

Cross-Border Workers' Compensation and Social Security Policy in North America

*An Analysis of the NAFTA Trucking Dispute through
the Eyes of a Workers' Compensation Practitioner*

Tequila J. Brooks*

Introduction

It's 2007. Juana Mendoza, a truck driver working for a company domiciled in Mexico, is driving her truck through rural Minnesota at midnight, trying to finish a run. A moose crosses in front of her truck on the highway and she swerves to avoid hitting the moose and damaging her employer's valuable truck. A passerby calls 911 on his

*Tequila J. Brooks, Attorney and International Consultant, Alexandria, VA.
Email: tequila.brooks@earthlink.net

cell phone, and Juana is rushed to the nearest emergency room for critical care. When she wakes up briefly from a coma three days later, hospital personnel ask for her insurance card. She hands them her IMSS (Instituto Mexico de Seguro Social) card. This is the card she has from the Mexican Institute for Social Security that allows her, as an employed and insured worker in Mexico, to obtain medical treatment from IMSS clinics throughout Mexico (for both on-the-job and off-the-job injuries, illnesses, and accidents). The U.S. hospital personnel in the tiny Minnesota town look at the card and say, "What's this?" Juana's B-1 business visitor's visa that allowed her to be in the United States was destroyed when her truck blew up. The hospital calls but cannot reach the Department of Homeland Security Bureau of Citizenship and Immigration Services to verify Juana's visa status. She is put on a plane and deported to Mexico. During in-flight turbulence, Juana dies of her injuries. Headlines in both countries read, "Mother of three dies en route from Minnesota to Juarez because she was denied medical care by local hospital."

Dramatic? Maybe. The idea that a non-U.S. citizen might die of critical illness or injury after being denied care and deported because of lack of insurance or appropriate documents is not so preposterous, as it has happened before (Roybal, 2000). The point of this illustration is to show that this may be exactly where current United States and Mexican policy is headed if the issue of workers' compensation and cross-border trucking under the North American Free Trade Agreement (NAFTA) is not confronted and dealt with by North American policy-makers. Sadly, just as the town council often waits until someone dies at an unsafe intersection before putting up a streetlight, truckers may have to die after being denied medical care before policy-makers turn their attention to the issue of workers' compensation in the NAFTA trucking policy debate.

The purpose of this article is to discuss the strengths and weaknesses of current U.S. NAFTA trucking policy, the context in which it was made, and to theorize about why the policy is the way it is. Why is workers' compensation not part of this policy and what recommenda-

tions need to be made to improve this policy? A secondary purpose of this article is to place the issue of NAFTA trucking policy and workers' compensation insurance in the larger context of health care and social security issues that affect the United States and Mexico, both as neighbors with interlocking labor markets and as trade partners in NAFTA.

Context of NAFTA, Trucking, Safety, and Workers' Compensation

The intersection of NAFTA, trucking, and safety is one of the most sensitive and explosive issues in North American free trade – which is itself a sensitive and explosive issue for many groups in North America. The North American Free Trade Agreement, which went into effect in January, 1994, called for Canada, Mexico, and the United States to open their borders to the other NAFTA partners' trucks, buses, and other large long haul vehicles (referred to as “carriers” by Department of Transportation statistical sources). This was to be carried out in a limited fashion in 1995 and to be completed by 2000. The idea of trucks and buses driving through a seamless North America drew opposition from a number of different sources. CANACAR, the Mexican National Association of Cargo Transport Carriers,¹ opposed the entrance of U.S. cargo transporters into Mexico because of concerns about business competition from U.S. and Canadian trucking companies.

The International Brotherhood of Teamsters (IBT) opposed a North American border-free trucking zone for a number of different reasons. The IBT and other U.S. unions opposed NAFTA because they felt that NAFTA was a new spin on an old story. The classic example was in the textile and clothing industries. As soon as unions made inroads organizing the textile and clothing industries in the U.S. northeastern

¹ See the Camará Nacional de Autotransporte de Carga Web site at: <http://www.canacar.com.mx/>

seaboard states, these industries moved south. As soon as these industries moved to the Carolinas and other southern states and unions made inroads in improving the working conditions in southern U.S. textile and clothing plants, employers began to move factories outside the United States. The labor movement recognized that NAFTA would result in job losses for U.S. workers and weaken U.S. unions' ability to improve conditions for their members. The implementation of a labor side agreement (North American Agreement on Labor Cooperation, or NAALC) to NAFTA, and passage and implementation of a Trade Assistance Act to compensate and retrain U.S. workers who lost their jobs as a result of demonstrable effects of NAFTA and other free trade agreements, did little to allay the U.S. labor movements' concerns. The IBT, a union primarily of truck and other large long haul vehicle drivers, objected in particular to the NAFTA trucking provisions because of the concern that Mexican truckers were paid less and had fewer protections and that the use of Mexican trucks in the United States would lead to further erosion of working conditions in the U.S. trucking industry. The IBT and others were also concerned that Mexican trucks presented a safety risk both to their own drivers and to others on U.S. freeways.

