.



“[W]e urge you to compete based on service and based on price, not based on safety.”

*—Tom Sanderson
CEO, Transplace; Bd of
Dir. of ASECTT*

³ Transcript of Stifel Nicolaus Conference Call “Why CSA Is Not Fit for Shippers and Brokers to Use,” on December 20, 2011, at p. 16.

When Shipper John (again, a fictional name used for purposes of hypothetical example only) then contacts Pimp Daddy with a load it needs hauled, Pimp Daddy gets to work. Pimp Daddy usually agrees to a set payment from Shipper John before it knows what the carrier will charge to haul the load. Pimp Daddy then puts the load out on its website for all interested carriers in its stable to bid against each other to win the load. The carrier with the lowest bid usually wins the load, and a Pimp Daddy employee checks the carrier's Pimp Daddy performance score on the computer at that time to make sure it has a high enough score with respect to on-time and related performance issues. The computer also makes sure the carrier has current operating authority from the DOT to be on the roads, and minimum DOT required insurance. The difference between what Shipper John pays Pimp Daddy and the amount the carrier agreed to accept from Pimp Daddy to haul the load is often referred to as the "spread," and represents Pimp Daddy's profit on that load. Once the amount has been agreed upon and the carrier's Pimp Daddy score checked to ensure it is a reliable member of Pimp Daddy's stable, a separate contract is entered with the carrier for that particular load setting forth the particulars of that delivery.

This example shows what often occurs when a broker hires a carrier to deliver a load. As can be seen, the focus of this process is on pricing and on-time performance, not the safety level of the carrier the broker is putting on the roadways. So, **what could Pimp Daddy have done** that it did not do? Here are a few examples:

- Go online to the FMCSA's website and check the carrier's BASIC scores before hiring it to haul the load.
- Use an outside service such as Carrier411 to provide updated information about the Carriers it uses, including real-time information regarding BASIC scores.
- Use real-time information about BASIC scores as part of the carrier's computer program as a screening mechanism prior to hiring the carrier.
- Require all carriers to have no alert statuses on any BASIC category in order to be eligible for loads.
- Communicate with carriers and monitor what steps were being taken by the carriers to comply with Federal Safety Standards.
- Ask upon initially signing up the carrier and then during the relationship how the carrier plans to comply with Federal regulations regarding hours of service.
- Ask upon initially signing up the carrier and then during the relationship how the carrier plans to comply with Federal regulations regarding falsifying logs.
- Ask upon initially signing up the carrier and then during the relationship how the carrier plans to comply with Federal regulations regarding use of alcohol or controlled substances.

- Ask upon initially signing up the carrier and then during the relationship how the carrier plans to comply with Federal regulations regarding driver training.
- Ask upon initially signing up the carrier and then during the relationship how the carrier plans to comply with Federal regulations regarding equipment and maintenance.
- Ask upon initially signing up the carrier and then during the relationship whether the carrier uses owner-operators.
- Ask upon initially signing up the carrier and then during the relationship whether the carrier has ever been fined by the FMCSA/DOT for noncompliance.
- Ask upon initially signing up the carrier and then during the relationship whether the carrier has ever been subject to disciplinary action by a State or Federal agency.
- Ask upon initially signing up the carrier and then during the relationship whether the carrier has ever had a safety rating or proposed safety rating other than “Satisfactory.”
- Check upon initially signing up the carrier and then during the relationship to ensure the carrier has adequate safety management controls in place.
- Maintain records to ensure the carrier was not manipulating its business practices to avoid poor safety ratings and/or safety scores.

Of course, not every broker uses the same methods, so you need to discover how the broker in your case went about qualifying the carrier involved. You might find a responsible broker who did check the B.A.S.I.C. scores and followed up with further inquiry, which may or may not have reasonably justified using the carrier despite the B.A.S.I.C. score involved. In many cases, however, the broker simply will not have checked the B.A.S.I.C. scores at all. Either way, however, you need to know what the broker did, or did not, do in your case. Knowing this will guide you in formulating your “Rules of the Road,” as discussed below.

