



**DEPARTMENT OF TRANSPORTATION**

**4910-EX-P**

**Federal Motor Carrier Safety Administration**

**[Docket No FMCSA-2011-0097]**

**Pilot Project on NAFTA Trucking Provisions**

**AGENCY: Federal Motor Carrier Safety Administration (FMCSA).**

**ACTION: Notice.**

**SUMMARY:** On September 12, 2011, FMCSA announced and requested public comment on data and information concerning the Pre-Authorization Safety Audit (PASA) for Grupo Behr de Baja California SA de CV (Grupo Behr), USDOT# 861744, a motor carrier that applied to participate in the Agency's long-haul pilot program. That action was required by the "U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007" and all subsequent appropriations. While Grupo Behr successfully completed the PASA process, commenters raised concerns about the company's safety record. In addition, during the Agency's safety vetting process, an operating authority violation was discovered. As a result, the Agency placed Grupo Behr's application on hold. The purpose of this notice is to respond to the comments received in response to the September 12, 2011, notice, and to explain the enforcement action that the Agency took as a result of the operating authority violation. In addition, this notice advises that the Agency will now issue provisional authority to Grupo Behr for participation in the long-haul pilot program.

**ADDRESSES:**

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> at any time or to Room W12-140 on the ground floor of

the DOT Headquarters Building at 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act System of Records Notice for the DOT Federal Docket Management System published in the Federal Register on January 17, 2008 (73 FR 3316), or you may visit <http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf>.

Public Participation: The [www.regulations.gov](http://www.regulations.gov) website is generally available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the "help" section of the [www.regulations.gov](http://www.regulations.gov) website. Comments received after the comment closing date will be included in the docket, and will be considered to the extent practicable.

**FOR FURTHER INFORMATION CONTACT:** Marcelo Perez, FMCSA, North American Borders Division, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001. Telephone (512) 916-5440 Ext. 228; e-mail [marcelo.perez@dot.gov](mailto:marcelo.perez@dot.gov).

**SUPPLEMENTARY INFORMATION:**

Background

On May 25, 2007, the President signed into law the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007 (the Act), [Pub. L. 110-28, 121 Stat. 112, 183, May 25, 2007]. Section 6901 of the Act requires that certain actions be taken by the Department of Transportation (the Department) as a condition of obligating or expending appropriated funds to grant authority to Mexico-domiciled motor carriers to operate beyond the municipalities in the

United States on the United States-Mexico international border or the commercial zones of such municipalities (border commercial zones).

On July 8, 2011, FMCSA announced in the Federal Register [76 FR 40420] its intent to proceed with the initiation of a U.S.-Mexico cross-border long-haul trucking pilot program to test and demonstrate the ability of Mexico-domiciled motor carriers to operate safely in the United States beyond the border commercial zones as detailed in the Agency's April 13, 2011, Federal Register notice [76 FR 20807]. The pilot program is a part of FMCSA's implementation of the North American Free Trade Agreement (NAFTA) cross-border long-haul trucking provisions in compliance with section 6901(b)(2)(B) of the Act. FMCSA reviewed, assessed, and evaluated the required safety measures as noted in the July 8, 2011, notice and considered all comments received on or before May 13, 2011, in response to the April 13, 2011, notice. Additionally, to the extent practicable, FMCSA considered comments received after May 13, 2011.

In accordance with section 6901(b)(2)(B)(i) of the Act, FMCSA is required to publish a notice in the Federal Register, and provide sufficient opportunity for the public to review and comment on comprehensive data and information on the PASAs conducted of motor carriers domiciled in Mexico that are granted authority to operate beyond the border commercial zones.

#### Comments and Responses

On September 12, 2011, FMCSA published the passed PASA results for Grupo Behr [76 FR 56274], and the Agency received responses from 13 commenters.

On October 14, 2011, the Agency published a second notice [76 FR 63988] that explained that Advocates for Auto and Highway Safety (Advocates) and the International

Brotherhood of Teamsters (Teamsters) expressed concern that Grupo Behr's out-of-service (OOS) rate was 28.6%, which was higher than the national average of 20.7%.

In addition, both commenters noted that Grupo Behr's vehicle maintenance rating within FMCSA's Safety Measurement System (SMS) was 45.8%. Advocates further noted that Grupo Behr had 40 vehicle violations in the 24 months prior to August 26, 2011. Also, the Owner-Operator Independent Drivers Association (OOIDA) indicated that publicly-available information indicated that Grupo Behr had an inadequate safety history.

FMCSA Response: Over the past year, Grupo Behr has improved its safety record. Grupo Behr's Vehicle OOS rate is currently 14% and its Driver OOS rate is 2% based on the December 14, 2012, SMS snapshot. Grupo Behr does not currently have any SMS Behavior Analysis and Safety Indicator Categories (BASICS) that exceed FMCSA's intervention thresholds. As a result, the company is in good standing to participate in the Pilot Program.