Safety concerns and political opposition from a number of different sectors, including the environmental sector on both sides of the border, kept the United States from implementing the NAFTA trucking provisions according to the timelines established within NAFTA. On February 6, 2001, a NAFTA Chapter 20 dispute panel ruled in Mexico's favor in Mexico's 1998 challenge and ordered the United States to implement the NAFTA trucking provisions. On November 27, 2002, U.S. President George Bush removed the moratorium on the entrance of Mexican long haul cargo vehicles and buses. On June 7, 2004, the U.S. Supreme Court ruled that the U.S. Department of Transportation (DOT) regulations that apply to the registration, inspection, and entrance requirements of Mexican trucks under NAFTA could be implemented without an environmental impact assessment.² The DOT had promulgated these regulations in May 2001, after Mexico prevailed in the NAFTA Chapter 20 dispute resolution process (*Cross-Border*

Trucking Services and Investment, 2001). In December 2001, congressional legislation setting forth the U.S. DOT's 2002 budgetary appropriation prohibited the DOT from using any of its funds to review or process Mexican long haul vehicle applications until the DOT promulgated specific application and safety requirements for Mexican long haul vehicles. Two interim DOT rules went into effect on May 3, 2002, but their application was held up until June 7, 2004.

Regulations and Other Policy Measures

NAFTA trucking policy in the United States is dictated by U.S. DOT regulations and some U.S. laws governing driver working conditions. The U.S. DOT published a series of manuals outlining procedures, requirements, and standards for truckers on its Web site.³ The manual, *Cross-Border Operating Handbook for Foreign Motor Carriers Entering the United States*, published in May 2002, summarizes these requirements. Mexican and Canadian long haul motor vehicles must undergo thorough safety audits which check for compliance with a number of requirements. These include whether the driver has a commercial driver's license, is qualified to drive the large long haul motor vehicle, has been tested for alcohol use and controlled substances, whether proper safety management practices are in place, and whether the vehicle is fully inspected and maintained and in good repair. The audit also checks to make sure that there is proof of financial responsibility for the large long haul motor vehicle and, if hazardous materials are being transported, whether safety compliance requirements are being met. Importantly, U.S. DOT regulations require registered long haul companies to submit a U.S. address for service of process and other legal communication.

² *Department of Transportation et al. v. Public Citizen et al.*, 541 U.S. 752; 124 S. Ct. 2204; 159 L. Ed. 2d 60. Available at: <http://a257.g.akamaitech.net/7/257/2422/07june20041115/www.supremecourtus.gov/opinions/03pdf/03-358.pdf>

³ See the U.S. DOT Web site at: <http://www.dot.gov/NAFTA/index.html>

The regulations and handbook require Mexican and Canadian large long haul vehicles to demonstrate, during the border-crossing inspection, that they have obtained insurance for bodily injury, property damage, and cargo liability before they are allowed to operate within the United States. The regulations do not specify that the carriers must demonstrate that they have obtained workers' compensation insurance for the drivers. The regulations and handbook indicate that Mexican and Canadian carriers must comply with all state, federal, and local laws and regulations, but refer specifically to licensing and other transportation requirements. The regulations and handbook do not specifically mention the issue of workers' compensation coverage. The state, federal, and local law clause can be easily misinterpreted or misunderstood by the owner of a foreign transport company who is unfamiliar with U.S. laws and who may not know anything about health care and workers' compensation insurance in the United States.

Mexican motor carrier companies (including both bus and long haul cargo companies) are subject to certain provisions of the U.S. Fair Labor Standards Act, which governs the federal minimum wage, child labor, and overtime. It is administered by the Wage and Hour Division of the U.S. Department of Labor. These companies are subject to the child labor provision that drivers of long-haul carriers be at least 18 years old. Drivers who go beyond 25 miles of the U.S. border and who spend more than 72 hours in the United States on a single visit must be paid the U.S. federal minimum wage (\$5.15/hour). These companies may not reduce the minimum wage artificially for drivers in this category by requiring those drivers to pay for tolls, gas, oil, tires, truck repairs, or food and lodging, etc. The *Cross-Border Handbook* is silent on the issue of overtime wages for drivers. In fact, Mexican overtime provisions are stronger than those in the United States. They require the employer pay two times the hourly wage for work over 40 hours/week instead of 1.5 times, as paid in the United States.

Mexican and Canadian motor carrier companies must also comply with occupational health and safety standards governed by the U.S. Occupational Safety and Health Administration. The *Cross-Border*

Handbook specifically mentions that Canadian and Mexican long haul vehicles must comply with U.S. civil rights provisions prohibiting discrimination against passengers, but is silent on the issue of compensation for on-the-job injuries and workers' compensation insurance.

Statistics in the Era of the 25-Mile Zone

The Analysis and Information Division of the U.S. DOT Federal Motor Carrier Safety Administration keeps detailed statistics on the number of registered Mexican and Canadian motor carrier companies and drivers as well as the number of accidents that occurred in 2003 involving Mexican and Canadian long haul cargo vehicles and buses. These statistics are publicly available and can be found at the division's NAFTA Safety Stats Web site.^{4, 5}

In 2003, 13,923 of the 682,039 (2%) active long haul motor carrier companies registered with the DOT and 31,380 of the 5,348,701 (0.6%) commercial drivers licensed to operate in the United States were domiciled in Mexico.⁶ Of a total of 81,549 crashes involving registered long haul motor vehicles in 2003, only 103 involved vehicles domiciled in Mexico - less than 0.1 percent. Only one of the crashes involving a Mexican-domiciled vehicle resulted in a fatality, in California. Of the crashes that occurred in 2003 involving Mexican-domiciled vehicles, 69% occurred in Texas, 22% in California, 4% in New Jersey, 2% in Illinois, 1% in New Mexico, and 1% in Ohio.

