

**UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

DOCKET NO. FMCSA-2012-0377

**COERCION OF COMMERCIAL MOTOR VEHICLE DRIVERS; PROHIBITION
NOTICE OF PROPOSED RULEMAKING**

**COMMENTS OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS
ASSOCIATION OF AMERICA, INC.**

The National Customs Brokers and Forwarders Association of America, Inc. (“NCBFAA”) 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 (“NPRM”).

The NCBFAA agrees that commercial motor vehicle drivers should not be coerced into violating the Federal Motor Carrier Safety Regulations (“FMCSRs”), or any other laws for that matter. Those regulations are essential for both the drivers' and public safety and there is no excuse for drivers to be subjected to any coercion, economic or otherwise, for any purpose. Consequently, the NCBFAA agrees with the FMCSA that persons involved in such activities should be dealt with in an appropriate manner.

Having said that, and for the reasons stated below, the NCBFAA believes that proposed regulations are overreaching and ambiguous and need to be carefully tailored to more properly address the source of the problem concerning the coercion of truck drivers. As drafted, the proposed regulation would place responsibility – and considerable

potential liability – on parties that are neither well positioned nor capable of ensuring that drivers comply with the safety regulations.

STATEMENT OF INTEREST

NCBFAA is the national trade association representing the interests of international ocean and air freight forwarders, non-vessel operating common carriers (“NVOCCs”), and customs brokers. The NCBFAA is comprised of over 1,000 members and 28 regional associations, representing transportation intermediaries that range in size from small companies with a few employees and single office to large companies with thousands of employees, with 20 to 40 offices in the U.S. and comparable numbers of affiliated companies around the world.

International forwarders and customs brokers are estimated to be involved in handling up to 90% of the import/export cargo that moves to and from the United States, either by directly arranging for both the international and domestic portions of the transportation, providing customs clearance services or are otherwise involved in the logistical chain under which this commerce flows. As noted above, the Association's members will provide these services typically as ocean forwarders, NVOCCs, and air freight forwarders, the last of which are commonly referred to indirect air carriers (or "IACs").

Ocean forwarders are directly regulated, licensed and bonded pursuant to regulations of the Federal Maritime Commission pursuant to the U.S. Shipping Act, while IACs are registered with and certified by the Transportation Security Administration. For their part, customs brokers are regulated and licensed by U.S. Customs and Border Protection, and, when acting as customs brokers, these companies

typically also arrange for the various truckers involved in moving the cargo off the piers or airport ports of entry. Consequently, all of these parties engaged in international transportation are already subject to comprehensive regulation by their jurisdictional agencies that oversee their activities and ensure that the public is being well served.

Of course, a large percentage of these companies – all of which are referred to in the NPRM as "transportation intermediaries" – also provide service in the purely domestic transportation marketplace as well. In doing so, they may be acting as property brokers, surface freight forwarders or even as motor carriers. The common touchstone for their activities is that all or most of the NCBFAA's members will be working with motor carriers to facilitate the movement of this nation's goods.

The NPRM expands the FMCSA authority with respect to safety regulations, which traditionally only covered motor carriers, drivers and commercial motor vehicles ("CMV"), to include shippers, receivers and transportation intermediaries. Although not specifically defined in MAP-21, the term "transportation intermediary" is stated in the NPRM to be "a person who arranges the transportation of property or passengers by commercial motor vehicle in interstate commerce, or who arranges the transportation of hazardous materials by commercial motor vehicle in interstate or intrastate commerce, including but not limited to brokers and freight forwarders." While the NCBFAA assumes that FMCSA assumed that the words "brokers" and "freight forwarders" were intended to relate to the property brokers and surface freight forwarders the agency has traditionally regulated, the wording of the proposed definition in section 390.5 could be read broadly enough to include customs brokers (at least when they are involved in the movement of the cargo off the piers and airports) and ocean forwarders, IACs and

NVOCCs (when they are arranging for trucking as part of international transportation). Thus, the members of the NCBFAA appear to be directly affected by the proposed regulations.