4. Formulate Your “Rules Of The Road”

Knowing what the broker did or did not do when qualifying the carrier involved in your crash will allow you to formulate the “Rules of The Road” to set up your case, and guide you through your depositions and ultimately trial. With all credit going to Rick Friedman and Patrick Malone for their work in developing the “Rules of the Road” method, this Broker Busting B.A.S.I.C.s presentation will not recount the specific what’s, how’s, and why’s of developing and using a good set of “Rules of The Road.” For those of you not already familiar with their work, I highly recommend you get the “Rules of The Road” book, listen to the CD’s, and/or attend one of their seminars to truly learn the “Rules of The Road” methodology.

However, I do want to give a few examples of potential rules that can be set up in a broker case. Play with these and come up with your own to fit the individual circumstances of your case. If you

develop a good set of rules, you will find that it helps lock in your opponent and its experts to agreeing with the basic safety principles that underlie your case...or else they look unreasonable and/or disingenuous if they disagree.

- The safety of those of us who use our interstates and roadways should always be the primary consideration when a third-party logistics company (broker) chooses a motor carrier to haul freight.
- A third-party logistics company (broker) must be careful to place loads with only safe motor carriers in order to protect those of us who use our interstates and roadways.
- A third-party logistics company (broker) must check the safety measurement system BASIC scores before placing a load with a motor carrier in order not to put a dangerous motor carrier on our interstates and roadways.
- A third-party logistics company (broker) must maintain internal records on motor carriers with whom they place loads to assure they are not manipulating their business practices in order to avoid poor safety measurement system BASIC scores or unsatisfactory/conditional safety ratings.
- A third-party logistics company (broker) must only place loads with competent, careful, skillful carriers because tractor trailers pose a danger to those of us who use our interstates and roadways.
- A third-party logistics company (broker) must not place a load with a motor carrier it knows or should know regularly violates federal trucking safety regulations.
- A third party logistics company (broker) must only place loads with motor carriers that have safety management controls that comply with industry standards in order to protect those of us who use our interstates and roadways.

5. Anticipate and Counter The Defenses

The final essential step in Broker Busting Basics is to anticipate and counter the defenses that the Broker-Defendant is sure to throw at you. Indeed, the broker industry started preparing their coordinated defense long before your accident ever happened. Being prepared for those defenses, however, is the key to defeating them.

Common Broker Defenses

As you might expect, the Broker Industry makes big money by taking the Ostrich Approach to safety and focusing its attention instead on on-time performance and pricing issues. As a result, they are fighting changes to that model tooth and nail, including Plaintiffs who try to hold them responsible for their negligent business practices. They have therefore attempted to craft a number of defenses to

use against negligent hiring claims. Included among those potential defenses, a Plaintiff may very well see the following:

Safety Rating One of the first statements likely to come out of Pimp Daddy Broker's mouth is "I checked the carrier's safety rating from the FMCSA, and it was satisfactory. Therefore, the carrier was deemed safe by the Federal Government to be on our roads and I was not negligent in hiring that carrier for the load." The big brokers in particular love to simply pass the buck to the federal government and say "that's enough for me." For example, Tom Sanderson, the CEO of Transplace, a large 3PL company, and board member of industry association ASECTT, said the following in a question and answer session regarding use of the BASIC scores at a December 20, 2011 industry conference call (with emphasis added):

Listener #1: Okay. I understand there are some flaws in the way they provide this information. I do not know if they will every [sic] come up with the perfect solution, but in absence of that, if it is one of the several ways to evaluate the quality of a carrier, do you still have the same negative views about the value of this?