The NAFTA Safety Stats demonstrate that the DOT regulations governing Mexican trucks and buses entering the United States seem to be working. Crashes on U.S. highways involving Mexican large long

⁴ See: <http://ai.volpe.dot.gov/International/border.asp>

⁵ The numbers in this section are based on the author's analysis of the NAFTA Safety Stats publicly available database.

⁶ 21,235 of the total active carriers operating in the United States were Canadian (3%), with 150,258 active Canadian commercial drivers (3%).

haul vehicles are a tiny fraction of overall interstate crashes involving large motor carrier vehicles. In fact, some observers wonder whether the U.S. DOT border-crossing requirements and inspections that apply to Mexican and Canadian trucks are more stringent than those that apply to U.S.-based trucks and buses in the state of Texas and draw resources from inspecting and regulating U.S.-based Texas trucks and buses (Oberman, 2004a).

NAFTA Safety Stats also demonstrate that no matter what safety measures are put into place, large motor carrier crashes still occur. On-the-job accidents are the logical result of some of those crashes. The stats are silent on one important dimension of the 103 accidents involving Mexican-domiciled trucks and other large vehicles in the United States. What happens to the Mexican drivers who get hurt while driving in the United States? Critically, these early statistics are drawn from the limited number of large motor carrier vehicles that traditionally operate within the 25-mile border zone at the U.S.-Mexico and U.S.-Canada borders - before these vehicles were allowed to operate throughout the United States. The implementation of NAFTA's trucking provisions in late 2004 affords Mexican and Canadian companies the opportunity to send drivers on longer distances throughout the United States, with a number of unforeseen consequences. That the consequences of even a limited opening of the borders to Mexican and Canadian carriers cannot be controlled is exemplified by the fact that there have already been accidents involving Mexican motor carriers in New Jersey, Illinois, and Ohio - states thousands of miles outside the 25-mile border zone - before the NAFTA trucking provisions were fully implemented.

U.S. DOT statistics are useful for determining in which states accidents involving Mexican and Canadian domiciled large long haul vehicles occur, and how the number of such accidents compare to the overall number of registered long haul vehicles in the United States. There is a dearth of statistical information, however, that workers' compensation officials, insurers, and practitioners need in order to craft intelligent enforcement measures and policy to address the issue

of on-the-job injuries suffered by Mexican and Canadian drivers in the United States. U.S. DOT statistics do not indicate how many Mexican and Canadian busing and trucking companies have workers' compensation coverage. Nor do state workers' compensation administrations have such statistics available.

For example, the Texas Workers' Compensation Commission (TWCC) has an excellent online database that allows members of the public to type in the name of a company and see whether the company has workers' compensation insurance coverage and what insurance company carries that coverage.⁷ The TWCC database is searchable by the employer's name and city in Texas. In contrast, the U.S. DOT has a publicly available database of all of the trucking and other long haul carrier companies registered with the DOT.⁸ This database is part of the Federal Motor Carrier Safety Administration's Safety and Fitness Electronic Records System (SAFER) Web site.⁹ It is possible to search this database to identify registered trucking and busing companies by state or province throughout North America - including Mexican states and Canadian provinces. Unlike the SAFER online database, the TWCC covered employer database does not include Mexican states and Canadian provinces in its search criteria, so it is not possible to easily determine whether or not Mexican carriers have Texas workers' compensation coverage. The only way to determine this information would be to do a search in the federal SAFER database to obtain the names of long haul transport companies domiciled in each Mexican state and each Canadian province, then type in the name of each company in the TWCC database - a time-consuming process, given the fact that there are over 13,000 Mexican companies registered with the U.S. DOT and tens of thousands of Canadian companies.

⁷ See: <https://www.txcomp.twcc.state.tx.us/twccprovidersolution/emprsrhglbhtml>

⁸ See: http://li-public.fmcsa.dot.gov/LIVIEW/pkg_carrquery.prc_carrlist

⁹ See: <http://safersys.org/>

The dearth of relevant workers' compensation coverage data for Mexican and Canadian large long haul vehicles entering the United States under the NAFTA trucking provisions is an obstacle to state enforcement of workers' compensation laws in relation to these vehicles. Having accurate, readily available statistical information would make it possible for state workers' compensation insurers to target education campaigns at such companies and drivers and to engage in other enforcement activities.

Statistics in the Era of the 25-Mile Zone vs. Statistics in the Full Implementation Era

In analyzing the U.S. DOT's NAFTA Safety Stats, it is important to recognize that these statistics were generated before the NAFTA trucking provisions were fully implemented.