It should also be noted that the statutory and regulatory requirement for participation in the pilot program is satisfactory completion of the PASA and a subsequent compliance review, after operation. The Agency may not establish standards for pilot program participants that are not comparable to the requirements for U.S. carriers.

OOIDA researched the vehicle identification numbers from inspection reports and questioned if Grupo Behr would be using a 1991 Class 8 Freightliner, which does not comply with the Environmental Protection Agency (EPA) requirement for vehicles of model year 1998 or later.

FMCSA Response: The FMCSA confirmed that all vehicles proposed for use in the pilot program by Grupo Behr meet both Federal Motor Vehicle Safety Standards and EPA requirements. The oldest of the proposed vehicles to be operated by Grupo Behr in the pilot program is 1998, and the 1991 Class 8 Freightliner in question by OOIDA will not be used.

OOIDA questioned the safety data collected on Grupo Behr's straight trucks and asked how this is affected by SMS segmentation. In addition, OOIDA challenged the accuracy of Grupo Behr's Vehicle Maintenance BASIC and alleged that the event group-- the group of carriers that Grupo Behr is compared against in SMS-- "watered down" their scores.

FMCSA Response: FMCSA notes that Mexican carriers are evaluated the same as U.S. carriers under SMS. Also, there are many types of trucking operations using a variety of equipment. The pilot program is designed to test and demonstrate the ability of Mexico-domiciled motor carriers to operate safely in the United States beyond the commercial zones; the Mexican trucking industry as a whole includes straight trucks that may operate beyond the commercial zones, and such operations are an important part of the pilot program.

Advocates asked if the drivers and vehicles to be used in the pilot program had been subject to any of Grupo Behr's OOS orders.

FMCSA Response: During the past 12 months, two of the five vehicles that Grupo will use in the Pilot Program have been placed out of service and deficiencies subsequently corrected. FMCSA notes that Grupo Behr's Vehicle Maintenance BASIC score is 30.9% resulting from on-road performance data, which is below our intervention threshold levels. In addition, during our PASA, FMCSA confirmed that Grupo Behr has a

systematic vehicle maintenance program that meets our requirements. The five vehicles to be used in the pilot program were inspected by FMCSA in June 2012 and received Commercial Vehicle Safety Alliance (CVSA) decals. The vehicles will be reinspected prior to installation of electronic monitoring devices and CVSA decals applied, as appropriate. Additionally, during the past 12 months, one driver who will participate in the pilot program was placed out-of-service for having an expired Licencia Federal de Conductor (LFC) during a roadside inspection. The FMCSA confirmed that this driver's LFC has since been reinstated. This driver was also subject to several subsequent inspections and has not been placed out of service, indicating that this deficiency was adequately addressed.

The Teamsters noted that Grupo Behr's insurance history has a period between July 2007 and April 2010 where "cancelled" is listed six times. Based on this information, the Teamsters questioned if Grupo Behr will be able to obtain and maintain insurance.

FMCSA Response: The insurance history questioned by the Teamsters for Grupo Behr is associated with the operating authority number MX630115. A review of the insurance history for MX630115, which is publicly available on FMCSA's Licensing and Insurance website, reflects no lapse in either required bodily injury-property damage liability insurance or cargo insurance coverage for Grupo Behr from July 2, 2007, through April 3, 2010. The policy cancellation notices associated with Grupo Behr's MX630115 operating authority are the result of the insurance industry's common practice of sending cancellation notices to FMCSA prior to the end of the term of insurance coverage, because of FMCSA's requirement that they notify the Agency 30 days prior to the end of the policy. FMCSA notes that the Agency's previous cross border Demonstration Project

was terminated on March 9, 2010, and Grupo Behr's provisional operating authority was revoked. Grupo Behr's insurance was not cancelled prior to the termination of the Demonstration Project.

In the October 14, 2011, notice, FMCSA explained that, based on the information provided by Advocates, OOIDA, and Teamsters, the Agency was conducting additional reviews of Grupo Behr's inspections and vehicles. As a result, the Agency would not issue long-haul operating authority to Grupo Behr until such time as the reviews were complete, and the above noted comments were addressed in a subsequent Federal Register notice. This notice satisfies that commitment by the Agency.