Tom Sanderson: Yes. **We think the FMCSA should uphold it's obligation to determine which carriers are fit for service and that we ought to select carriers based on their on-time pick-up and delivery performance, the quality of their equipment, and the prices that they offer. That is where the marketplace should be competitive.**

Listener #1: **And not safety reports that they have with state troopers and other government agencies?**

Tom Sanderson: **Absolutely Not.**⁴


The brokers raising this argument also typically try to argue that a carrier's safety rating is the result of a full compliance review conducted by the government, whereas the BASIC scores are not, and that frequency and focus of roadside inspections that underlie the BASIC scores varies region to region. They therefore contend that the safety rating is the only reliable rating because it is based on a full scale review of the carrier. As discussed more fully in the following section, that argument simply doesn't hold water, particularly in instances where there has been an extended time period since the carrier's prior compliance review. In many cases, carriers go years without a compliance review.


Disclaimer On BASIC Scores

Another popular stratagem used by the brokers is the "disclaimer" that is located at the bottom of the SMS website screen when looking up a motor carrier's BASIC scores. That disclaimer currently reads as follows:

⁴ Transcript of Stifel Nicolaus Conference Call "Why CSA Is Not Fit for Shippers and Brokers to Use," on December 20, 2011, at p. 19-20.

*USE OF SMS DATA/INFORMATION

The data in the Safety Measurement System (SMS) is performance data used by the Agency and Enforcement Community. A  symbol, based on that data, indicates that FMCSA may prioritize a motor carrier for further monitoring.

The  symbol is not intended to imply any federal safety rating of the carrier pursuant to 49 USC 31144. Readers should not draw conclusions about a carrier's overall safety condition simply based on the data displayed in this system. Unless a motor carrier in the SMS has received an UNSATISFACTORY safety rating pursuant to 49 CFR Part 385, or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways.

Motor carrier safety ratings are available at <http://safer.fmcsa.dot.gov> and motor carrier licensing and insurance status are available at <http://li-public.fmcsa.dot.gov/>.

Expect the broker to argue that this disclaimer means the BASIC scores are only for use by the FMCSA and State enforcement personnel to identify motor carriers for further monitoring, and that they should not be used by others (including brokers) to determine whether a carrier is safe.

We Don't Have To

Another argument Brokers like to use is that there is no requirement under Federal Regulations that they check the carriers' safety statistics. Again, the argument brokers attempt to make is that the Federal Government is charged with giving a "safety rating" and giving the carrier authority to haul loads on our roads.

Similarly, the March 2011 "Carrier Selection Framework" published by the Transportation Intermediaries Association ("TIA") itself states that: "[i]t has been, and remains, TIA's consistent position that the FMCSA Safety Rating alone determines a motor carrier's fitness for use, and should always take precedence over, and clearly outweigh, any single score, or collection of scores, or data set, including CSA's SMS or BASIC scores."⁵

BASIC Scores Are Not Accurate

Brokers attempt to argue that the BASIC scores themselves are not accurate and therefore should not be utilized. They argue that the scores themselves have no relationship to accident frequency, and that the scores relating to a particular motor carrier are an unreliable, inadequate and improper method of estimating that particular motor carrier's probability of being in a future accident. There are a number of sources that brokers attempt to use in crafting this argument.

For example, the following sources are among those that have been relied upon in arguing the BASIC scores are not accurate and should not be relied upon:

⁵ Carrier Selection Framework, by Transportation Intermediaries Association, March 2011 at p. 12.

Why CSA Is Not Fit for Shippers and Brokers to Use, Stifel Nicolaus conference call on January 5, 2012. This conference call featured a number of transportation industry speakers, including Tom Sanderson, who stated that “[t]he SMS scores have no relationship to accident frequency.”

REGULATORY ROULETTE: Assessing CSA, Equity Research paper by Wells Fargo Securities Senior Analyst Anthony P. Gallo, dated March 28, 2011. In this analysis/study, Mr. Gallo states that they believe the composite BASICs scores do not provide a true depiction of a carrier’s safety, and THAT they did not find that composite scores were indicative of accidents or injuries/fatalities.

