UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

UNIFIED REGISTRATION SYSTEM

Supplemental Notice of Proposed Rulemaking
Docket No. FMCSA-97-2349

COMMENTS

SUBMITTED BY THE

TRANSPORTATION INTERMEDIARIES ASSOCIATION

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The Transportation Intermediaries Association (TIA) submits these comments in response to the Federal Motor Carrier Safety Administration's (FMCSA) October 26, 2011 Supplemental Notice of Proposed Rulemaking (SNPRM) asking for public comment on various aspects of FMCSA's proposed Unified Registration System (URS) for motor carriers, freight forwarders and property brokers. TIA supports FMCSA's statutorily mandated efforts to simplify the current patchwork registration system, much of which was carried over from the Interstate Commerce Commission (ICC) when the licensing and insurance monitoring functions of that agency were transferred to the Federal Highway Administration and then to the FMCSA by the ICC Termination Act of 1995 (ICCTA). However, in streamlining those requirements, TIA believes that FMCSA must be careful to do so in a way that will address certain abuses that have arisen under the current system, and that retains adequate protections for the shipping public. Furthermore, TIA members use their MC Numbers to brand their business. TIA would request that the agency continue to allow MC Numbers to reflect a broker's business history. For reasons set forth in more detail below, TIA makes the following recommendations.

- To prevent unauthorized re-brokering of freight by motor carriers: issue separate operating authority numbers for motor carrier and for property broker authority held by the same or related entities, so that shippers will know clearly at the time they book their shipments whether they are dealing with that entity either as a motor carrier or as a property broker.
- To prevent unauthorized re-brokering of freight by motor carriers: clarify that separate brokerage authority is required if motor carriers wish to place freight accepted by them on another motor carrier for a fee.

- To prevent churning of operating authorities by unscrupulous or fraudulent operators: take steps to conduct a thorough review of repeat applications by carriers or brokers filed within the same year and to create an active database of companies; we respectfully suggest you link the Unified Registration System or other registration requirement with operating authority.
- To further prevent churning and confusion in the marketplace, we respectfully suggest that FMCSA prohibit the sale of authority numbers outside the sale of the company.

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 doing 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 1200 motor carrier property brokers, surface freight forwarders, international ocean transportation intermediaries (ocean freight forwarders and non-vessel-operating common carriers), air forwarders, customs brokers, warehouse operators, logistics management companies, intermodal marketing companies, and motor carriers.

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 the 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. Shippers count on transportation intermediaries to arrange for the smooth and uninterrupted flow of goods from origin to destination, and many carriers rely upon them to keep their equipment filled and moving. 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 craft 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 is own members and of the customers they serve.

UNIFIED REGISTRATION SYSTEM SHOULD BE TIED TO OPERATING AUTHORITY

The industry is plagued with "churners" or as the agency likes to describe them "chameleons," those companies that come in and out of the industry. Neither the DOT nor the companies in the industry know what companies are still in business. Requiring every licensed company (broker, forwarder, and carrier) to register its authority every year and requiring DOT to cancel any authorities not re-registered will allow everyone to know what companies are still in business. Annual registration is not new, but the dots have not been connected. Every carrier, broker, and forwarder is supposed to pay an annual UCR fee. TIA, ATA, and OOIDA currently have legislation being considered in Congress, which would require DOT to tie continuation of authority to this or another existing requirement.

TIA applauds FMCSA efforts through this rulemaking to account for all regulated entities, by requiring evidence of financial responsibility and designation of agents. TIA supports FMCSA's elimination of 49 CFR Part 365, subpart D, governing transfers of operating authority. Furthermore, requiring authority numbers to be unique and non-transferable along with requiring at least three years of relevant experience or providing the Administrator with satisfactory evidence of certified training, will ultimately make the job of tracking down the "bad actors" easier. An additional benefit will be stronger companies entering the market since a principal in the company will have experience in the market.

While legislation is required to change the licensing process to require three years of experience, under current law the Agency has the power to link licensing, renewal, and the continuation of authority to the payment of UCR fees. This change would not only benefit the UCR process, but would help keep the FMCSA database up to date.