COMMENTS

Under the NPRM, all companies involved in arranging for transportation of property by commercial motor vehicles would now be prohibited from engaging in what is referred to as “coercion” by withholding or threatening to withhold business from a driver where it knew or should have known that awarding that business would result in the driver violating any of the FMCSRs. In that regard, the proposed definition in section 390.5 of the NPRM literally 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, officers, or representatives, knew or should have known, would require the driver to violate [certain FMCSRs].

The NCBFAA agrees that drivers should not be subject to coercion for any reason, and certainly not if the effect of that would be to compel drivers to violate any of the FMCSRs. Nonetheless, the Association is concerned that the definition of "coercion" is ambiguous and overbroad.

In the experience of the NCBFAA, when a shipper or transportation intermediary needs trucking services, it contacts the motor carrier company and requests that the motor carrier provide the necessary equipment and driver. The service needs (*e.g.*, type of equipment required, whether the cargo is hazardous, desired pick up and delivery

schedules, origins and destination, any special services) and rates are negotiated with the trucking company and, assuming agreement, a driver by the motor carrier is dispatched to handle the transportation in accordance with the service parameters discussed with the customer. It is the motor carrier that assigns the driver and the shipper or transportation intermediary has no input to that process. The shipper or transportation intermediary rarely know in advance, for example, 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 ("HOS") set forth in 49 CFR Part 395. To the contrary, being privy to that type of that information is the responsibility of the driver and his or her employer.

With this in mind, what is the shipper or transportation intermediary to do if the driver in this example is unable to handle the shipment due to HOS considerations? If the shipper/transportation intermediary knows about the HOS issue – which would likely only be the case because the driver happened to say something about it – 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 that case, 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.

Read literally the definition would now make it a violation for a shipper or transportation intermediary to refuse a load to that driver if it "knew or should have known" that the driver was about to exceed or already had exceeded the HOS. Yet, the

shipper 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/she cannot lawfully handle the load due to HOS or other concerns, the shipper or transportation intermediary would not be able to contact the trucker and request that they replace the driver. Instead, the load just sits.

In apparent recognition of the adverse affect this situation will clearly have on the movement of cargo, the NPRM purports to justify the "knew or should have known" test by stating this is merely a codification of the common law principle of "*respondeat superior*" and that any party giving delivery date parameters to a driver necessarily "has assumed the role normally reserved to the driver's employer." The NCBFAA disagrees with this proposition.

A shipper's request that a load be delivered to its destination by a certain time does not create an employer/employee relationship any more than does a customer's request that a dry-cleaning job be done by a certain date. Similarly, requesting that Federal Express or any carrier deliver a shipment by a certain date does not make one the "employer" of the driver, any more than would be the case if an individual told the driver moving household goods when he would like the goods delivered at destination.

Simply advising a trucking company or the assigned driver what the expected delivery date is does not make the party providing that information the driver's employer. To the contrary, the determination of employment status requires a consideration of a number of factors, including the level of control over the manner of work performance, the right to discharge, the method by which compensation is paid, the provision of

necessary tools, materials and equipment, and whether taxes are withheld for work performed.

Not only is there no justification for that stretch of the *respondeat superior* principle, but this would also create a dangerous precedent of exposing an entity to vicarious liability for actions of individuals over which that entity does not and cannot exercise control. By taking the position that the shipper or transportation intermediary becomes the driver's employer simply through having requested the trucking company to deliver cargo by a specific date, FMCSA would be opening the flood gates to civil litigation against those parties for any accident in which the carrier or its driver is involved. Similarly, as many agencies look to enhance their unemployment compensation funds, it is likely that those states (and perhaps the Internal Revenue Service) would attempt to hold the shipper/transportation intermediary to be an "employer" of the driver for tax purposes as well based on FMCSA's new definition.