CSA: Good Intentions, Unclear Outcomes, Equity Research paper by Wells Fargo Securities Senior Analyst Anthony P. Gallo, dated November 4, 2011. In this analysis/study nearly a year after the initial implementation of CSA, Mr. Gallo states that they “remain convinced investors and other interested parties should NOT rely exclusively on a carrier’s composite BASIC scores to assess accident probability or overall risk. Indeed, we believe the composite scores can be misleading.” (page 2)

CSA: Another Look With Similar Conclusions, Equity Research paper by Wells Fargo Securities Senior Analyst Anthony P. Gallo, dated July 2, 2012. Mr. Gallo offers another paper, this one following the UMTRI report, and again maintains that there is no meaningful statistical relationship between BASIC scores and crash rates for Unsafe Driving, Fatigued Driving, Driver Fitness, or Vehicle Maintenance.

Understanding CSA, December 2012 presentation by Wells Fargo Securities, Anthony P. Gallo. Again, Mr. Gallo asserts that there is no meaningful statistical relationship when using simple regression analysis between bad BASIC scores and actual accident occurrence.

Compliance, Safety, Accountability: Analyzing the Relationship of Scores to Crash Risk, American Transportation Research Institute, October 2012. This is an extensive analysis of the BASIC scores, and brokers have focused on the portion of the analysis that found a negative relationship between the Driver Fitness and Controlled Substance/Alcohol BASIC categories and crash risk.

Statistical Issues in the Safety Measurement and Inspection of Motor Carriers, James Gimpel, University of Maryland, May 2012. In this analysis by Professor James Gimpel from the University of Maryland, Dr. Gimpel claims that the “statistical relationships detected in these data are not only a cloudy reflection of the true population, but may well be flat wrong.”⁶ He claims that only a small share of motor carriers are inspected each year, and due to local peculiarities and biases in the selection process, the resulting data collection is an imperfect representation of the overall carrier population, especially small carriers. He further claims that the various measurements are subject to wide variation in emphasis and application based from location to location geographically.

SMS BASIC Scores are Not Valid Predictors of Crash Frequency, Inam Iyob, Ph.D. In this study, purportedly performed at the request of the organization “Alliance for Safe, Efficient and Competitive Truck Transportation” (“ASECTT”), self styled data analyst and mathematical expert Inam Iyob, Ph.D.

⁶ *Statistical Issues in the Safety Measurement and Inspection of Motor Carriers*, James Gimpel, May 2012 at p. 9.

prepared a statistical analysis refuting the FMCSA's analysis that showed a relationship between BASICS and crash risk. Dr. Iyob claims that "it is not statistically accurate to say the SMS methodology and BASIC percentile scores are an accurate predictor of carrier safety predicated upon the crash data the Agency uses to justify its conclusions....[T]he way the SMS Basics Unsafe Driving and Fatigued Driving are captured, calculated and interpreted by FMCSA does not show any correlation to crashes. Hence usage of SMS data for carrier selection will unduly favor some and penalize others, and thus should be avoided."⁷

Countering The Broker Defenses

Some of the defenses noted above seem rather daunting at first. After all, the industry cites to at several different studies that say the BASIC scores are not accurate measures of safety and should not be used. So, what does a Plaintiff have to go on? Well, quite a bit, actually.

UMTRI and ATRI Studies Support Relationship Between BASIC Scores and Crash Risk

To begin with, the more independent studies out there actually **support** the relationship between BASIC scores and carrier's crash risk. The most independent of the studies was conducted by the University of Michigan Transportation Research Institute. The UMTRI has a reputation for quality, independent research and analysis in the transportation industry. As the American Trucking Associations ("ATA") noted in March 2012, "[c]onsistent with UMTRI's reputation and tradition, the evaluation is comprehensive, well-written, and informative."⁸ The UMTRI undertook an analysis of the CSA 2010 Operational Model Test. In that analysis, the UMTRI concluded that the SMS BASIC Scores **are related to Carrier Safety**, although they were weaker for the Driver Fitness and Cargo Loading/Securement BASIC categories.

