



P E T I T I O N

March 9, 2022

Via DOTExecSec@dot.gov & U.S. Mail

The Honorable Pete Buttigieg
Secretary of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

Re: Petition to Amend 49 CFR 390.5 to Define “Dispatcher.”

Dear Secretary Buttigieg:

This is a *Petition for Rulemaking* submitted pursuant to 49 C.F.R. §389.31.

For many years, the Small Business in Transportation Coalition (“SBTC”) and its predecessor group Association of Independent Property Brokers & Agents (“AIPBA”), have been asking the Federal Motor Carrier Safety Administration (“FMCSA”) ad nauseum to address the broker bond and entities calling themselves “dispatchers” or “dispatch services;” that is, with respect to the latter, “persons” who unlawfully operate as property brokers and “arrange” for the interstate motor carrier transportation of regulated commodities “for compensation” without a license and bond.

By way of background, on September 5, 2013, the FMCSA issued this Guidance (<https://www.fmcsa.dot.gov/mission/policy/federal-register-notice-registration-and-financial-security-requirements-brokers>) 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: <https://nccdb.fmcsa.dot.gov/nccdb/home.aspx>.

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/>).

The Honorable Pete Buttigieg

March 9, 2022

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.

On January 13, 2015, during an FMCSA session at the annual Transportation Research Board (“TRB”) conference in Washington, D.C., the AIPBA trade group, which I founded for brokers in 2010 that later merged with the SBTC in 2016, asked then-FMCSA Associate Administrator for Field Operations Anne L. Collins what the status of this enforcement program was. She advised she was unaware and indicated the agency would have to get back to AIPBA. AIPBA then escalated this matter to then-Acting FMCSA Administrator Scott Darling's attention. AIPBA did not receive a response from FMCSA.

Thereafter, AIPBA filed a formal complaint with FMCSA against an unlicensed broker calling herself a “dispatcher” under FMCSA’s complaint number 100086655.

Under Docket No. FMCSA–2014–0211, AIPBA thereafter advised FMCSA that it was investigating unlicensed brokerage activity, including, but not limited to, the activities of entities referring to themselves as “dispatch services,” which operate as non-exclusive agents of motor carriers. AIPBA believed such business activity clearly falls within the definition of regulated brokerage as defined in 49 CFR 371 and an old Interstate Commerce Commission (“the Commission”) decision (again, we note the AIPBA thereafter merged with the SBTC in 2016 and was dissolved as a separate entity.)

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.

As AIPBA did in 2015, SBTC thereafter called on FMCSA to proceed with its “comprehensive enforcement program” to detect and enforce its rules against those who engage in unfair competition with duly licensed property broker members of the SBTC by evading and unlawfully circumventing the \$75,000 bond and the requirement to obtain a broker license. However, for almost a decade, FMCSA has neglected to implement this “comprehensive enforcement program,” which it promised industry.

Like AIPBA before it, the SBTC has consistently maintained that the \$75,000 bond amount is an unreasonable barrier to entry/overly burdensome for a start-up to

The Honorable Pete Buttigieg

March 9, 2022

maintain, on the flip side, we do not believe that unlicensed brokers should be allowed to operate without any bond at all with impunity. Yet that is precisely what has been happening.

In 2018, SBTC asked that FMCSA enforce the license and bond requirement by declaring “dispatch services” that service more than one carrier unlawful property brokers and begin charging such illegal entities with violation of the FMCSA’s regulations and the applicable statute requiring licensing of property brokers.

FMCSA **denied** this request.

That is, on October 4, 2018, SBTC petitioned FMCSA for rulemaking to formally request an amendment to the regulatory definition of property broker.

SBTC pointed out 49 CFR 371.2 states:

§ 371.2 Definitions.

(a)Broker means a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.

(b)Bona fide agents are persons who are part of the normal organization of a motor carrier and perform duties under the carrier’s directions pursuant to a preexisting agreement which provides for a continuing relationship, precluding the exercise of discretion on the part of the agent in allocating traffic between the carrier and others.

(c)Brokerage or *brokerage service* is the arranging of transportation or the physical movement of a motor vehicle or of property. It can be performed on behalf of a motor carrier, consignor, or consignee.

(d)Non-brokerage service is all other service performed by a broker on behalf of a motor carrier, consignor, or consignee.

SBTC requested an amendment to this rule to reflect long-standing precedent carried over under the Interstate Commerce Commission Termination Act of 1995.

We offered the following proposed version for your review and action, underlining our proposed changes to the rule to incorporate the Commission’s prior findings into your rule.

§ 371.2 Definitions.

(a)Broker means a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of

The Honorable Pete Buttigieg

March 9, 2022

shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport. **An entity that is in a position to allocate shipments between competing principals is a broker, who requires a license.**

(b) *Bona fide agents* are persons who are part of the normal organization of a motor carrier and perform duties under the carrier's directions pursuant to a preexisting agreement which provides for a continuing relationship, precluding the exercise of discretion on the part of the agent in allocating traffic between the carrier and others. **An agent who devotes his service exclusively to a single carrier, is part of that carrier's organization and does not require a broker license.**

(c) *Brokerage* or *brokerage service* is the arranging of transportation or the physical movement of a motor vehicle or of property. It can be performed on behalf of a motor carrier, consignor, or consignee.

