

SBTC Releases Reaction to FMCSA's Nov. 16th Federal Register Notice on Definitions of Brokers & Bona Fide Agents, Impacting "Dispatchers..."

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[James Lamb](#)

Executive Director,
Small Business in Transportation Coalition (SBTC)
@JimLambUSA

**IS IT ARRANGING,
OR NOT ARRANGING...
THAT... IS THE QUESTION!**

Here are our takeaways from [FMCSA's interim guidance and request for comments on brokers and bona fide agents that impacts dispatchers](#), which is scheduled to be published in the Federal Register on Wednesday, November 16th, 2022...

Whereas the notice states:

"FMCSA does not believe that where entities merely host an electronic platform for shippers and motor carriers to connect directly (i.e. load boards) that broker operating authority registration is required."

SBTC concurs that load boards are not brokers but conduits used by the players in the supply chain similar to telephones. FMCSA appears to have adopted SBTC's position.

"FMCSA wishes to clarify that handling money exchanged between shippers and motor carriers is a factor that strongly suggests the need for broker authority, but it is not an absolute requirement for one to be considered a broker."

SBTC concurs with FMCSA that dispatchers who argue they are not brokers because they do not handle the money are misguided. FMCSA appears to have adopted SBTC's position.

"After careful consideration, FMCSA has determined that representing more than one motor carrier does not necessarily mean one is a broker rather than a bona fide agent... Any determination will be highly fact specific and will entail determining whether the person or company is engaged in the allocation of traffic between motor carriers."

SBTC is not sure what FMCSA believes "allocation of traffic between motor carriers" means in the current notice. We explore FMCSA's apparent premise below that traffic cannot as a matter of "allocation of traffic," originate from a broker to a carrier through a "dispatcher," but only from a shipper to a carrier through a broker. Based on ICC precedent we brought to FMCSA's attention that is not cited in the notice, SBTC believes FMCSA got this wrong.

In [Practices of Property Brokers](#) the Commission considered the distinction between agents of carriers and brokers and concluded that one who was in a position to allocate shipments between competing principals was a broker, who required a license. On the other hand, an agent who devotes his service exclusively to a single carrier, is part of that carrier's organization and does not require a license. It stated (at 299):

Thus the distinction between a broker and bona fide agent is one of fact, and it is obviously difficult to frame a hard and fast definition of a bona fide agent that would be determinative in all cases. However, we are convinced that the term "bona fide agent" is here used in a narrower sense than is usually connoted by the term agent, for otherwise it would be meaningless in view of the fact that in a broad sense of the word a broker is also an agent. We are of the opinion that the bona fide agent contemplated by the statute is one marked by a continuing relationship between the agent and carrier pursuant to a preexisting agreement between them whereby the agent functions as a normal part of the carrier's organization, performs his duties under the direction of the carrier in the status practically of an employee, and is precluded from exercising discretion in the awarding of traffic or otherwise acting with independence in respect thereof.

The Commission then concluded that the ability to allocate traffic between competing carriers was the controlling factor distinguishing a "broker" from a "bona fide agent" stating (at 301, 302):

***The discretionary allocation of traffic as between competing carriers should be and under the rules herein approved will be conclusive on the question of broker versus agent status.

SOURCE: Transportation Law text, Fourth Edition, Copyrights 1965, 1973, 1979, 1983, Library of Congress Catalog Card Number 82-83545, ISBN 0-697-08516-3, John Guandolo author, Member of the bar of the District of Columbia, Author of "Federal Procedure Forms," Co-Author of "Transportation Regulation," Former Editor-in-Chief "ICC Practitioners Journal," Chapter 14 Brokerage Licenses Pg 221-222

SBTC disagrees, along with other commenters, that a person can be a dual agent and not be a broker as a matter of agency law, which holds that an agent cannot argue he is simultaneously the agent of two competing principals...