SEPARATE DOT REGISTRATION NUMBERS SHOULD BE REQUIRED FOR MOTOR CARRIER AND PROPERTY BROKER AUTHORITY

TIA strongly urges FMCSA not to combine multiple operating authorities under a single registration number. Many motor carriers currently operate under the widely held misperception that registering as a motor carrier entitles them to broker freight to other motor carriers when they cannot handle it themselves. This is clearly incorrect, as even the FAQs on the FMCSA web site explain. However, the practice appears to be widespread, and has led to many commercial problems for TIA member brokers who may be unaware when they book with known and reliable Carrier A that the freight may in fact be moving on unknown and possibly unreliable, and possibly unsafe Carrier B. These facts only come to light when Carrier A, having been paid by the broker or shipper, fails to pay Carrier B, and Carrier B then asserts a claim against the broker and/or shipper. In some instances Carrier B may also refuse to release the cargo until the freight charges have been paid, even though the shipper or broker already has paid once to Carrier A.

The re-brokering of freight may also create serious problem when there is a cargo loss or damage claim arising from Carrier B's negligence. When the broker or shipper makes a claim against

Carrier A, A may decline the claim and simply refer it to Carrier B, with whom the shipper and broker have no enforceable contractual relationship.[1]

Unauthorized rebrokering of freight by motor carriers also frustrates the efforts of Government and industry to promote the use of safe carriers. When undisclosed rebrokering of freight occurs, carriers with a poor safety history—often those who would never have been chosen by the shipper or broker—can remain in business and circumvent the safeguards intended to discourage the use of unsafe carriers. In effect, the carrier with a poor safety record is permitted to hide behind the record of safer and more reliable carriers.

TIA takes the strong view that once a motor carrier accepts a load, it must remain primarily responsible for the safe transportation and delivery of the cargo. Furthermore, payment to that carrier should satisfy the shipper and/or broker's freight payment obligation.

Under the Interstate Commerc Act, motor carriers, and only motor carriers, have the operating authority to provide motor vehicle transportation. See 49 U.S.C § 13102(12). Motor carriers must register in order to operate as motor carriers. See 49 U.S.C § 13902; 49 C.F.R. Part 365. Motor carrier registration alone does not encompass broker registration or the ability "to be a broker for transportation of property." See 49 U.S.C §§ 13901; 13902, 13904.

A broker sells or arranges for transportation by a motor carrier for compensation. See 49 U.S.C. § 13102(2). Operating as a broker requires registration as a broker. See 49 U.S.C §§ 13901,

[1] These examples are drawn from actual cases brought before the TIA Ethics Committee under its complaint procedures for the informal resolution of alleged violations of the TIA Code of Ethics.

13904; 49 C.F.R. Part 365. Broker registration alone does not provide motor carrier authority or the ability to transport goods or passengers. See 49 U.S.C § 13904.

Brokers are not permitted to represent themselves as carriers. See 49 C.F.R. § 371.7(b) It stands to reason then, that a carrier accepting a shipper's load that the carrier does not intend to transport itself, must identify itself as acting as a broker with the required broker authority and bond.

Transportation is defined in the law as using a motor vehicle, or other storage instrument, to move goods or passengers, and the services related to that movement. See 49 U.S.C § 13102(19). Transportation broadly encompasses all aspects of this movement from receipt, to care, to unpacking of cargo. See id. Congress understood transportation to refer to the "entire process" of movement from arranging for this movement, through the final resolution of any claims concerning the movement.[2] See Conference Report of H.R. 2539, ICC Termination Act of 1995, 104th Cong., Vol. 141 No. 203, 141 Cong. Rec. H 14993 (1995).

The Conference Report on H.R. 2539, ICC Termination Act of 1995, adopted the revised 1995 definition of "transportation" in order to "clarify that services related to the movement of

[2] Senate amendment

... The definition of "transportation" was expanded to include "arranging for", "packing", and "unpacking" passengers and property as part of services related to transportation.

