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U.S. Supreme Court Finally Removes Decade-long Roadblock to U.S.-Mexican Trucking

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On June 7, 2004, the U.S. Supreme Court ruling in the case of the *U.S. Department of Transportation v. Public Citizen* cleared the way for Mexican and American truckers to operate in each other's home markets. The ruling upheld the authority of Congress and the Bush administration to implement a freedom that had supposedly been granted a decade earlier under the North American Free Trade Agreement.

To eliminate the last legal barrier to giving Mexican trucks full access to American highways and vice versa, the Court overturned a 2003 ruling from the Ninth Circuit Court of Appeals in California, which had found that the federal government violated environmental law when it announced plans to open highways to Mexican trucks without conducting air-quality impact studies. The administration had argued that the appeals court was incorrect because its ruling interfered with the ability of the executive branch to comply with NAFTA. Cutting to the central issue, Justice Clarence Thomas (writing for the majority) said that U.S. regulatory agencies were under no obligation to do a full review of the potential environmental impact, the requirement that had left Mexican trucks stalled at the border for a decade.

The final wrangle over the opening of the U.S.-Mexican border to international trucking stemmed from a much earlier contest over the deregulation of transportation in particular and free trade in general. Beginning in the late 1970s, the U.S. federal government enacted a wave of deregulatory legislation aimed at transportation. The airlines were deregulated in 1978, leading to dramatic reductions in the price of tickets. The deregulation of interstate trucking, begun in 1980, culminated with the abolition of the Interstate Commerce Commission in 1994. Intrastate trucking followed, also in 1994. In each case the freer flow of trade resulted in an upswing in commercial activity and lower

prices for the consumer as such innovations as "just in time" deliveries lowered substantially the cost of producing and delivering goods throughout the United States.

The border between Mexico and the United States proved a bottleneck. Protectionist pressures kept Mexican trucks from crossing more than a few miles into the United States and made the crossing time-consuming and expensive; American trucks operated under similar restrictions when crossing into Mexico. The vision of free-flowing trade from Canada to Central America remained just that, a vision, while the perception that the United States might be promoting free trade in theory but undermining it in practice tarnished our reputation internationally and gave rise to resentments south of the border.

NAFTA and Cross-border Trucking

How did that happen? The Bus Regulatory Reform Act of 1982 imposed a moratorium on the granting of authority to Mexican and Canadian motor carriers to operate in the United States beyond a limited zone along the respective borders. The moratorium with respect to Canada was lifted the same year, giving U.S. carriers access to Canadian markets; but the restrictions on Mexican-domiciled trucks and regular-route buses remained. They could operate only in border commercial zones, generally 3 to 20 miles past a U.S. municipality's corporate limits. Beyond that limit Mexican trucks had to offload their cargo onto American trailers. When American truckers crossed the border into Mexico, they were required to do the reverse. In other words, an international shipment traveling from Mexico to the United States or vice versa demanded at least two drivers and two trailers to perform a single freight movement. The process was inefficient and therefore costly in terms of time and manpower.

NAFTA, designed to promote free trade among the United States, Mexico, and Canada, was ratified by the U.S. Congress in late 1993 and implemented on January 1, 1994.

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It was to have ended that inefficient procedure by liberalizing access for cross-border bus and truck services.

The agreement laid out sweeping modifications in transportation provisions:

- Three years after the signing of the agreement, by December 1995, Mexican and U.S. carriers were to be allowed to serve the adjoining border states of the other country. However, there were no provisions for domestic transportation within each country by a foreign-owned carrier, that is, cabotage.
- Six years after ratification, cross-border service for international commerce was to be available to any point within the United States, Canada, or Mexico. Again there were no provisions for cabotage.
- Seven years after ratification, U.S. companies might own 51 percent of Mexican trucking companies; after ten years, 100 percent ownership would be allowed. Again, there were no provisions for cabotage.

Left unresolved were such issues as labor law, local driving restrictions, cargo security, and customer service. Primary political concerns still being debated included the safety of Mexican carriers, to say nothing of insurance requirements and cargo liability for Mexican drivers operating on U.S. roads.

NAFTA Promises Delayed

Under pressure from the International Brotherhood of Teamsters, as well as environmental and consumer safety groups, the Clinton administration changed course, announcing in December 1995 that it would delay implementation of the cross-border liberalization provisions. The shift was a particular embarrassment for Federico Peña, then U.S. secretary of transportation and a strong supporter of the accord, who had traveled to San Antonio, Texas, to announce progress in opening the border to international trucking, only to find that the border was still closed.