During the review of Grupo Behr's operations, it was determined that Grupo Behr operated beyond the scope of its operating authority. Grupo Behr had a lease agreement with a U.S.-based motor carrier, Maria Guadalupe Carrillo Cervantes (USDOT # 1553781). However, per section 219(d) of the Motor Carrier Safety Improvement Act of 1999 (MCSIA) [Public Law 106-159],<sup>1</sup> no Mexico-domiciled commercial zone carrier may lease vehicles for use beyond the commercial zone. Specifically, this statute reads:

**SEC. 219. FOREIGN MOTOR CARRIER PENALTIES AND DISQUALIFICATIONS.**

(d) LEASING.—Before the implementation of the land transportation provisions of the North American Free Trade Agreement, during any period in which a suspension, condition, restriction, or limitation imposed under section 13902(c) of title 49, United States Code, applies to a motor carrier (as defined in section 13902(e) of such title), that motor carrier may not lease a commercial motor vehicle to another motor carrier or a motor private carrier to transport property in the United States.

FMCSA issued a Notice of Violation (NOV) to Grupo Behr on November 9, 2011, citing Grupo Behr for operating beyond the scope of its operating authority by leasing vehicles

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<sup>1</sup> Pub. L. 106-159, 113 Stat. 1748 (December 9, 1999); 49 U.S.C. 521 note.

to Maria Guadalupe Carillo Cervantes. Grupo Behr and Maria Guadalupe Carrillo Cervantes terminated this agreement on November 11, 2011.

The Agency required Grupo Behr to provide a corrective action plan to ensure that the company had ceased all leasing agreements, and would ensure no further transportation outside of the commercial zones. In June 2012, FMCSA conducted a focused investigation of Grupo Behr and confirmed that since the NOV, there are no inspections or evidence of Grupo Behr's commercial motor vehicles operating beyond the U.S. municipalities on the U.S.-Mexico border and their commercial zones. A copy of this focused review was added to the carrier's PASA document on the Pilot Program Web site.

Finally, during the focused investigation, FMCSA reviewed the mandatory elements of the PASA to determine if Grupo Behr remained in substantial compliance as required by Appendix A to Subpart B of 49 CFR Part 365.

Two violations that were not found during the PASA were discovered during the focused investigation. Grupo Behr was using a driver vehicle inspection report (DVIR) form that listed the bumper; engine; cabin floor; fuel tank; cab; tires; drive shaft; muffler; chassis; rear door; air tanks; trailer; 5<sup>th</sup> wheel; and seal/tiedowns, but did not list service brakes, including the trailer brake connections; parking brake; steering mechanism; lighting devices and reflectors; horn; windshield wipers; rear vision mirrors; wheels and rims; and emergency equipment as required on the DVIR. The Agency subsequently received a corrective action letter from Grupo Behr committing to using a revised version of the DVIR. A copy of this letter is included with the PASA documentation on the pilot program Web site.

In addition, at the time of focused investigation, Grupo Behr could not provide adequate documentation of required alcohol testing. Grupo Behr addressed this issue in its corrective action letter. Since the closeout of the focused investigation, Grupo Behr provided sufficient information to the Agency to show that alcohol testing was done at the required 10 percent sampling rate. To demonstrate this, the focused review documentation was added to the initial PASA on the Agency's Web site to reflect the two reviews.

Grupo Behr has acknowledged affiliations with Logix Transport, Inc. (USDOT # 2210821). Logix Transport, Inc. was originally granted operating authority as a U.S.-based motor carrier on December 8, 2011, but requested that the operating authority be converted to a property broker certificate. Logix Transport, Inc. was granted a property broker certificate on May 9, 2012. FMCSA has no evidence that Logix Transport, Inc. operated as a motor carrier in the United States.

Grupo Behr is also affiliated with the U.S. freight forwarder Pacific Customs Services (Grupo Logix), Freight Forwarder number 9476. FMCSA has no evidence that Pacific Customs Services (Grupo Logix) has operated as a motor carrier in the United States.

FMCSA also notes that Grupo Behr was affiliated with Logistics Transport dba Logix Transport USDOT 850185, Logistics Transport was found to have an unsatisfactory safety rating in March 2003 and has not operated since. This is well beyond the 3 years of history the Agency requests that applicants supply on their OP-1 (or OP-1MX) application for authority.

As noted above, Grupo Behr had a business relationship with Maria Guadalupe Carrillo Cervantes (USDOT 1553781), which currently has vehicle and driver OOS rates

of 14.5% and 2%, respectively, based on the 24-month record ending December 14, 2012. Maria Guadalupe Carrillo Cervantes has no SMS BASICs above threshold levels. In addition, FMCSA has established that the business relationship between Grupo Behr and Maria Guadalupe Carrillo Cervantes no longer exists.

We are also aware that Grupo Behr is affiliated with Logix Transport, Inc. (USDOT number 2210821/MC number 767176). However, this enterprise carrier's authority is inactive.

Based on the original passed PASA, completion of the focused investigation, corrective action documentation, and improved out of service rates and SMS scores, FMCSA deems Grupo Behr's safety record sufficient for participation in the pilot program. Therefore, FMCSA will issue provisional operating authority for participation in the pilot program.

Issued on: January 29, 2013

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Anne S. Ferro  
Administrator