...because then he is not meeting his fiduciary duty to one of his principals when he arranges or finds or sources a given load for one of his two carriers and does not give that load to the other carrier. FMCSA has not adopted SBTC's position and seems to have overlooked this argument, which calls for SBTC to address this in a subsequent comment. It appears the FMCSA is dancing around this as a matter of semantics, referring to euphemistic language like finding loads and sourcing loads to avoid acknowledging that a dispatcher is, in fact, performing a middleman function when operating beyond the scope of one contract with one carrier; that is, the agency appears to be using the terms "find" or "source" as a substitute for using the phrase "arranging for(,) transportation" rather than examining the true role dispatchers play in arranging for transportation between brokers and carriers.

"After careful consideration, FMCSA clarifies that when a dispatch service does not participate in the arrangement of freight, or when it represents only one motor carrier, it is not a broker. If a dispatch service arranges transportation on behalf of multiple motor carriers and engages in the allocation of traffic, however, then pursuant to 49 CFR 371.2, it is not a bona fide agent and must obtain broker operating authority registration."

The central problematic issue, here, is FMCSA draws misguided and improper conclusions that "arrangement of freight" and "allocation of traffic" can only be construed to mean arranging or allocating between a shipper and carrier and not a broker and carrier by a party purporting to be agents of competing carriers authorized by FMCSA to operate anywhere in the 48 continental states by virtue of their operating authority as evidenced by their active MC number. We believe if a third party is involved in any portion of the arrangement of transportation, including helping the carrier "find" the load that the broker is trying to place for his shipper client, then that constitutes, well, arranging.

If a dispatcher "agent" finds a load and gives it to one of his two Houston, Texas carrier clients (principals), then he is --in effect-- "engaged in the allocation of traffic between motor carriers." So, the regulatory logic and rationale, here, does not fit with the finding.

SBTC contends that **nothing** in law supports a finding that the arranging of transportation by a "dispatcher" between a broker (already arranging transportation herself) and a carrier is any different than arranging transportation between shippers and carriers. The common definition of the word "arrange" is:

ar·range
/əˈrānj/
verb

1. put (things) in a neat, attractive, or required order.
"she had just finished arranging the flowers"
2. organize or make plans for (a future event).
"they hoped to arrange a meeting"

In any event, this FMCSA guidance appears to have pulled the rug out from under the

[TIA's argument that brokers are shippers.](#)

We again point to the authoritative statute. FMCSA acknowledges the law when it states:

Broker is defined in 49 U.S.C. 13102(2) as 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.”

First, we ask you to please note that Congress used the singular phrase "agent of a motor carrier." It did not state agents of motor carriers. This is because Congress wanted a bona fide agent of a carrier to be confined to working for that one single carrier as we and other commenters have asserted.

Second, nowhere in the law is "arranging" for transportation defined to mean an activity that necessarily involves a shipper being involved; that is none of the terms "allocation of traffic," "arrangement of transportation," or "arrangement of freight," are predicated on a shipper having to be one of the two parties a third party is dealing with. To back this argument up, we only need to point to the freight forwarding model, which is, in essence, a second intermediary in certain shipments.

As a matter of logic and consistency, the FMCSA cannot have its cake and eat it too here; that is, FMCSA cannot, on the one hand, suggest that dispatchers in between brokers and carriers don't need a license, but brokers not contracting directly with a shipper operating in between forwarders and carriers do.

Remember, [freight forwarders are defined by 49 U.S. Code § 13102:](#)

(8) Freight forwarder.—The term “[freight forwarder](#)” means a [person](#) holding itself out to the general public (other than as a pipeline, rail, motor, or [water carrier](#)) to provide [transportation](#) of property for compensation and in the ordinary course of its business—(A)assembles and consolidates, or provides for assembling and consolidating, shipments and performs or provides for break-bulk and distribution operations of the shipments;

(B)assumes responsibility for the [transportation](#) from the place of receipt to the place of destination; and

(C)uses for any part of the [transportation](#) a [carrier](#) subject to jurisdiction under this subtitle.