In its analysis, the UMTRI concluded as follows:

For all BASICS, crash rates were higher for carriers exceeding SMS thresholds than for carriers not exceeding thresholds. The crash rate was highest for carriers exceeding the Unsafe Driving threshold. Rates were also high for the Fatigued Driving BASIC and the Controlled Substance and Alcohol BASIC. The SMS also identified many more carriers for intervention than did SafeStat. Scatter plots indicate that all of the BASIC measures have positive associations with crash rates, except for the Driver Fitness and Loading/Cargo Securement BASICS. Excluding the Crash Indicator, the Unsafe Driving BASIC has the strongest association with crash rates.⁹

The support for use of the BASIC scores as a crash indicator does not end at the UMTRI study, however. In fact, an in-depth study conducted by a member of the transportation industry itself strongly supports the validity of BASIC scores. The American Transportation Research Institute ("ATRI") put out a report in October 2012 titled *Compliance, Safety, Accountability: Analyzing the Relationship of*

⁷ *SMS BASIC Scores are Not Valid Predictors of Crash Frequency*, Inam Iyob, Ph.D, at p. 4.

⁸ *Summary and Analysis of FMCSA's Evaluation of the CSA Operational Model Test*, American Trucking Associations, March 2012.

⁹ *Evaluation of the CSA 2010 Operational Model Test*, August 2011, at p. 104.

Scores to Crash Risk. The ATRI analysis sought to expand on previous findings by using a more targeted statistical analysis. The report notes the studies from Wells Fargo, Dr. Iyooob, and J. Gimpel noted above, and questions the conclusion of those authors. In fact, it specifically states that “[s]imply put, the failure to detect a relationship [in those studies] may be the result of choosing an incorrect statistical analysis....Since conclusions cannot be drawn from the simple linear regression used by the Wells Fargo, [Iyooob], and Maryland authors, there are several alternative approaches available to answer the research question.”¹⁰

The ATRI study went on to find important findings that demonstrate a relationship in most situations between BASIC scores and crash rates. First, the analysis showed with high confidence that BASIC scores are positively related to crashes in the Unsafe Driving, HOS and Vehicle Maintenance BASICs. A negative relationship was found, however, for the Driver Fitness and Controlled Substances/Alcohol categories.

The ATRI study went beyond simply looking at whether a particular score number in a particular category corresponded to higher crash risk. Instead, it next looked at whether carriers with an “alert” status, i.e. a score above the “threshold,” in the category had higher crash rates. That analysis again revealed that carriers with an “Alert” showed higher crash rates than carriers who were not on alert status in four of the five public BASIC categories: Unsafe Driving, Fatigued Driving, Vehicle Maintenance and Controlled Substance/Alcohol. Again, however, their analysis showed that an alert status for Driver Fitness corresponded to a lower crash risk than carriers who were not on alert status.

In its final findings, the ATRI study went beyond looking at individual BASIC categories. First, the study concluded that the more BASIC scores a carrier has, even if they are not at an Alert status, the higher the risk of crash. And from that, the study further analyzed and concluded that the more “Alert” statuses a carrier has, the higher the risk of crash. In fact, the study concluded that “[t]he best indicator of crashes...is not how many BASIC scores a carrier has, but how many “Alerts” the carrier has.”¹¹ For example, a carrier who has an “alert” status in five BASIC categories is 5.1 times the crash risk of a carrier who had some data collected for it but no resulting BASIC scores.

The Tangled Web Of Broker Defense—An Abundance Of Material For Impeachment

Not only do the UMTRI and ATRI studies actually demonstrate that the BASIC scores are a significant and important indicator of carrier safety, but there is an abundance of material with which to cross examine experts who attempt to utilize the materials the Broker industry tries to use as support. In short, the materials they use are produced by the industry, for the industry, and can be readily impeached.

Tom Sanderson

¹⁰ *Compliance, Safety, Accountability: Analyzing the Relationship of Scores to Crash Risk*, October 2012 at p. 6, 7.

¹¹ *Id.* at x.