It is one thing for a motor carrier, shipper, transportation intermediary or any third party to take action that actually does coerce a driver into improperly violating the FMCSRs or otherwise engaging in some malpractice. But, a shipper or transportation intermediary who learns that the driver is ineligible to haul its goods due to HOS issues and then redirects the transportation to a different carrier or driver is not engaging in any inappropriate coercive practice. To the contrary, it is both acting prudently to facilitate the movement of its goods and actually helping to enforce the HOS regulations by not letting the ineligible driver handle the load. Yet, as worded, the proposed regulation literally appears to consider this to be a violation, since the shipper/transportation intermediary would then be "...withholding...business...from a driver...under circumstances

which the ...shipper...or transportation intermediary ...knew, or should have known, would require the driver to violate ..." the FMCSRs.

The NCBFAA believes that where a shipper or transportation intermediary learns that a driver may not haul a load because he/she does not have the available hours, it should be able to freely advise the trucker of the situation so it can provide another driver who does have available hours to complete the haul in a timely manner. Alternatively, the shipper/transportation intermediary should be able to use another carrier entirely, particularly one that is sufficiently responsible and knowledgeable about the status of its drivers. Otherwise, commerce would grind to a halt once the assigned driver indicated that he/she really could not lawfully operate the equipment that the motor carrier assigned to the load. That might not hurt the motor carrier, since the shipper/transportation intermediary would be estopped under this expansive definition of "coercion" from using another trucker. However, the shipper/transportation intermediary – whose goods had to be moved promptly to meet a production line need, a vessel sailing or a time-sensitive sale – would have no option and would not be able to make commercially rational decisions to either request that the motor carrier provide a substitute driver or pick a different carrier. The goods would just sit until that initially assigned driver was once again "legal" under the HOS regulations.

While it would wreak havoc with the transportation marketplace, the expansive definition of "coercion" proposed here is not necessary. Shippers and transportation intermediaries typically hire trucking companies rather than the drivers those companies employ. These motor carriers, unlike shippers and transportation intermediaries, are well equipped – and are already responsible – to determine if their drivers are capable of

completing the requested service on time and in compliance with applicable safety regulations; and dispatch them accordingly. However, read literally, under the proposed regulation it is shippers and transportation intermediaries who would bear the consequences of the trucker company's decision to dispatch a driver who may not have enough hours available to haul a load by a given deadline. Thus, transportation intermediaries would always potentially face a dilemma where either the load would be delivered late or they would be exposed to accusations of coercion.

The NCBFAA of course agrees that trucking companies should not coerce their drivers to violate any safety or other regulations. At the same time, the basis for penalizing trucking companies or other parties who may actually attempt to coerce drivers to violate the FMCSRs currently exists. For instance, motor carriers and all other parties are already prohibited from facilitating, aiding or abetting a violation of the safety regulations by Section 390.13 of the FMCSRs. Further, the discharge, discipline of or discrimination against a driver when the driver refuses to operate a vehicle in violation a CMV health or safety standard is prohibited by 49 USC § 31105 and labor regulations implemented pursuant to the Surface Transportation Assistance Act of 1982, contained in 29 CFR § 1978.102.

If FMCSA believes that section 32911 of MAP-21 requires the agency to specifically address the issue of prohibited driver coercion, this goal should be achieved by more narrowly tailoring a regulation so as to prohibit inappropriate conduct. But, the proposal – which purports to make a shipper or transportation intermediary the "employer" of a driver simply because it needs goods delivered by a date certain – is

inappropriate and will open a Pandora's box of unintended consequences for these non-carrier parties.

CONCLUSION

NCBFAA supports the efforts of FMCSA for its goal of enhancing compliance with the FMCSRs, increasing safety on the U.S. roads and highways, and improving working conditions for commercial motor vehicle drivers. However, NCBFAA is concerned that the proposed regulations would unduly interfere with the efficient operation of the transportation market, unnecessarily complicate relationships between the industry participants, and inappropriately place liability on parties not in a position to ensure compliance with FMCSRs.

Respectfully submitted,

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