Before the Federal Motor Carrier Safety Administration

SBTC & OOIDA Petitions to Strengthen 49 CFR 371.3 Broker Transparency

Docket No. FMCSA-2020-0150

Property Broker Listening Session

TIA Petition for Rulemaking to Repeal 49 CFR 371.3(c) and to Address "Dispatch Services"

Docket No. FMCSA-2020-0190

SUPPLEMENTAL COMMENTS

SUBMITTED BY THE

SMALL BUSINESS IN TRANSPORTATION COALITION

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Thank you for extending the comment period on our Petition to you and for releasing the TIA Petition to Repeal 49 CFR 371.3c. We have reviewed the TIA Petition and have determined there is nothing additional in it worth responding to beyond our original comment filed in the above-referenced dockets on October 13, 2020.

We now would like to offer more precise comments that address the 8 specific questions you have asked the public to comment on. Your questions and the SBTC's answers follow…

1. FMCSA has authority under 49 U.S.C. 14122(a) to require the form of records to be prepared or compiled by carriers and brokers, the Agency's right of inspection under 49 U.S.C. 14122(b), its authority to prescribe time periods for preservation of records under 49 U.S.C. 14122(c), and its authority to require annual financial reports from motor carriers, freight forwarders and brokers. FMCSA also has discretionary authority to prescribe regulations to carry out the provisions of 49 U.S.C. 13101-14916 that govern the commercial aspects of motor carrier and broker transportation. 49 U.S.C. 13301(a). Section 13301(a) is the statutory successor to former 49 U.S.C. 10321, which the ICC relied on in 1980 in prescribing the regulations later redesignated as part 371. In light of the significant statutory changes reducing the scope of regulatory authority over commercial transportation that have occurred since 1980, what statutory provisions, if any, would be carried out by the regulatory changes requested by the petitioners? In particular, how would a rule restricting the rights of private parties from including certain terms in their agreements align with the Agency's statutory authority?

By citing a range of statutes (13101-14916) FMCSA sidesteps and fails to pinpoint the actual statute that is applicable here when dealing with big brokers' collusive evasion of regulation through their legal departments' common tactic of making a carrier waive their rights under 49 CFR 371.3c contractually under threat to hold freight hostage if they fail to submit to the demand to override your regulation. That statute is 49 U.S. Code § 14906.

> *49 U.S. Code § 14906.Evasion of regulation of carriers and brokers*
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> *A person, or an officer, employee, or agent of that person, that by any means tries to evade regulation provided under this part for carriers or brokers is liable to the United States for a civil penalty of at least $2,000 for the first violation and at least $5,000 for a subsequent violation, and may be subject to criminal penalties.*

We are not aware of anything in contract law that allows two private parties to agree to circumvent a regulation and essentially deregulate themselves in violation of a specific statute that prohibits evasion of a regulation through such a waiver. If FMCSA were to deem this permissible, then it would have to also allow and respect under this logic a

collective bargaining employment contract whereby labor and management simply agree contractually that drivers will not have to use ELDs despite the fact that there is a regulation that requires same to avoid threat by labor of a strike. You would clearly charge carriers under the evasion rule for such a waiver in the name of safety. To not do so in this instance, shirks not only your authority but your duty and responsibility to uphold the rule of law.

Given a fact pattern whereby a broker attempts to circumvent a duly-promulgated rule such as 49 CFR 371.3c in its contracts, the FMCSA already knows it has the lawful authority under said evasion statute to prosecute the violation. In fact, FMCSA last revised its penalty rules in 2019 at: https://www.federalregister.gov/documents/2019/07/31/2019-14101/revisions-to-civil-penalty-amounts

At that time, you specifically increased the penalty for violation of 49 U.S. Code § 14906 from $2,133 to $2,187.

In terms of major changes, we note the original 371.3c was implemented as a rule by the ICC in October of 1980 after the President had already signed into effect the Motor Carrier Act of 1980 and deregulated trucking. It was therefore the intent of the ICC not to eliminate the regulation of brokers outright but balance regulatory relief against the protection for shippers and carriers by imposing the new rule:

> *(c) Each party to a brokered transaction has the right to review the record of the transaction required to be kept by these rules.*

We refer to and incorporate by reference here the SBTC's first comment on this docket filed October 13, 2020 for a complete explanation of the history of the rulemaking and ICC's original intent.

The additional major changes include the sunset of the ICC in 1996, which included the Section 204 ("Saving Provisions") of the ICC Termination Act of 1995 through which, ICC precedent carried over to USDOT; transfer of the Secretary's authority to FHWA and then to the FMCSA in 2000; elimination of carrier rate and rules tariff publication (except for common carriers of household goods) and contracts/tariff filings; elimination of antitrust immunity for collective rate-making by STB in 2008; and 2005 SAFETEA-LU provisions to deregulate insurance certain FMCSA insurance filings. None of thi,s however, has anything to do with a rule dedicated to broker recordkeeping or transparency in terms of giving carriers and shippers the right to review brokers' transactional records to which they are a party.

2. How would a rulemaking expanding FMCSA's role in enforcement of the requirement mandating that brokers automatically disclose financial details about each transaction to the respective motor carrier transporting the load, as requested in the OOIDA and SBTC petitions, align with the statutes identified above? What measures could FMCSA take to ensure that regulatory action in this area is an appropriate exercise of the Agency's authority?