One consequence of the implementation of NAFTA's trucking provisions is that now Mexican and Canadian large motor carriers are free to transport people and cargo throughout the entire continental United States, resulting in longer hauls over greater distances - with the heightened risk of an increased number of accidents involving drivers who are not familiar with U.S. highways and roads. A critical, secondary consequence is that drivers of these vehicles may be involved in accidents thousands of miles from home - including on-the-job accidents. An environment in which Mexican and Canadian drivers were limited to operating within 25 miles from the border between the United States and their home country made it possible for these drivers to arrive home more quickly for medical care and compensation from a system they were accustomed to. Communities at the U.S.-Mexico border such as El Paso/Juarez, Reynosa/McAllen and Tijuana/San Diego are linked by a number of cross-border ties such as family relationships and cultural commonalities that may serve to ease the effects of an on-the-job accident. For example, the Texas Workers' Compensation Commission has a long history of dealing with administering workers' compensation benefits involving workers domiciled

in Mexico (Juarez, for example) and working in the United States (El Paso, for example). According to Luis Mata, Field Office Manager of Region IV of the Texas Commission based in El Paso, Texas, the commission does not administer many benefits directly to Mexican addresses. While there are no formal statistics of the phenomenon, it is generally thought that workers who live on the Mexican side of a U.S.-Mexico border community (and work on the U.S. side) use the local U.S. address of a relative or friend for purposes of matters related to the U.S. job, including the administration of workers' compensation benefits. The human element that results from the convenience of linked cross-border communities means that the injured worker may easily attend a workers' compensation hearing on the U.S. side of the border on a day pass. There may be family members on both sides of the U.S.-border community who can transport the injured worker to medical appointments at both U.S. and Mexican health care facilities.

The conveniences of the cross-border community are not in place for drivers of large long haul motor vehicles who may now drive outside the border region. These drivers may have accidents on U.S. freeways and suffer on-the-job accidents in and near communities that do not have the capacity to deal with cultural and language differences. What has traditionally been an issue recognized by workers' compensation officials and medical facilities in some states at the U.S.-Mexico border will now be an issue that must be faced by workers' compensation officials throughout the United States. This is not simply an issue that involves a Mexican driver who is hurt on the job in a foreign country thousands of miles from home and family. It is an issue that implicates high costs for everyone involved - which makes it all the more puzzling why the issue has been ignored by policy-makers and workers' compensation insurance companies. The Mexican motor carrier company may be liable not only for fines that can be levied by state workers' compensation agencies for non-compliance, but also for lawsuits by injured drivers not covered by some form of workers' compensation insurance. Local emergency rooms, hospitals, and other medical facilities may be stuck bearing the cost of providing medical services to injured Mexican drivers when they follow the Hippocratic

oath and regulations requiring that they provide emergency medical care to the uninsured - meaning that local taxpayers and community coffers will be tapped to pay for medical care for foreign drivers whose employers could have easily obtained workers' compensation insurance.

Representatives of some trucking industry groups predict that few Mexican long haul motor carrier companies will take advantage of the NAFTA trucking provisions, given the high cost of complying with requirements to enter and operate in the United States. Some of these representatives are not concerned about competition from Mexican long haul motor carrier companies because these companies are only allowed to transport cargo from points in Mexico to points in the United States but not between U.S. cities (Oberman, 2004b). These predictions do not necessarily mean that Mexican long haul motor carrier companies will not take advantage of NAFTA trucking provisions.

Mexican bus companies have been positioning themselves for over a decade to break into the U.S. market to serve the millions of Mexicans and Americans of Mexican descent who travel back and forth between the United States and Mexico (Lan, 1999, 2000). Unlike in the United States, where one large national company has a virtual monopoly on bus services, Mexico has thousands of independent bus companies, many of them world class. For example, bus companies like Primera Plus feature buses manufactured by Mercedes-Benz whose safety standards and specifications exceed those required by U.S. law, are more comfortable than airplanes, show movies on long rides, and even offer a ham sandwich (with a tiny slice of hot pepper) and a can of soda to riders. Now that these bus companies have access to the U.S. highways, they will certainly give U.S. bus companies and even airlines a run for their money when it comes to traveling to the interior - and beaches and other tourist spots - of Mexico. Nor can the increased manufacturing in the interior of Mexico of goods (like automobiles) for the U.S. market (for example, the only factory in the world that produces Volkswagen's new "Bug" is in the interior of Mexico) be ignored. Moreover, Mexican farmers and corporate agricultural producers retooled production of fruits and vegetables for U.S. markets in the

NAFTA era, and the implementation of the NAFTA trucking provisions is critical to the transport of these perishable food items to their destinations in the U.S. market (Hufbauer et al., 2004). It cannot be assumed that sophisticated Mexican motor carrier companies that before only had the capacity to transport these goods to the border will not take advantage of the implementation of NAFTA's trucking provisions to transport these goods to their destination in the interior of the United States.

By ignoring and not addressing the complex array of issues involving the consequences of NAFTA trucking provisions, federal policy-makers have left drivers, long haul motor carrier companies, states, and local communities to bear the costs that will result from problems that would be completely preventable if the issues were addressed. One sad and ironic potential consequence of ignoring the issues implicated by the intersection of NAFTA trucking and workers' compensation is that Mexican drivers and companies may be blamed for the unfair shift of costs for on-the-job accidents involving Mexican drivers, increasing or causing xenophobia in the United States and eroding U.S.-Mexico relations.

Analysis of NAFTA Trucking Policy

The natural questions at the top of any workers' compensation practitioner's mind when reading about the NAFTA trucking policy are: What about workers' compensation insurance? Why isn't workers' comp insurance coverage included in the insurance audit Mexican and Canadian carriers undergo when they cross into the United States? Why has such an important issue been ignored by policy-makers when it involves such high potential costs and unfair shifting of costs to entities that should not be responsible for these costs?

