UNITED STATES

DEPARTMENT OF TRANSPORTATION

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

Coercion of Commercial Motor Vehicle Drivers; Prohibition

Notice of Proposed Rule

Docket No. FMCSA-2012-0377

COMMENTS

SUBMITTED BY THE

TRANSPORTATION INTERMEDIARIES ASSOCIATION

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August 11, 2014

The Transportation Intermediaries Association (TIA) submits these comments in response to the Federal Motor Carrier Safety Administration's (FMCSA) May 13, 2014 notice of proposed rulemaking on the Prohibition of Coercion of Commercial Motor Vehicle Drivers.

The Transportation Intermediaries Association (TIA) commends the FMCSA for examining ways to reduce the instances where a commercial motor vehicle driver can be coerced into breaking their Federal Motor Carrier Safety Regulations (FMCSRs). Achieving this goal will ultimately improve safety along the transportation supply-chain. As the leading association representing Department of Transportation (DOT) licensed property brokers and other transportation intermediaries, TIA agrees with the Agency that drivers should not be coerced into breaking safety rules, and submits these comments.

TIA is fully aware that this particular rulemaking was mandated by Congress (P.L. 112-141), but proposed rule (1) does not comport with Federal law, (2) would create new liabilities for shippers and transportation intermediaries, (3) creates a Catch 22 for shippers and intermediaries that will result in confusion for shippers and transportation intermediaries and excess work for the Agency, and (4) appears to exclude public entities and government facilities.

IDENTITY AND INTEREST OF THE TRANSPORTATION INTERMEDIARIES ASSOCIATION

TIA is the professional organization of the $162 billion third-party logistics industry. TIA is the only U.S. organization exclusively representing transportation intermediaries of all disciplines that conduct business in domestic and international commerce. TIA is the voice of transportation intermediaries to shippers, carriers, government officials, and international organizations.

TIA members include approximately 1,400 motor carrier property brokers, surface freight forwarders, international ocean transportation intermediaries (ocean freight forwarders and

non-vessel-operating common carriers), air freight forwarders, customs brokers, warehouse operators, logistics management companies, intermodal marketing companies, and motor carriers. TIA members employ more than 60,000 people.

TIA is also the U.S. member of the International Federation of Freight Forwarders Associations (FIATA), the worldwide trade association of transportation intermediaries representing more than 40,000 companies in virtually every trading country.

THE ROLE OF TRANSPORTATION INTERMEDIARIES

Transportation intermediaries or third party logistics professionals act as the "travel agents" for freight. They serve tens of thousands of shippers and carriers, bringing together the transportation needs of the cargo interests with the corresponding capacity and special equipment offered by rail, motor, air, and ocean carriers.

Transportation intermediaries are primarily non-asset based companies whose expertise is providing mode and carrier neutral transportation arrangements for shippers with the underlying asset owning and operating carriers. They get to know the details of a shipper's business, then tailor a package of transportation services, sometimes by various modes of transportation to meet those needs. Transportation intermediaries bring a targeted expertise to meet shippers' transportation needs.

Many shippers in recent years have streamlined their acquisition and distribution operations. They have reduced their in-house transportation departments, and have chosen to deal with only a few "core carriers" directly. Increasingly, they have contracted out the function of arranging transportation to intermediaries or third party experts. Every Fortune 100 Company now has at least one third party logistics company ("3PL") as one of its core carriers. Since the intermediary or 3PL, in turn, may have relationships with dozens, or even thousands of underlying carriers, the shipper has many service options available to it from a single source by employing an intermediary.

Although intermediaries are described in the business and trade literature as "non-asset-based," many intermediaries in fact own some assets, broadly defined. These include local pick-up and delivery vehicles, over the road trucks, warehouses, and cargo consolidation centers, complex computer and telecommunications systems, dispatching centers and sales offices. It is, therefore, difficult to describe a typical intermediary, or to divide them into fixed categories. They range from small, family owned businesses to multi-billion dollar, publicly traded corporations.

SHIPPERS AND CARRIERS RELY ON TRANSPORTATION INTERMEDIARIES

Shippers rely upon 3PLs to arrange for the smooth and uninterrupted flow of goods from origin to destination, and carriers rely upon them to keep their equipment filled and moving. Many carriers, especially the thousands of small motor carriers and owner operators rely on motor carrier brokers to find freight for them, and to process the paperwork necessary for the movement.

TIA and its members support outsourcing part or all of an entity's supply chain to a third party logistics professional. To be successful, both parties need to be clear about what is expected, how it will be measured, and how it will work. The shipper and its 3PLs work together to construct the best solution by lane and circumstance to meet the shipper's needs.

Thus, in the comments that follow, TIA has taken into account the experience and needs both of its own members and of the customers they serve.