Conference substitute

... The Conference adopts the Senate definition of "transportation" to clarify that services related to the movement of passengers or property include all pre- and post-move services directly related to that transportation. The Conference believes that, with respect to remedies, the transportation of passengers and property includes the entire process from arranging for the movement through the final resolution of any claims disputes. See Conference Report of H.R. 2539, ICC Termination Act of 1995, 104th Cong., Vol. 141 No. 203, 141 Cong Rec H 14993 (1995).

passengers or property include all pre- and post-move services directly related to that transportation." Id. "Transportation was revised to "include 'arranging for', 'packing', and 'unpacking' passengers and property as part of services related to transportation." Id. That the words "arranging for" are included in the definition of transportation does not abolish the system of carrying and brokering registration developed by Congress. It remains exclusively for the motor carrier to carry goods and sell its own space and to the broker to sell the transportation capacity of a motor carrier for compensation. The crucial difference between motor carriers and brokers concerns their authority to carry, not the presence of "arranging for" in their definitions.

Authorization to transport goods and services is the key distinction between acting as a motor carrier and a broker. A broker arranges "the transport of property by an authorized motor carrier." See 49 C.F.R. § 371.2(a). A motor carrier is not a broker when it arranges the transportation of shipments which it is authorized to transport and which it has accepted and legally bound itself transport. Id. Note the difference in wording for motor carriers and brokers in § 371.2(a). Brokers arrange for transportation *by* authorized motor carriers; motor carriers arrange for transportation of shipments *they* are authorized to carry *and* have accepted and bound themselves to transport. Thus, the type of arranging available to the motor carrier is limited exclusively to arranging for the transportation of goods entirely under and within its own authority.

If a motor carrier accepts a shipment, then passes that shipment on to another motor carrier, for compensation, it has arranged for "the transport of property by an authorized motor carrier" and thus acted as a broker, for which a broker's registration is required.

The courts have confirmed that the party that "legally binds itself to transport" is the carrier and the party who "merely agree[s] to locate and hire a third party to transport" the goods is the broker. A motor carrier that transports goods itself acts as a carrier, but a motor carrier who locates and hires another motor carrier to transport goods and turns over responsibility to this new motor carrier acts as a broker. See CGU Int'l Ins. v. Keystone Lines Corp., U.S. Dist. Lexis 8123, 5 (N.D. Cal. 2004)(resolving whether defendant qualifies as a carrier or broker under the Carmack Amendment); Custom Cartage, Inc. v. Motorola, Inc., U.S. Dist. Lexis 16462, 22-24 (N.D. Ill. 1999)(distinguishing between broker and motor carrier for liability under the Carmack Amendment); 49 C.F.R. § 371.2(a).

To provide the transportation they have agreed to perform, it is not necessary for a motor carrier to use its owned vehicles in the transport of goods. See Custom Cartage, U.S. Dist. Lexis 16462, at 22-23. There are clear guidelines on motor carriers using vehicles they do not own. Leasing and interchange of vehicles are the *only* instances where an "authorized carrier may perform authorized transportation in equipment it does not own." See 49 C.F.R. § 376.11. 49 C.F.R. § 376 lays out the specific requirements for leasing and interchange of vehicles and equipment, **not freight**. 49 C.F.R. § 376 also maintains strict requirements that must be followed by motor carriers seeking to interchange equipment.

To summarize, a shipper may tender cargo for transportation to a motor carrier directly, or with the assistance of a broker. Once a motor carrier is in possession of the goods, it may, under its motor carrier authority, move the goods on its own equipment, or on leased or interchanged

equipment. If the motor carrier does not wish to act as the carrier, and instead wants to tender the cargo to another carrier, it requires a broker's license, and the shipper/broker is entitled to know at the outset that the carrier in this instance is acting as a broker, and *not* as a carrier.

The current FMCSA registration system (inherited from the ICC) has caused confusion by assigning a single MC number to an entity operating as both carrier and broker, thus making it impossible for the party tendering the cargo to be sure which operating authority the carrier is choosing to exercise at any given moment. The proposed unitary system, and the accompanying draft Form MCSA-1 would perpetuate, and possibly compound, the problem by permitting an entity to use a single document to apply for both types of authority, and by using a single DOT number to cover them both.[3]