It seems that the oversight is in part political and in part due to the way U.S. federal agencies make policy. Politically, the issue of workers' compensation insurance as it relates to NAFTA and Mexican trucks

and buses is politically sensitive. The advocates for implementing the NAFTA trucking provisions probably did not want to highlight the fact that Mexican drivers may get injured on the job while driving on U.S. freeways. Acknowledging the reality that drivers will have crashes and will suffer on-the-job injuries – something that workers' compensation administrators, insurers, advocates, and even many employers acknowledge on a day-to-day basis – would detract from the argument that Mexican trucks and buses are as safe as U.S. trucks and buses, and that the United States should comply with its NAFTA obligation to open its freeways to the trucks and buses of its Canadian and Mexican neighbors. In short, policy-makers may have wanted to ignore the issue of on-the-job injuries when it came to NAFTA and Mexican trucks and buses.

As a practical matter, failing to include workers' compensation insurance seems to be the logical result of the way policy is made at the federal level in the United States. If NAFTA trucking policy is an example of the norm, federal policy-making is a highly segmented and compartmentalized affair. Each federal agency makes policy solely within the scope of its own mandate. The U.S. DOT creates policy as it applies to highway safety and registration of long haul motor carriers. The U.S. Department of Labor (DOL) writes policy as it applies to statutes it administers (such as the Fair Labor Standards Act and occupational safety and health). If one asks DOL officials about whether Mexican and Canadian motor carriers must demonstrate proof of workers' compensation insurance, they respond, "Ask the Department of Transportation. That's outside our mandate." If one asks the same question of DOT officials, they say, "Ask the Department of Labor. That's outside our mandate." Nor can it be ignored that federal policy-makers do not control workers' compensation law. As with many other state law issues, federal policy-makers fail to consider the impact of federal law and policy on state law and local communities as standard operating procedure. If it isn't a federal issue, it isn't important.

This kind of policy-making prevents seeing the big picture and addressing all the issues to effectively enforce laws and to craft intelligent

policies. No criticism of the efforts of public servants in either of these federal agencies is intended. Public servants working for the U.S. DOT should be commended for promulgating and effectively enforcing some great regulations as they apply to Mexican and Canadian carriers as well as maintaining some useful and easily accessible statistics and other information sources. Public servants working for the U.S. DOL should be commended for raising workplace issues with their colleagues in the DOT. The point is simply this: as a state law issue, workers' compensation was never addressed by the federal agencies involved in making the NAFTA trucking policy. As a result, Mexican drivers may find themselves without proper medical care or treatment when they get hurt on the job while driving in the United States. Mexican trucking companies may find themselves out of compliance with state workers' compensation laws, liable for fines related to their noncompliance, and liable to their own employees for tort claims and wrongful death actions under U.S. law. Local communities, emergency rooms, and hospitals and other medical facilities may find themselves using precious funds intended to serve the uninsured in emergency situations to treat on-the-job injuries of drivers of Mexican and Canadian large long haul vehicles. These are only some of the potential unintended consequences that may occur because the issue of on-the-job injuries was ignored when the NAFTA trucking policy was designed.

The problem of workers' compensation coverage is not limited to Mexican long-haul carriers and drivers operating in the United States. What will U.S. carriers and drivers do in the event of a crash or an on-the-job injury while operating in Mexico? Do multi-state workers' compensation policies specially designed for long-haul carriers cover on-the-job injuries when drivers cross into Mexico? Will Mexican IMSS clinics accept U.S. insurance? And for those Mexican drivers in the United States, will the IMSS pay U.S. prices for medical treatment on behalf of those Mexican drivers who somehow persuade emergency rooms and other health care providers to accept the IMSS card?

Policy-makers at the U.S. federal level do not seem to be asking these questions. Politics and habit seem to have gotten in the way of asking

the right questions, and it is left to individuals to muddle through and suffer when there is no ready solution – and to pay the consequences in human and economic terms.

The North American Agreement on Labor Cooperation

The logical question to ask is what role the North American Agreement on Labor Cooperation (NAALC) had in the development of NAFTA trucking policy. The NAALC is the side agreement to NAFTA. The NAALC created a small international organization called the Commission for Labor Cooperation (CLC) Secretariat, which reports to a tri-national Council of Ministers and Secretaries of Labor of the three NAFTA partners. Ostensibly, the CLC Secretariat would be the ideal institution to help the NAFTA partners conceive of the problem of NAFTA trucking as it intersects with the workplace – and to make recommendations of “cross-border picture” solutions to the problem.

The answer to the question is that the CLC Secretariat played no role in developing the NAFTA trucking policy. For a host of reasons about which one can only speculate and which are outside the scope of this article, the CLC Secretariat never became an effective policy development body.