TIA CONCERNS WITH THE PROPOSED RULE

(1) The NPRM does not comport with current law.

A broker is defined in Title 49 U.S.C. Section 13102 as:

> *The term "broker" means a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.*

As seen in the United States Code, a broker is not a motor carrier, and simply arranges for the transportation of a particular product on behalf of the Shipper. The NPRM defines the term "coercion" in relevant part as:

> *a threat by a motor carrier, shipper, receiver, or transportation intermediary, or their respective agents, officers or representatives, to withhold, or the actual withholding of, current or future business, employment or work opportunities from a driver for objecting to the operation of a commercial motor vehicle under circumstances which the motor carrier, shipper, receiver, or transportation intermediary, or their respective agents, offices, or representatives, knew or should have known, would require the driver to violate [certain FMCSRs].*

TIA agrees that drivers should not be coerced to violate FMCSRs, but the instant NPRM moves the broker beyond the statutory provision of "arranging" for transportation by a motor carrier for compensation. Instead of the current situation in which shippers and transportation intermediaries contact motor carriers and request that the carrier provide the necessary equipment and driver, the proposed rule would require the shipper and transportation intermediary to engage in employment related functions that the statute places on the motor carrier. It is the motor carrier that hires, trains, assigns, and dispatches the driver. It is the motor carrier that purchases or leases, and then maintains the equipment. It is the motor carrier that is responsible for adhering to the hours of service regulations. The NPRM would

place the shipper and transportation intermediary into the role of employee management having to ask about hours of service availability. This change in requirements may have a significant impact on liability exposure for shippers and transportation intermediaries, and can be easily fixed by substituting "carrier" for "driver" in the rulemaking when it comes to shippers, receivers, and transportation intermediaries.

(2) The NPRM creates new liabilities.

The proposed rule is based on the principle of "respondeat superior," holding the "master" liable for the acts of his "servants." TIA agrees with the Agency's statement that the motor carrier is normally responsible as the employer for the actions of its driver; however, the following statement raises a huge red flag for our members:

> *When a shipper, receiver, or transportation intermediary directs a driver to complete a run within a certain time, it has assumed the role normally reserved to the driver's employer. As such, it may commit coercion if it fails to heed a driver's objection that the request would require him/her to break the rules. The shipper, receiver, or transportation intermediary will not be excused from liability for coercion because it did not inquire about the driver's time remaining or pretended not to hear the objection. When directing the driver's actions, these entities "should have known" whether the driver could complete the run without violating the FMCSRs.*

What the Agency is doing here is establishing an employer-employee relationship between broker and driver. The FMCSA's statement that "the shipper, receiver, or transportation intermediary will not be excused from liability for coercion because it did not inquire about the driver's time remaining" arguably turns the "should have known" standard into a "should have asked" standard. The statement seems to indicate that the broker must inquire as to whether the driver can complete transportation of a load with a scheduled delivery within the scheduled time even if the driver does not affirmatively object to a schedule.

This requirement would expose shippers, receivers, and transportation intermediaries to vicarious liability suits. State courts have established unfortunate precedents, which increase exposure to vicarious liability for brokers and shippers. In the case of *Sperl v. Henry et al.*, an Illinois court found that the broker, "controlled the details of the driver's operation, schedule and compensation creating agency and, therefore, vicarious liability." This particular broker was held liable and required to pay damages in the amount of $23 million. On appeal, the Illinois appellate court found that, "These facts support the inference that [broker] controlled the details of [the driver's operations, schedule and compensation."

Respondeat superior is another way of saying vicarious liability. Rather than speaking in terms of respondeat superior and attempting to impute liability for the driver's conduct on third parties, it would be preferable if FMCSA spoke in terms of seeking to address the broker's own misconduct in allegedly coercing the driver to violate the FMCSR. To the extent that the FMCSA is insinuating that the NPRM creates liability on the respondeat superior theory, it is inaccurate and unnecessary. Unfortunately, FMCSA's reference to respondeat superior may be used by the plaintiffs' bar to argue that shippers, receivers, and transportation intermediaries are somehow liable for the conduct of drivers that violate the FMCSR. Regardless, the regulations, if passed, could create additional ammunition to be used against shippers, receivers, and transportation intermediaries in arguing that their own conduct contributed to a highway accident.

Another reason for TIA objecting to the Agency establishing the employer-employee relationship between a broker and motor carrier, can be found further within the NPRM, which reads:

> *If the Labor Department determines that a driver was fired or suffered any adverse action for thus refusing to compromise safety, it can order the employer to reinstate the driver, pay back pay and compensatory damages, pay punitive damages up to $250,000 where warranted, and take other remedial actions.*

The issue of agency or respondeat superior also arises in employment lawsuits. TIA is, therefore, concerned that the NPRM creates new employment liability exposure for shippers, receivers, and transportation intermediaries from the Department of Labor. Transportation

intermediaries have to walk a very fine line when contracting with motor carriers, to keep the relationship that of an independent contractor and not one of agency. By requiring transportation intermediaries to know a driver's hours of service ability, FMCSA is blurring the line between independent contractual relationships to that of agency, thereby, creating a new liability threat for the industry.