For example, one resource utilized by Brokers is a Stifel Nicolaus Conference Call *Why CSA Is Not Fit For Shippers and Brokers to Use*, from January 5, 2012. One of the two featured speakers who is often cited is Tom Sanderson. Mr. Sanderson is an industry executive who just happens to be CEO of Transplace, a large privately owned third party logistics company. Not only is Mr. Sanderson a broker industry insider with a clear bias and self-interest against use of the BASIC scores, his actual transcript from the Conference Call focuses on profit over safety, and provides a wealth of juicy quotes for cross examination. Here are some examples from the transcript (with emphasis added):

Our key message today is that shipper's and broker's should not be using the Safety Measurement (SMS) data (formerly known as CSA) in the selection of carriers. There are several reasons for that statement...First, ***you would be needlessly exposing yourself to additional vicarious liability and negligent selection lawsuits.*** It is far superior to rely on the FMCSA....(page 2)

It would cost your company money to deny it access to carriers that are approved for use by the FMCSA; these are carriers that have insurance and that have satisfactory safety ratings—***you would be fundamentally costing your company money and harming your service*** by not utilizing them. (page 2)

It would be fine for the FMCSA to use the methodology to determine which carriers should be further scrutinized....(page 3)

[D]o not use SMS methodology. The use of SMS methodology by shippers and brokers, I believe and this is purely my opinion, is a bad idea. ***If a shipper or broker uses SMS methodology, it assumes a risk of non-compliance and a higher duty than the duty required by statute for the government to do. You cannot stop introduction of SMS methodology or challenge its validity if you use it and are sued in a court. In essence, you lose the ability to rely upon federal preemption and the government's ultimate safety fitness determination as the gold standard. Additionally, you lose the argument that the regulators, not the consumers, should be responsible for carrier fitness.*** (page 12)

[W]e call you to action. If you are a shipper or a broker, do not use the CSA/SMS scores to select carriers. If you are a carrier—and some of the large carriers do this, thinking that this is a competitive advantage for them—***we urge you to compete based on service and based on price, not based on safety.*** (page 16)

We think the FMCSA should uphold it's obligation to determine which carriers are fit for service and that ***we ought to select carriers based on their on-time pick-up and delivery performance, the quality of their equipment, and the prices that they offer. That is where the marketplace should be competitive.*** [Listener Question]: ***And not safety reports that they have with state troopers and other government agencies?*** [Sanderson Response]: ***Absolutely not.*** (page 19-20)

The premise of regulation is that people are certified on a pass/fail basis so that the consumer—in this case, the consumers are the shippers and brokers—can rely upon the government’s determination. When you vary from that and it is put in the hands of the plaintiff’s bar, you lose this open and free marketplace, which in trucking is the driving factor in the national transportation policy. (page 20)

Clearly, the sole focus of Mr. Sanderson is on price and on-time delivery/pick up by carriers. Safety score consideration is something he actively encourages brokers to avoid and he pleads with carriers to **not** compete in terms of safety issues. Does it get any more damning than an industry leader actively encouraging the carriers out there on our roadways to not compete based on their safety?

Wells Fargo Studies

The studies by Anthony P. Gallo at Wells Fargo Securities present similar opportunity for attack on cross examination. To begin with, the reports themselves note that they may have a conflict of interest. In fact, the reports have this disclaimer at the bottom of their first page (with emphasis added):

Wells Fargo Securities, LLC does and seeks to do business with companies covered in its research reports. As a result, investors should be aware that ***the firm may have a conflict of interest*** that could affect the objectivity of the report and investors should consider this report as only a single factor in making their investment decisions.

At the end of the reports, Wells Fargo discloses a number of companies in which Wells Fargo Securities, LLC and/or its affiliates own(ed) stock, manage(d), provide(d) services to, or have/had some other significant financial interest or relationship. Among the companies cited are some of the biggest names in the Transportation and Brokerage industries, including Arkansas Best Corp., C.H. Robinson Worldwide, Inc., Heartland Express, Inc., Hub Group, Inc., J.B. Hunt Transport Services, Inc., Landstar System, Inc., Old Dominion Freight Line, Inc., Swift Transportation Co., and Werner Enterprises, Inc.¹²