(d) *Non-brokerage service* is all other service performed by a broker on behalf of a motor carrier, consignor, or consignee.

We again asked FMCSA to report to Congress on the fact that the \$75,000 bond requirement in MAP-21 caused FMCSA to revoke 9,802 intermediaries in 2013, which represented approximately 40% of the surface transportation intermediary industry at that time, and on the appropriateness of the \$75,000 amount pursuant to its MAP-21 mandate. And we reminded the agency it was FMCSA's position during household goods broker bond rulemaking (which concluded right before MAP-21 was enacted) that bonds over \$25,000 have "anti-competitive effects."

However, the agency **denied** this October 4, 2018 petition on January 29, 2020.

Since then, on September 10, 2019, we filed an exemption application (FMCSA-2020-0130) for small brokers to be exempt from the \$75,000 bonding requirement reviving the previous AIPBA exemption application. Like with the AIPBA's exemption application before it, the agency **denied** this exemption application too on December 16, 2021, leaving two sets of third-party intermediary players that arrange for interstate motor carrier transportation of regulated commodities: one that has to abide by the license and bonding requirement, and the other, which doesn't and operates as unlicensed and unbonded brokers to the detriment of shippers and carriers under the title "dispatcher;" this, with impunity in spite of Federal law, a statute which is simply not enforced by the government:

49 USC §14906. Evasion of regulation of carriers and brokers

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.

The Honorable Pete Buttigieg

March 9, 2022

On May 6, 2020, we petitioned to amend 49 CFR 371.3 concerning broker transparency. That matter is **pending**.

Thereafter, on May 19, 2020, OOIDA petitioned to amend 49 CFR 371.3 concerning broker transparency. That matter is **pending**.

On August 4, 2020, TIA petitioned to rescind 49 CFR 371.3(c) and for FMCSA to issue regulatory guidance to distinguish between dispatch service and brokerage. That matter is **pending**.

On April 19, 2021, Ourbus, Inc. petitioned to amend 49 C.F.R. §§ 390.5 and 390.9 to provide a clear delineation between motor carriers of passengers and brokers for such motor carriers, and as to the scope of Federal preemption over the regulation of brokers. That matter is **pending**.

On August 1, 2021, we filed a petition for 'Retrospective Review' of 49 CFR 371 & Issuance of OST Guidance on Broker Transparency. That matter is **pending**.

As far as we can tell, the only relevant place within the regulations where anything remotely close to the term “dispatcher” exists is within your definition of “motor carrier”:

*Motor carrier means a for-hire motor carrier or a private motor carrier. The term includes a motor carrier's agents, officers and representatives as well as employees responsible for hiring, supervising, training, assigning, or **dispatching** of drivers and employees concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories. For purposes of subchapter B, this definition includes the terms employer, and exempt motor carrier (emphasis added).*

As numerous entities have petitioned you in recent years on the subject of brokers vs. dispatchers/dispatch services, we believe it is now time for you to define the term “dispatcher.”

Comes now, the SBTC to propose, pursuant to the Commission’s aforementioned precedent¹ the following new definition be alphabetically inserted into 49 CFR 390.5 in between “Disabling damage” and “Driveaway-towaway operation:”

¹ See Section 204 (“Saving Provisions”) of the ICC Termination Act of 1995:
<https://www.govinfo.gov/content/pkg/PLAW-104publ88/pdf/PLAW-104publ88.pdf>

The Honorable Pete Buttigieg

March 9, 2022

Dispatcher means an employee or an agent of a motor carrier with a fiduciary duty to his principal who coordinates traffic with shippers, property brokers and receivers and devotes his service exclusively to a single carrier, is part of that carrier's organization, and is not in a position to allocate shipments between competing principals.

We believe this new regulatory definition will help you respond to TIA's pending petition and fairly and accurately apply the Commission's long-established wisdom to help the industry understand that anyone engaged in arranging for transportation for compensation who is in a position to allocate shipments between competing principals is in fact a third-party broker, not a bona fide agent improperly referring to himself as a "dispatcher" or "dispatch service."

Furthermore, as a matter of agency law, this definition is firmly grounded in the well-established legal doctrine that an independent third-party cannot simultaneously declare itself to be an agent of two or more competing carriers without violating an agent's "*fiduciary duty to principal*" when allocating shipments and choosing to load one carrier over the other. We hope we can finally settle this issue for the industry once and for all with this petition for rulemaking so that industry can step in, fill the enforcement void, and address these unlicensed brokers under the private cause of action in MAP-21.

Thank you for your consideration.

Sincerely,

/s/ JAMES LAMB

SBTC Executive Director

cc: John Putnam (via email)

Earl Adams (via email)

Larry Minor (via email)

Laurence Socci (via email)