It is worth noting as well, that transportation intermediaries do not hire or contract with drivers for the movement of a particular load, instead the transportation intermediary engages the DOT licensed motor carrier, even if that motor carrier is a single truck owner operator. While TIA does not believe it was the intent of the Agency to create this increased liability exposure, or make the broker pay these compensatory damages to a terminated driver, TIA implores the Agency to issue a technical correction in the Final Rule, clarifying that this specific provision is isolated to that of a motor carrier and its employee, the driver.

(3) The NPRM creates a Catch 22 for the industry.

As pointed out earlier in these comments, it is the motor carrier that assigns the driver and the shipper, receiver, or transportation intermediary rarely know in advance, how long a driver has been on duty. Nor would it normally know whether any assigned driver is either about to exceed or already has exceeded the maximum permissible hours of service. To the contrary, being privy to that type of information is the responsibility of the driver and his or her employer, the motor carrier.

With this in mind, what is the shipper or transportation intermediary to do if the driver is unable to handle the shipment due to HOS considerations? If the shipper or transportation intermediary discovers the HOS issue as required by the proposed regulation, any decision to refuse to tender the shipment could be construed as violating the proposed regulation. For then, it would be knowingly, "withholding ... work opportunities from a driver" when it "knew" the driver was unable to lawfully handle the load. In this situation, because the motor carrier

elected to dispatch a driver that could not lawfully handle the load, the cargo would not be able to move until such time as the driver in question was again able to operate the equipment. This could cause a factory to shut down, grocery store shelves to remain empty, which in turn could cause the shipper, receiver, or transportation intermediary to be fined or lose future business.

Read literally, the definition would now make it a violation for a shipper or transportation intermediary to refuse a load to a driver if it "knew or should have known" that the driver was about to exceed or already had exceeded the HOS regulations. Yet, the shipper or transportation intermediary could not properly request that the driver perform the transportation, as it would then be both "coercing" the driver and aiding and abetting the HOS violation. So, if a driver assigned by a motor carrier shows up to pick up a load and advises the shipper or transportation intermediary that he or she cannot lawfully handle the load due to HOS or other concerns, the shipper or transportation intermediary would not be able to contact the carrier and request that they replace the driver. Instead the load would just sit. This is a catch 22, which Merriam-Webster defines as

> 1. a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule (the show-business catch 22 – no work unless you have an agent, no agent unless you've worked – Mary Murphy); also: the circumstance or rule that denies a solution.
> 2. (a) an illogical, unreasonable, or senseless situation; (b) a measure or policy whose effect is the opposite of what was intended; (c) a situation presenting two equally undesirable alternatives.
> 3. a hidden difficulty or means of entrapment.

(4) The NPRM appears to exempt public entities and government facilities.

TIA notes that the NPRM addresses shippers, receivers, and transportation intermediaries. TIA questions the Agency whether ports; Department of Defense facilities, Customs and Border Protection facilities, and the General Services Administration are included. TIA argues that to not include these public facilities that engage motor carrier services and cause carriers to wait to load, unload, or cross the border be an unfair exemption for the public sector at the expense

of the private sector. TIA urges the Agency, therefore, to clearly define the scope of this rule to include the Department of Defense (DOD), the General Services Administration (GSA), Port Terminal Operators, and all other applicable entities that contract with motor carriers to haul their specific goods along the transportation supply-chain.

CONCLUSION

TIA urges FMCSA to make the necessary changes to the NPRM to prevent coercion without creating new liabilities for shippers, receivers, and transportation intermediaries as well as clarifying that the rules apply to ports, government, and other public entities. Specifically, TIA urges FMCSA to amend the NPRM as follows:

> ~~When~~ A shipper, receiver, or transportation intermediary, port operator, government or other public entity ~~directs a driver to complete a run within a certain time, it has assumed the role normally reserved to the driver's employer. As such,~~ may commit coercion if it fails to heed a ~~driver's~~ carrier's objection that the request would require ~~him/her~~ it to break the rules. The shipper, receiver, or transportation intermediary, port operator, government or other public entity will not be excused from liability for coercion because it did not inquire about the ~~driver's time remaining~~ carrier's ability to transport the load within FMCSRs or pretend not to hear the objection. ~~When directing the driver's actions, these entities "should have known" whether the driver could complete the run without violating the FMCSRs~~.

Respectfully Submitted,

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TIA