TIA strongly urges FMCSA to require separate applications for motor carrier, broker, and freight forwarder authority, and to assign separate and different DOT registration numbers for motor carrier and broker authority, even (or perhaps especially) when they are held by the same entity. A property broker (or shipper) booking a shipment can then verify the operating authority referenced by the carrier to determine whether the carrier is itself accepting carrier responsibility for the load, or is instead simply planning to "re-broker" the load to a third party carrier. As the SNPRM notes, the USDOT Number is "a unique identifier used to monitor a carrier's safety performance." A shipper or broker relies on that number and the accompanying safety and insurance data publicly available from DOT and other sources, to make sure that it is selecting a safe and reliable carrier. Once a motor carrier accepts a load *as a carrier*, using its unique DOT

[3] See, for example, instruction 17 to box 17 of the Form, which directs the applicant to check "all the appropriate classifications that apply" on a single form.

carrier identification number, it should be possible for the person tendering the freight to hold it liable as a carrier, even if it impermissibly re-brokers the load to someone else. FMCSA would make this possible by assigning separate and unique numbers to motor carrier and property broker registrations, so that the shipping public can easily determine which operating authority a registrant is relying upon in accepting a load.

FMCSA SHOULD STRICTLY MONITOR REPEAT APPLICATIONS BY THE SAME PERSONS OR ENTITIES

While TIA supports simplified and streamlined application procedures, the current system lends itself to many abuses. Many instances have been brought to TIA's attention where a financially unstable or irresponsible operator will leave its creditors unpaid or cargo undelivered. When its operating authority is revoked due to failure to maintain adequate insurance or a bond, or when it wants to change its name to avoid detection, it applies for new authority under a new name, with the officers shuffled slightly to give the impression that a new company has opened its doors, and it resumes operation. A ring of such fraudulent operators, using more than a dozen names and operating authorities, was recently criminally prosecuted in Georgia, and TIA has received periodic reports of many more.

FMCSA proposes to allow a longer period for an applicant to file proof of insurance and designation of agents for service of process. TIA understands that the increased number of filings will add substantial amounts of paperwork for the Agency, but increasing the period of time for filing proof if insurance and designation of agents would only give scammers an easier

ride. Furthermore, where an applicant has the same officers or directors as a previously registered entity, or proposes to operate from the same address, or has applied for operating authority previously within the past year, FMCSA should put in place procedures for closer scrutiny to ensure that the applicant is not trying to hide potentially illicit activities behind a smokescreen of multiple operating authorities, or to avoid liabilities for existing operations simply by opening up a purportedly "new" company, with a new DOT identification number. TIA believes that FMCSA is moving in the right direction by requiring new entrants to undergo a safety audit within 18 months of beginning operations and review procedures established under 49 CFR § 365.109.

FMCSA SHOULD PROHIBIT THE SALE OF AUTHORITY NUMBERS

TIA strongly urges FMCSA to prohibit the practice of reinstating authority numbers that have been inactive for more than 12 months. A recent review by Internet Truckstop indicates that 22 percent of reinstated MC numbers were not reinstated by the original owner, and had, in fact, been purchased by a different company. Internet Truckstop's report indicates that half of the reinstated MC numbers were purchased as part of the sale of a company; while the other half just purchased the MC number itself.

According to Internet Truckstop, as well as information gathered from TIA's members, one of the most common reasons for a broker or carrier to secure an older MC number is to give the appearance that the company has been in business longer than they actually have. To quote the Internet Truckstop report

> Any change in ownership usually flags a change in the company's methods of operation and business practices. In the case of a broker, this can mean a change in pay and contract terms. For a carrier this might mean different levels of insurance coverage and rate structures. Unfortunately, it is also well known that certain insidious elements within our industry will purchase and then reinstate MC numbers for the purposes of committing fraud.

TIA agrees with these assessments. Unless someone purchases the entire company, they should be prohibited from purchasing and reinstating a retired MC number. In fact, TIA urges FMCSA to completely retire MC numbers and DOT numbers that have been out of service for more than 12 months.

CONCLUSION

In conclusion, TIA commends FMCSA for taking steps to eliminate fraud in the industry, but the Agency needs to ensure that by simplifying the application and registration process, it doesn't open the door for an increase in reincarnated entities. TIA would suggest that the Agency simplify the process, while tightening the rules to ensure only the honest companies are able to enter the industry.

Respectfully Submitted,

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