To many observers, the CLC Secretariat never fulfilled its potential as an institution to address and tackle complex cross-border issues where its particular nature as a neutral North American body might come into play. Some observers feel that after its first few years of existence in the mid to late nineties, the CLC Secretariat never gained credibility with labor, business, and government and never attained high-enough a profile to make it a big player on the NAFTA trade and labor stage – ironically, as it was the institution specifically designed for such a purpose. The CLC Secretariat pales in comparison to its sister institution, the Commission for Environmental Cooperation (CEC) Secretariat. It is not only that the CEC Secretariat has a larger budget and a bigger staff than the CLC Secretariat. Over the years, the CEC

Secretariat has had strong leaders with the capacity to deal with top-level officials as equals. The CEC Secretariat took its role as a convener seriously, publicly bringing together various parties from different sides of every issue to tackle and explore the tough issues.¹⁰ Had the CLC Secretariat taken its role as a convener seriously and had it strong and credible leadership and high enough a profile, this tri-national institution would have been in the ideal position to help the federal governments of the United States, Mexico, and Canada overcome the shortcomings of federal policy-making. The CLC Secretariat could have brought together state and federal policy-makers, business organizations, unions, independent drivers' associations, insurers, health care providers, and community hospitals to explore and tackle the issue of cross-border trucking and on-the-job injuries. As it is, such a meeting was never convened.

In 1998 and 1999, the CLC Secretariat conducted two meetings of a Working Group on Cross-Border Workers' Compensation. The group stopped meeting in 1999, when a survey commissioned by it concluded that there was no current perception of a cross-border workers' compensation problem. Critics have argued that the survey produced was flawed because it did not ask the right questions, did not include a hypothetical that would have generated richer responses, and was not sent to private insurers who could have shed light on the issue of cross-border workers' compensation issues. Another shortcoming of the working group is that it included only a few government officials and none of the private parties - employers, workers' compensation insurers, employee groups, unions, and plaintiff and defendant workers' compensation attorneys - who held information and knowledge relevant to the issue. In short, these critics believe that the CLC working group was hampered due to political reasons.

In 2002, researchers at the CLC Secretariat conducted an internal focus group that brought together North American thinkers and actors

¹⁰ See the CEC Secretariat's Web site at: <http://www.cec.org>

who could shed light on the issue. Unlike the working group of 1998 and 1999, this day and a half focus group included non-governmental actors, including a safety expert from the U.S. IBT, a representative from the U.S. American Trucking Association, and an attorney who had dealt with the problems faced by Mexican workers (both documented and undocumented) in the United States who had been hurt on the job and encountered obstacles in receiving workers' compensation benefits due to cross-border issues. Other participants included experts in Mexican social security law and policy, a physician who treated injured workers in Mexico, and an expert in a Canadian inter-provincial agreement designed to make it so that Canadians who are injured while working outside their home province are properly treated and compensated. The focus group concluded that a problem existed and that many people had encountered cross-border workers' compensation problems years before truckers and bus drivers under NAFTA were allowed to venture outside the 25-mile border zone.

With only tepid support of CLC Secretariat directors and less support from the NAALC labor ministries, nothing ever really happened on the issue of cross-border workers' compensation at the CLC Secretariat. Even if it had, it is questionable that the top-level policy-makers and international negotiators at the U.S. DOT and U.S. DOL would have incorporated the CLC Secretariat in the sensitive policy development and negotiations that resulted in NAFTA trucking policy.

Government Alternatives to the NAALC

In the absence of action by the CLC Secretariat and the Council of Ministers, federal policy-makers did convene many of the parties who should reasonably be involved in the dialogue to develop policy addressing the NAFTA trucking issue. In May 2002, the U.S. DOT organized a conference in San Antonio, Texas, in which it brought together U.S. DOT and U.S. DOL officials and their Canadian and Mexican counterparts, federal highway safety officials, and representatives from the transport industry in the United States, Canada, and

Mexico.¹¹ Notably absent from the speaker list were state officials administering workers' compensation and other insurance laws, representatives of the Mexican Institute of Social Security (IMSS, the primary health care provider for on-the-job and off-the-job injuries in Mexico), representatives of transport worker unions and independent driver associations, representatives of insurance companies, and representatives of health care industry. Consequently, the issues that were not raised in this conference were the impact of the NAFTA trucking on state workers' compensation law and administration, the role unions and drivers have in ensuring safety throughout North America, ways in which insurance companies can address the issue, potential cross-border solutions involving IMSS, and how health care providers, emergency rooms, and hospitals in communities throughout the United States and North America should deal with injured truck and bus drivers domiciled in Mexico and Canada.

Private Sector Alternatives to the NAALC and Industry Initiatives

In the absence of effective government policy development measures addressing the workers' compensation and health care implications of the NAFTA trucking provisions, the private sector has not advocated for attention to the issue. The logical business sector to raise the issue would be the insurance industry - both general insurers because of the potential liability that can arise as the result of Mexican and U.S. large long haul motor carrier companies failing to obtain workers' compensation insurance coverage for their drivers, and workers' compensation carriers because of the revenue potential involved in insuring Mexican and Canadian trucks registered to operate on U.S. highways. The insurance sector has been strangely silent on the issue. Notably, the National Association of Insurance Commissioners committee that has

¹¹ The NAFTA Land Transportation Information Conference was held May 28-31, 2002, in San Antonio, TX. For more information, see: <http://www.dot.gov/NAFTA/conf.html>

been working on normalizing cross-border insurance coverage issues under the trucking regulations did not even recognize the issue of workers' compensation insurance until the December 2004 meeting in New Orleans.

Where to from Here?