Not only does this demonstrate a clear bias, but the very essence of the “study” themselves is subject to impeachment. Indeed, the studies were conducted by an analyst for a securities firm, not a researcher in transportation industry issues like the UMTRI study. In fact, Mr. Gallo’s own statement before the U.S. House Committee on Small Business on July 11, 2012, calls into question his very qualifications for conducting the “studies” put forth by Wells Fargo. In his Oral Statement to the Committee, Mr. Gallo began by stating as follows (with emphasis added):

I am not an expert on truck safety, small business or statistics....My research is largely conducted in the context of providing investment ideas and strategies to institutional

¹² *Regulatory Roulette: Assessing CSA*, March 28, 2011 at p. 6; *CSA: Good Intentions, Unclear Outcomes*, November 4, 2011 at p. 13; *CSA: Another Look With Similar Conclusions*, July 2, 2012 at p.19.

investors. I publish fundamental market research on the trucking, railroad and parcel segments within the broader freight transportation industry.¹³

Further, as indicated in the ATRI study, the methodology used in the Wells Fargo analysis itself uses an incorrect statistical analysis and should not be relied upon.

Iyoob Report

The report by Inam Iyoob again is rife with material for cross examination. This report appears to be yet another manufactured piece of evidence by the transportation industry. Let's look deeper.

First, who does Dr. Iyoob work for? He is the Director of Engineering for Transplace. Does that name sound familiar? That's right, he works for the company run by our good friend Tom Sanderson discussed above, who thinks competition should be based on on-time performance, not safety, and actively urges those in the transportation industry to do so. Dr. Iyoob's biography at the Transplace website in fact focuses not on safety issues, but on his having "delivered more than \$120 million in annual freight expense cost reductions to a broad base of Transplace customers."¹⁴ Thus, this "study" comes from the most biased of possible sources—a major broker company itself.

But wait, there's more. Dr. Iyoob's report claims that he conducted the review "at the request of ASECTT." Looking a little deeper, it turns out that, according to the Journal of Commerce, Tom Sanderson—Dr. Iyoob's boss—was on the board of directors and named Chairman of ASECTT in July 2011.¹⁵

ASECTT itself is an organization committed to avoiding use of the BASIC safety statistics. Among the ASECTT Membership Requirements, a carrier, shipper, broker, or other member of the transportation industry must affirm the principle that: "Shippers and brokers should be able to rely upon the Agency's certification as the sole basis for determining carrier fitness, free from vicarious liability pursuant to state law concepts." Further, among the stated purposes of the organization are as follows:

- (2) To ensure that motor carriers authorized by the FMCSA fulfill their non-delegable safety duties under the Federal Motor Carrier Safety Regulations.
- (3) To affirm the FMCSA's duty to determine carrier safety fitness for use by the shipping and traveling public.

¹³ Transcript of Oral Statement on Wednesday July 11, 2012, before the Committee on Small Business, available at http://smallbusiness.house.gov/uploadedfiles/7-11_gallo_testimony.pdf.

¹⁴ See Inam Iyoob biography at <http://symposium2012.transplace.com/speakers/dr-inam-iyob-director-engineering-transplace>.

¹⁵ <http://www.joc.com/alliance-safe-efficient-and-competitive-truck-transportation-announces-selection-organization%E2%80%99s>.

(4) To affirm that shippers and brokers can rely upon the Agency's ultimate fitness determination without exposure to vicarious liability, negligent hiring or negligent selection when the carrier selected has been certified by the Agency for use.¹⁶

In fact, ASECTT has gone so far as to sue the FMCSA to try and prevent it from releasing BASIC scores to the public and/or suggesting that the public rely upon the BASIC scores as part of their safety determinations.¹⁷ Oral arguments on that case, brought by ASECTT, Transplace, and several other members of the transportation industry, were heard by the Federal Circuit Court for the District of Columbia on September 10, 2013. No decision has yet been handed down by the Circuit Court, but the intricate, central involvement of the same key players as those involved with the Iyob study itself in litigation seeking to prevent use of the BASIC safety information provides further evidence to argue the unbiased nature of the Iyob study.