We believe this is misguided. The SBTC petition does **not** make such a request and we simply wish to point that out here that we are only asking for clarification of an existing rule, not new regulations on brokers. The SBTC's petition specifically asks the agency to enforce its existing rule vis-à-vis the evasion statute referenced above and put brokers on notice that those currently engaged in circumventing the rule contractually must cease and desist… by adding our requested language.

3. Are the transparency issues raised by OOIDA and SBTC limited to small brokers or large brokers (e.g., brokers with revenues above a certain threshold, brokers with a certain number of transactions, etc.) or are they more widespread such that the rulemaking should cover all brokers, regardless of size?

The SBTC believes many big brokers have illegally colluded in violation of antitrust statutes to set a common policy through their legal departments to bully carriers into waiving their rights as a condition for getting loads and business. If this problem was limited to one broker's business practices then we would have no such concern. But we have received information that many big brokers' legal departments follow this practice designed to hide rate information to defeat competition, regulation, and engage in price-gouging and/pr price-fixing. We complained to the Department of Justice Antitrust Division in late April and understand an investigation into this matter is currently in progress.

Small brokers, on the contrary do not have big legal departments and use basic contracts that do not have a waiver of 371.3c provision built in. Nor do they have the time to attend conferences at which, presumably, these discussions on how to defeat regulation are entertained. We note the TIA's former CEO Robert Voltmann spent much of the year in 2014 attending at least three such conferences during which, he pitched "collaboration in pricing" to conference attendees, which sounds a lot to us like price fixing. We brought this to the attention of DOJ at that time and again this past Spring when we were interviewed by the US Attorney, DOJ Special Agents, and Antitrust Division attorneys.

4. If the transparency issues are primarily associated with large brokers, what revenue threshold should the FMCSA consider for the applicability of any new requirements, and how would the Agency obtain accurate information about brokers' revenues?

The agency could require annual reports for brokers to determine if the broker is subject to your regulations aimed at big brokers in terms of the SBA threshold for small business brokers. As we have advised the agency in the past, the SBA sets the threshold for small business brokers at $15m under for NAICS Code 488510 – Freight Transportation Arrangement. See: https://www.sba.gov/sites/default/files/Size_Standards_Table.pdf

5. The OOIDA petition requested that brokers provide information to motor carriers automatically and electronically. The Agency requests commenters to provide their views on the most efficient and effective means of accomplishing this request. Should each broker have, for example, a stand-alone system with motor carriers receiving an email from the broker after the contractual service has been completed, or should brokers be allowed to satisfy the request with partnerships or networks through which registered brokers would upload transaction information which would then be automatically transmitted via the network to the registered carrier associated with the transaction?

Insofar as OOIDA brings up the issue of a strict interpretation of the rule that is intended to deter carriers from exercising their right to review the records by making carriers physically travel to and appear in a broker's office, we agree the rule should be updated so that the carrier and shipper have a right to request a copy of transaction records and receive them by email to respect the intent of the original ICC rule, which was created in 1980 before email existed or via fax for that matter. That is the only update that is necessary due to a "change in times."

We note the remainder of OOIDA's position is aimed at bringing the disclosure obligations of the proposed "TRUCC Act," which was previously abandoned, into fruition as a matter of regulation rather than statute and we defer to the agency's wisdom on that matter.

6. The OOIDA petition request that FMCSA require brokers to provide transaction information automatically within 48 hours of the completion of the contractual services would likely require information technology (IT) resources that are currently not in use. FMCSA requests that commenters provide cost estimates for implementing an IT solution to accomplish OOIDA's request, either through stand-alone systems run by individual brokers, or systems operated by groups of brokers notifying the individual carriers utilizing any of the brokers within the group.

The SBTC has no data to offer other than the fact that a gmail account is free.

7. Please provide a quantitative estimate of the economic benefits that would likely be achieved by motor carriers if FMCSA adopted the rules OOIDA and SBTC requests. How much additional revenue might motor carriers receive on a per-transaction basis?

It is unknown how much money big brokers have been withholding from carriers beyond the typical 12.5% margins that are reasonable and customary. The TIA purports their members average 16%. We cannot see how that is true when there are documents floating around social media that appear to show 65% margins when you do they math. In any event, we would suggest the impact would be substantial if you merely approve the SBTC request to stop the bleeding.

However, one former large broker recently suggested on social media in response to an SBTC tweet that estimates of $500,000 in costs are an egregious exaggeration that should be ignored.

8. Please provide a quantitative estimate of the economic costs to brokers or others if FMCSA adopted the rules OOIDA and SBTC request. How much profit reduction on a per-transaction basis would brokers experience, and what percentage of the costs would be passed through to shippers or motor carriers?

Questions 7 and 8 are cart-before-the-horse questions. We cannot offer you information that would be compiled under a regulatory scheme of enforced transparency until you enforce your transparency rule. We know big brokers have a reason they don't want transparency and that reason is because it would contradict the 16% margin data they want you and the motor carrier industry to believe. Just trust us is not working, especially when we see the effects of price-gouging of shippers and the squeezing of independent owner-operators like we did in the Spring of 2020 when the pandemic hit.

In closing, we again make reference to our October 13, 2020 comments previously filed with you and request you please approve the SBTC Petition to clarify the existing broker regulations as indicated in our petition and herein, and deny the TIA's attempt to now circumvent their big broker members' evasion of regulation by repealing the 49 CFR 371.3c transparency rule grounded in 70+ years of regulatory wisdom.