The obvious solution

The most obvious potential solution to the workers' compensation aspects of the NAFTA trucking policy would be for the U.S. DOT to amend the trucking regulations to require Mexican and Canadian long haul carrier companies to obtain appropriate workers' compensation insurance coverage and for border inspectors to check for this coverage when they conduct the document and safety checks when registered Mexican and Canadian trucks and buses cross the border. Such a requirement would not be too burdensome on the border inspectors since they are already conducting thorough inspections, including inspections of compliance with DOT insurance requirements. Nor would it be too burdensome on the Mexican and Canadian long haul carrier companies, who are ostensibly required to obtain such coverage under state law and who could be saved from other kinds of liability that would likely result from not having such coverage. The amended regulation could be accompanied by educational materials for long haul carrier companies and drivers about what to do in the case of an on-the-job injury in the United States. DOT databases could be amended to include workers' compensation coverage information as well as the other useful information currently available.

One argument against such a federal regulation is that workers' compensation is a state law requirement. This argument is not very strong, however, given that other kinds of insurance coverage currently required by the DOT are also governed by state law. Arguably, the DOT has the constitutional authority to require such coverage as the result of the federal government's authority to regulate interstate commerce -

not to mention its authority to regulate international commerce pursuant to the U.S. Constitution.¹² Moreover, there is a precedent for federal regulations requiring an employer to obtain workers' compensation coverage or its equivalent when a foreign employee is involved. The H-2A regulations, governing visas for foreign temporary agricultural workers, require employers who hire such workers to obtain workers' compensation coverage or its equivalent for these workers.¹³ For a state like Texas, which does not require employers to have workers' compensation coverage, adding language regarding the equivalent to workers' compensation coverage may overcome any potential federal/state constitutional conflict that may arise. Since 69 percent of the accidents involving registered Mexican long haul carriers operating in the United States happen in Texas, such a regulation would be beneficial to the Texas court system because legal cases involving injuries to drivers domiciled in Mexico would be handled by the Texas Workers' Compensation Commission, not Texas courts in the form of tort actions. Moreover, such a regulation would provide the Texas Commission with the opportunity and information to educate Mexican and Canadian long haul carrier companies as well as the companies that write workers' compensation insurance about the benefit of voluntarily obtaining workers' compensation coverage in the state of Texas.

The obvious solution may appear simple and elegant. It is also a solution that could - and should - be implemented unilaterally by the U.S. Department of Transportation in the short term. The problem with the obvious solution is it does not address several issues that underlie the root of the problem that resulted in oversights and weaknesses in the way NAFTA trucking policy was made in the first place. The most glaring oversight was that state policy-makers, especially state workers' compensation administrators, were not consulted in any meaningful way.

¹² U.S. Constitution, Section 8, Clause 3: "The Congress shall have Power ... To regulate Commerce with foreign Nations."

¹³ See, 20 CFR 655.100-199.

This lack of consultation has a number of negative consequences:

1. State workers' compensation administrators and policy-makers may not have complete information to understand and address the implications that the NAFTA trucking provisions may have on their workers' compensation systems and local health care systems. When a Mexican or Canadian driver suffers an on-the-job injury while driving through a U.S. state, state administrators and policy-makers will be unprepared to handle the situation.
2. Federal policy-makers may miss out on the rich knowledge and experience state workers' compensation administrators and policy-makers can contribute to developing NAFTA trucking safety policy. Workers' compensation law and policy is simply too nuanced and complicated for a federal agency to address without the input of the people who administer and enforce this law and policy on a day-to-day basis.
3. Federal policy-makers have missed out on the opportunity to incorporate a safety measure that pre-dates both occupational health and safety laws and highway safety laws - the incentive provided by the potential of workers' compensation liability for employers to keep workplaces safe (including mobile workplaces like long haul trucks and buses). Federal inclusion of and cooperation with state workers' compensation administrators and policy-makers would simply increase the chances that there will be fewer accidents and that those accidents that result in on-the-job injuries will have fewer negative, unintended consequences for the drivers and companies involved.
4. Creative opportunities for law enforcement and policy-making will be lost.

There are simply too many issues and implications of NAFTA trucking, safety, workers' compensation, and health care to be addressed in this article - issues that state policy-makers and workers' compensation administrators are aware of. None of these issues will come to light or be addressed effectively without the involvement of state parties.

The same principles apply when it comes to federal inclusion of and cooperation with private parties – workers’ compensation insurers, employer and business groups, unions and employee groups, and the private workers’ compensation attorneys who represent employees, insurers, and employers. When it comes to excluding private parties – whether intentionally or unintentionally – government actors at the federal and state level miss out on the rich knowledge and experience of those who implement government policy on a day-to-day basis and deal with its strengths and weaknesses on a practical level. Government policy-makers have a particular point of view that must be balanced and questioned by private parties who have different points of view. Government policy-makers also miss out on the law and policy implementation and enforcement potential of private parties. A few examples of such private contributions to implementation and enforcement:

- Insurers can encourage employers to maintain safe workplaces to reduce premiums.
- Unions and employee groups can contribute to workplace safety and accident prevention by educating drivers and bringing a driver perspective to safety programs.
- Employers can implement safety measures to avoid liability and share these ideas with other employers.

Moreover, there are clearly areas of knowledge that private insurers have (i.e., What would a workers’ compensation policy for a Mexican trucking company that operates periodically in several U.S. states look like?). It is impossible to know without the input of workers’ compensation insurers.