Additionally, again as indicated in the ATRI study, the methodology used in the Iyob analysis itself uses an incorrect statistical analysis and should not be relied upon.

Gimpel Report

The report by James Gimpel at the University of Maryland, *Statistical Issues in the Safety Measurement and Inspection of Motor Carriers*, again raises serious questions about the source of the report.

To begin with, why James Gimpel? Dr. Gimpel's CV indicates that his educational background is in **Political Science**...not transportation. In fact, he was the editor of *American Politics Research* from 2003 to 2011. Likewise, his peer reviewed journal articles deal with various political issues, including from 2012 the article "The Tea Party Movement and the Geography of Collective Action." Dr. Gimpel's profile on Politico.com indicates that "His research has focused on political behavior, campaigns and elections, public opinion and immigration politics and policy."¹⁸ This, of course, begs the questions why a political science professor would write on this subject? Was he paid for the paper, and if so by whom? Was the transportation industry behind this paper, too?

And again, in any event, as the ATRI study indicated, the methodology used by Dr. Gimpel in his analysis used an incorrect statistical analysis and should not be relied upon.

Government Support

Various government publications support the use of the BASIC scores by brokers when hiring carriers, and countermand the industry's argument that it is enough to simply rely upon the "safety rating" assigned after a full compliance review is conducted. For example, the August 2011 UMTRI

¹⁶ <http://asectt.blogspot.com/p/about-us.html>

¹⁷ *Alliance For Safe, Efficient, and Competitive Truck Transportation, et al. v. Federal Motor Carrier Safety Administration, et al.*, Case No. 12-1305 (D.C. Cir.).

¹⁸ http://www.politico.com/arena/bio/james_g_gimpel.html

study, which is available from and disseminated by the FMCSA itself, states as follows (with emphasis added):

At current staffing levels, FMCSA and its State partners conduct about 16,000 CR's [Compliance Reviews] annually on the approximately 514,000 motor carriers nationwide that FMCSA considers to be active....The CR program is resource-intensive and it may take a trained safety investigator several days to complete one CR. Therefore, ***the program requires considerable Agency and State partner resources and only reaches a small portion of the Nation's motor carriers.*** After performing a CR, FMCSA issues a safety fitness determination and a corresponding safety rating. One of the limitations of this process is that the safety rating remains in effect until another CR is performed. As a result, ***a safety rating may not be an accurate indicator of a carrier's current safety fitness.***¹⁹

Similarly, a September 2011 Report to Congressional Committees from the United States Government Accountability Office (GAO) likewise notes the limited significance of the safety rating and the important use of the BASIC scores by the public in hiring carriers:

Before CSA, FMCSA relied primarily on comprehensive compliance reviews on-site at carriers to determine whether they were operating safely....However, compliance reviews are extremely resource intensive; therefore, only a small percentage of the motor carrier industry can be evaluated in this manner, given limited federal and state resources. Annually, for example, FMCSA and its state partners have conducted compliance reviews of about 3 percent of registered motor carriers. As a result, ***FMCSA was not able to evaluate the vast majority of registered motor carriers and most were not assigned a safety rating.***

FMCSA fully implemented the (SMS) system to measure the performance of carriers in all safety categories in 2010. This information is provided to carriers to help them identify and address their own safety issues. Additionally, FMCSA has made most carrier's safety data publicly available since December 2010....***Shippers and insurers, among others, can now use this information to make business decisions.***²⁰

¹⁹ *Evaluation of the CSA 2010 Operational Model Test*, August 2011 at p. 1. In fact, industry executive Bruce Johnson, the Director of Carrier Services for Industry giant C.H. Robinson Worldwide, Inc. at the time, admitted in 2012 that only approximately 2% of the carriers underwent a compliance review each year. Interestingly, Mr. Johnson is also on the Board of Directors of the industry organization TIA.

²⁰ September 2011 U.S. Government Accountability Office Report to Congressional Committees, *Motor Carrier Safety*, September 2011 (GAO-11-858) at p. 4-5, 13.