The Mexican government, stung by the affront, brought an action before an international arbitration panel that ruled, in February 2001, that the United States could not impose a blanket ban on Mexican trucking, despite its often-voiced safety concerns. Those concerns could, however, justify treating Mexican carriers differently than domestic and Canadian carriers when processing applications.

President George W. Bush had asserted during his 2000 campaign that the United States should honor its NAFTA commitments and assured Mexican president Vicente Fox that the border would be fully opened to international trucking and to regular-route bus services. In keeping with the new spirit of openness, the Federal Motor Carrier Safety Administration, in March 2002, proposed three regulations to allow Mexican trucks to operate beyond the commercial zones, setting forth safety-monitoring procedures for all Mexican-domiciled carriers operating anywhere in the United States.¹

Before rules were issued, an FMCSA assessment found that the rules would have no significant environmental impact. The agency therefore concluded that a full

Environmental Impact Statement was not necessary. It then issued a finding of no significant impact, followed by the interim final rules. On November 27, 2002, President Bush modified the 1982 moratorium to clear the way for expanded truck and bus operations.

Claiming to be deeply concerned about the safety of the Mexican trucking stock and about the prospect of a decline in air quality, critics of NAFTA had already mounted an attack. Joan Claybrook, president of Public Citizen, in alliance with the Environmental Law Foundation and other environmental groups as well as the Teamsters, filed suit in federal court, claiming that the government had violated the National Environmental Policy Act and the Clean Air Act by opening the door to Mexican trucking, which would allegedly pollute the U.S. atmosphere. The Teamsters, it is reasonable to suggest, were less concerned with the putative environmental harm than with the threat posed by Mexican drivers competing for jobs.

The Supreme Court's unanimous ruling of June 7 finally closed the door to their legal challenges and opened the gate for cross-border trucking—more than a decade after enactment of NAFTA.

Backup at the Border

As a result of those concerns and of legal questions, crossing the border has remained a time-consuming process laden with administrative and legal requirements. Those who have been dealing with Mexico for many years have learned to maneuver through the maze with some degree of ease; novices would do well to follow their advice.

Much criticism and concern has focused on drayage or cartage, the step-by-step procedure according to which cargo coming from Mexico is transferred to another carrier legally able to operate in the United States. Drayage, it is said, results in air pollution as carriers park in line, belching exhaust as they wait to cross the border. In fact, the drayage/cartage requirement is unique to the Port of Laredo, where the trailers are transported across the border by a cartage or drayage company employed by the freight forwarder or customs broker to ensure delivery to a crossing facility from which cargo can be picked up and delivered to its final destination in the United States. The process adds seriously to costs and slows deliveries.

Laredo, the largest and busiest of the border ports, ships more than the port of New York. It has invested heavily in its infrastructure and has two relatively new commercial border-crossing facilities. The standard picture of trucks fouling the air is thus unfair to Laredo. The city has tried to keep waiting time and thus pollution to a minimum and prides itself on having some of the cleanest air in the country. State and local regulations cull out trucks with bald tires and rigs belching smoke, making it impossible for them to continue to cross at Laredo. The Columbia and World Trade bridges, restricted to commercial traffic, carry a steady stream of tractor-trailers. The first has 6 lanes; the second offers the impressive spectacle of 12 lanes of big rigs.

All other border ports, of which there are more than 20, allow the Mexican carrier to pick up the southbound cargo at

the location of the U.S. freight forwarder and move the trailer cargo through customs to execute delivery at the appropriate customer locations. Northbound cargo is handled in similar fashion: the Mexican carrier picks up the trailer with its cargo from the shipper and moves it through customs inspection before making delivery to a U.S. freight forwarder location or directly to a U.S. carrier terminal facility.

Because import duties are still applicable on some items, administrative requirements still exist to support NAFTA compliance. To complicate matters, Mexican law requires that almost all duties be collected and submitted to the Mexican government prior to physical entry of cargo into Mexico. U.S. customs brokers, in contrast, are not required to collect applicable import duties at the time of entry since the law has provisions for delayed payment.

There has long been talk of streamlining this cumbersome process, but so important is trade between Mexico and the United States that shippers have been willing to cope with the problems. Eighty percent of the trade between the United States and Mexico now moves by truck, and the volume of shipments has grown steadily, especially since the advent of NAFTA. From 1993 to 2000, there was a fourfold increase in two-way trade between the United States and Mexico, with four million border crossings annually.