There is no substitute for genuine inclusion and dialogue where parties with different points of view are able not only to express those points of view but to listen to the points of view of other parties. This kind of genuine dialogue allows parties with different points of view to begin to build a joint understanding of a complex issue and develop intelligent policy based on that joint understanding. Unfortunately,

there is little likelihood that the institution ostensibly designed to conduct this kind of broad-based policy dialogue – the CLC Secretariat – has the capacity to do so in the immediate future. It is up to federal agencies like the U.S. DOT and the DOL to begin this work in the absence of other alternatives. It is also up to creative and enterprising state workers' compensation administrators and policy-makers to find ways to address these issues.

Some not so obvious solutions

As complicated as the implications and consequences of the NAFTA trucking provisions may be, these provisions are simply one sliver in the overall implications of other NAFTA issues and the complicated relationship between the United States and Mexico and, to a lesser extent, the United States and Canada. Many of these issues predate NAFTA, such as the increasingly integrated U.S.-Mexico labor market, migration, the fact that there are currently millions of Mexicans working in the United States who are not covered by social security in either country, and the fact that many believe social security systems in both the United States and Mexico to be under economic strain.

This article has not explored the issue of U.S. drivers of large long haul vehicles in Mexico who suffer on-the-job injuries. As U.S. policy-makers consider formal requirements that Mexican and Canadian large long haul carrier companies obtain workers' compensation coverage for drivers who enter the United States, Mexican policy-makers might consider requiring that comparable U.S. companies register U.S. drivers for coverage under the federal IMSS workers' compensation system. Not only would such a policy option ensure medical treatment should U.S. drivers be injured while driving on Mexican highways, but additional revenue would contribute to the financial stability of IMSS.

As discussed above, many aspects of the NAFTA trucking policy must necessarily be driven and are the responsibility of federal agencies like U.S. DOT and DOL because of the international relations issues

involved. Nevertheless, organizations of state policy-makers like the IAIABC can play an important role in developing intelligent cross-border health and workers' compensation policy. There is nothing to stop state-based organizations like the IAIABC from taking the first step of inviting DOT and DOL officials to participate in dialogue. Moreover, there are already some existing initiatives and projects that can be models for creative state-based projects or can be expanded to include workers' compensation issues. For example, the Arizona-Mexico Commission established a Health Services Committee headed by the Director of the Arizona Department of Health Services and the CEO of an Arizona hospital. One purpose of the committee is to explore and research the feasibility of encouraging private health benefit plans that can be offered and utilized in both the United States and Mexico.¹⁴ Another state-based organization that has infrastructure in place to begin exploring cross-border workers' compensation and health care issues is the Council of State Governments (CSG), an organization of state legislators.¹⁵ Within the CSG there is a council of border legislators who are in contact with and working with their counterparts in Mexico called the Border Legislative Conference,¹⁶ which is strategically placed to begin the conversation of cross-border workers' compensation issues as well as to study and develop state legislation that would address some of the issues raised in this article.

Concluding Thoughts

Despite some positive developments, the NAFTA trucking policy is flawed because it does not address issues of state and local concern such as workers' compensation coverage and health care and because it was developed without meaningful input from state policy-makers. The oversights and flaws in NAFTA trucking policy are a reflection of those in NAFTA itself. Labor and environmental activists recognized

¹⁴ See: <http://www.azmc.org/index.asp?from=health>

¹⁵ See: <http://www.csg.org/csg/default>

¹⁶ See: <http://www.csgwest.org/blc/home.html>

that NAFTA would have unintended – or, as they have argued, intended – negative consequences in the areas of labor and environment. What NAFTA proponents as well as labor and environmental activists did not recognize was that the NAFTA will have many negative, unintended consequences in a number of areas of policy that are not adequately covered by NAFTA or the labor and environmental side agreements. Workers' compensation and health care are simply two such areas. Moreover, the flaws in NAFTA and the way policy is made concerning NAFTA issues are also reflected in the way policy is made when it comes to issues that predate and were in many ways exacerbated by NAFTA, such as the implications for millions of Mexicans living and working in the United States. The NAFTA trucking policy, a complex issue itself, is simply one small part of bigger, more complex issues. Cross-border and inter-governmental cooperation and coordination and the development of targeted international agreements can contribute to resolving such issues. State actors like the IAIABC and the CSG can have a creative and active role in resolving these problems utilizing their particular state-based viewpoints.

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Tequila Brooks served as Labor Law Advisor with the Commission for Labor Cooperation Secretariat for almost five and a half years. While working at the Secretariat, she co-authored a study of the laws impacting migrant agricultural workers in Canada, Mexico and the United States (2003), was primary author and project coordinator of a tri-national clear language guide to labor and employment laws for migrant workers in North America (2004), wrote the Canadian and U.S. chapters of a study of employment discrimination and equal pay laws in North America and conducted and supervised research in the area of workers' compensation and occupational safety and health laws in North America. She is also author of the article, "An Introduction to Mexican Workers' Compensation Law for the U.S. Workers' Compensation Practitioner," published in the Fall 2003 issue of the IAIABC Journal. Prior to joining the Secretariat, Ms. Brooks practiced workers' compensation law on behalf of workers in the state of New Mexico. She has a J.D. and M.A. in Latin American Studies from the University of New Mexico and graduated from St. John's College in Annapolis, Maryland.