The term does not include a [person](#) using [transportation](#) of an air [carrier](#) subject to part A of subtitle VII.

Case-in-point... if a shipper retains, say, a freight forwarder to ship via ocean mode his used car from Hawaii to Los Angeles, California... with the understanding that it will be transported by car carrier on to Dallas, Texas, and upon the shipment arriving at the LA ports, the forwarder contracts with a broker to engage the carrier, no one will say the broker does not need a license because he is not allocating traffic or arranging for transportation because he is not working for the shipper. All parties would be required to be licensed, insured and/or bonded... both of the intermediaries and the carrier.

FMCSA has established interim guidance criteria for when it believes a "dispatch service" is a bona fide agent of a carrier and when it is a broker stating: "FMCSA does not believe it is the intent of Congress to eliminate the services that dispatch services provide."

FMCSA further seems to believe the law should elastically be a matter of what is popular as opposed to, what the law actually says. Note they state in this notice: "It is clear based on feedback from industry that there is a need and desire for dispatch services, among large and small motor carriers."

But the actual law matters, and this construct of dispatcher would not likely withstand judicial scrutiny.

Lastly, while suggesting determinations as to whether a dispatcher is really a broker need to be made on a "case-by-case basis," here:

"Ultimately, the analysis of whether a person or entity requires broker authority is often highly fact specific and must be made on a case-by-case basis."

...FMCSA indicates no bureaucratic mechanism that it intends to offer to the industry to adjudicate whether a dispatcher is a broker needing a broker license on a case-by-case basis. That is, the guidance includes no announcement of an "FMCSA Illegal Broker Enforcement Bureau" to which, industry could complaint and allege specific unlicensed broker activity despite having told industry that was coming way back in 2013.

On September 5, 2013, the FMCSA issued [this Guidance](#) advising it would be developing a "comprehensive enforcement program" with respect to unlicensed brokers and invited industry groups to report unlicensed brokerage activity via [this online complaint portal](#).

FMCSA stated:

FMCSA acknowledges there are motor carriers that occasionally broker loads that have not previously been required to obtain operating authority registration from FMCSA as brokers. However, FMCSA is unable to determine at this time how many motor carriers may be engaged in some brokering activities, making implementation of a comprehensive enforcement program difficult. Therefore, FMCSA will phase in its enforcement of the broker registration requirements for motor carriers that also broker loads. During the first phase-in period, FMCSA will accept complaints regarding unregistered brokerage activities of motor carriers through our National Consumer Complaint Database (see <http://nccdb.fmcsa.dot.gov/>).

FMCSA will work with industry groups to use this complaint information and other data to ascertain the extent of the unlicensed broker population subset within the motor carrier industry. The agency will then work toward developing a comprehensive enforcement program. FMCSA strongly encourages all motor carriers not to accept loads from unregistered brokers or freight forwarders, as these entities might not have the financial security mandated by MAP-21. FMCSA also notes that motor carriers brokering loads without properly registering with FMCSA as brokers may be subject to private civil actions pursuant to 49 U.S.C. 14707 (emphasis added).

Absent same, the industry is left with only the MAP-21 private cause of action. This passing of the buck shifts the burden to adjudicate these unnecessarily complicated criteria that FMCSA is putting into play, on to Federal judges. That, in turn, will have the impact of jamming or clogging the already burdened courts.

Thirty-five years ago, Mr. Higgins, my then-college Sociology professor, taught me:

The thing is...
what the thing does...

It was astoundingly simple.

I would suggest the simplest approach, here, would be for FMCSA to rethink this interim guidance and in final guidance conclude that whenever a dispatcher acts as an agent for more than one carrier, he is **always** engaged in the allocation of traffic between motor carriers... even if he is limited to arranging for loads between brokers and his carrier principals. And that... under FMCSA's own conclusion-- duly grounded in and supported by ICC precedent-- means:

...if it looks like a broker,
...and it acts like a broker,
...it's a broker!