The standard horror story had unsafe and polluting rigs massed at the border, waiting to cross once the Court decided on deregulation. The reality is radically different. Perhaps 90 percent of Mexican truck owners have one truck, little insurance, and no desire to travel north to a land whose language they do not know. Thus the shortage of drivers north of the border is balanced by an equally serious dearth of drivers willing to go north. Opening the border is unlikely to result in a flood tide in either direction.

Progress in Mexico

NAFTA encouraged sweeping changes south of the border as well. In 1989 the Mexican trucking industry was deregulated, allowing the number of carriers to balloon from about 350 servicing monopolistic routes to 50,000 carriers with Mexico-wide authority. The most significant difference between Mexican carrier deregulation and deregulation in the United States and Canada in the 1980s lies in the administrative control of tariffs and transportation contracts still exerted south of the border.

At the same time, the Mexican government moved to improve its highway infrastructure. The Toll Highway Development Program, initiated in 1989, led to the construction and operation of more than 5,000 miles of highway. Unfortunately, the high fees assessed by toll road operators have led many Mexican carriers to continue utilizing the non-toll federal highway system. Many issuers of bonds have, in fact, defaulted on their construction bonds. As a result, the infrastructure, although showing great improvement, is still far from the levels to which most U.S. and Canadian carriers are accustomed. Despite these difficulties, there has been a significant investment in Mexico's logistics infrastructure, including motor carrier terminals, roads, bridges, and carrier-support services.

In addition to its high cost, fuel poses another problem: sulfur content of Mexican diesel fuel is higher than the maximum levels allowed by the U.S. Department of Transportation for the domestic U.S. market. Truckers have feared that the high-sulfur diesel would reduce the efficiency of U.S.-based carrier equipment, and the low-sulfur diesel of the United States could have a similar effect on Mexican equipment if either crossed the border under the terms of NAFTA.

Critics of trucking liberalization continually raise safety issues. They paint a picture of decrepit rigs in the last stages of decay and unsafe at any speed. In fact, the older trucks in the Mexican fleet are concentrated in the drayage corridor outside Laredo; they never penetrate farther north. Long-haul Mexican trucks have become more modern, hence safer, over the past few years. The inspector general (IG) of the U.S. Department of Transportation has noted that the failure rate for Mexican trucks in California during 2000 was 27 percent, close to the U.S. national failure rate of 24 percent. The IG also reported that the failure rate for Mexican trucks had decreased from that of the preceding year.

In preparation for the Supreme Court's decision, the U.S. Department of Transportation recently announced that it was prepared to begin immediately inspecting Mexican buses and trucks to allow them to provide services between Mexico and the United States. There is nothing in NAFTA that will prevent inspectors from fully enforcing U.S. air quality and highway safety standards.

Conclusion

The preceding survey of the issues related to trucking that have been plaguing the Mexican border for so many years suggests once again the folly of protectionism. The ongoing vendetta against Mexican trucking has raised prices in the United States while discouraging the trucking industry south of the border. The efforts to prohibit Mexican drivers may have shielded American Teamsters, but they have certainly raised Mexican hackles. Given the current problems in foreign policy, it seems especially unwise to unnecessarily alienate an important neighbor to the south.

At the same time, when considering the difficulties along the border, it is worth noting the assiduity with which the trucking industries on both sides have managed to ameliorate problems and to forge ahead, despite the obstacles. A clear pathway from Canada through Mexico to Latin American may still be only a rosy vision of the future, but that vision is alive and well.

The Supreme Court has given greater substance to that vision by upholding NAFTA and allowing Mexican trucks to operate freely in the United States if they are in compliance with our regulatory structure. In deciding for the Department of Transportation, the Court has removed the remnants of trucking regulation and opened the doors to market solutions. It has clarified in no uncertain terms this country's support for free trade and the benefits that such trade confers.

1. The first regulation would establish an application process for Mexican truckers seeking permission to travel outside U.S. cities

and commercial zones along the border, and a separate application process would be set up for trucks that would remain in the border areas. The application process would require Mexican carriers to file reports on their safety practices, certifying that they follow

safety regulations while in the United States. Finally, Mexican trucking companies would have to complete a safety audit every 18 months that would include information on maintenance and repairs to vehicles as well as information about the drivers.