

**Small Business in Transportation Coalition (SBTC) Written Testimony Before the House  
Committee on Transportation and Infrastructure, Subcommittee on Highways and  
Transit.**

***FAST Act Implementation: Motor Carrier Provisions***

**May 22, 2018**

Chairman Graves, Ranking Member Norton and Committee Members; thank you for the opportunity to submit this written testimony on behalf of the Small Business in Transportation Coalition to express our views and concerns with the FAST Act implementation and how the Act affects our members.

The Small Business in Transportation Coalition (SBTC) is a 501(c)(6) non-profit trade organization with over 14,000 dues paying members from every state and the District of Columbia. SBTC represents, promotes and protects the interests of small business truckers, motor carriers, brokers and forwarders in the transportation industry. Thousands of our members are small motor carrier businesses that are affected by the FAST Act and other regulations put into effect by the Federal Motor Carrier Safety Administration (FMCSA).

While there are many areas of the FAST Act that affect our members, there are a few that especially concern us that we would like to draw to the Committee's attention. Those areas include: the Electronic Logging Device (ELD) mandate, Hours of Service (HOS) rules, compliance with the Sunshine Act, and the Property (Freight) Broker Bond issue.

**Electronic Logging Device Mandate**

In its application for exemption to the ELD mandate (which was originally submitted to FMCSA on November 20, 2017 and revised at the request of FMCSA to conform to a regulation that applies to individual motor carrier exemption applicants on February 1, 2018 and has STILL not been published in the Federal Register), SBTC points to how the FMCSA published the final ELD rule --after conducting public notice and comment rulemaking-in furtherance of the Moving Ahead for Progress in the 21st Century Act ("MAP-21") on December 16, 2015, in which, the FMCSA referenced the steps it had taken to minimize adverse economic impacts on small entities. SBTC contends that a reading of the FMCSA analysis suggests that FMCSA has essentially ignored and disregarded the impact on the smallest of industry players in an overbroad assessment that places one-man interstate owner-operators into the same category as other "small businesses" within the trucking industry. For instance, in referencing North American Industry Classification System ("NAICS") codes 484110 through 484230 (Freight Trucking), the FMCSA makes no distinction whatsoever between businesses with annual revenues of \$27.5 million and mere one-man operators of commercial motor vehicles. We believe the FMCSA has a duty to consider the impact of the ELD mandate on small motor carrier businesses.

Prior to the \$2 billion ELD mandate taking effect, the SBTC received many serious concerns from our members and stakeholders regarding the implementation of the mandate. Those concerns ranged from the government mandate that a private business purchase a product strictly for the benefit of law and regulation enforcement, the likely violation of the 4<sup>th</sup> Amendment

protections against unlawful searches and seizures, the accuracy of the data being collected by the ELD devices, the government's use of the collected data, the government's ability to track truck drivers at any given time, the required use of a government mandated product to do the same task that truck drivers have been doing for decades, and more.

These concerns have been validated, as FMCSA has granted an assortment of waivers, exceptions, and soft enforcement deadlines to various industries and businesses; all of which have only led to more confusion about the mandate from our members and truck drivers across the country.

Further, we contend that regulations that are more extensive than necessary (such as the ELD mandate) are not in the public interest. Under the ELD mandate, a truck driver MUST shut down his vehicle – regardless of what he is carrying, or his current location – simply because the ELD (which may or may not be accurate) says so. In many instances, this could lead to a safety concern if a driver is on a desolate or dangerous road and is forced to shut down his truck because the ELD device requires him to do so. We believe the ELD mandate exacerbates this dangerous situation.

Additionally, there appears to a concern even among ELD manufacturers themselves that the ELD devices currently being marketed and sold to drivers are not fully compliant with the ELD regulations. There have been reports of system failures, faulty GPS tracking, inaccurate recording of duty statuses, speed irregularities and more. Although FMCSA is fully aware of these issues, it has not taken steps to correct the problem or even inform truck drivers that their ELD device may not be compliant.

It is for these reasons the SBTC requests an oversight hearing on the implementation of the ELD mandate. We would hope an oversight hearing would educate Congress and the public about the problems with the ELD mandate, how those problems can be addressed, and what legislative or administrative steps must be taken to address these grave issues.

### **Hours of Service**

We believe FMCSA should regulate the number of hours of sleep drivers must have as opposed to regulating the number of hours drivers must work, drive or be on break. The idea that by regulating hours worked we somehow ensure that drivers are well rested for the next shift is completely flawed. Time not driving does NOT automatically equate to time spent sleeping or resting. It just means time not driving and making money.

FMCSA should regulate the hours drivers are required to sleep, rather than the hours they are allowed to work, because adequate sleep is far more related to safety than the regulation of hours worked. We propose eliminating the 14-hour clock rule and allowing off-duty sleep time to be spread across the 24-hour day as a driver feels the need to sleep in order to safely operate a commercial motor vehicle.

FMCSA Administrator Ray Martinez noted several times during his testimony before Congress on May 22, 2018, that the safety of drivers and of the public is the number one concern of FMCSA. Therefore, it makes perfect sense to regulate the hours of sleep that drivers must take and to provide flexibility in the hours of service rules so that drivers may be able to sleep when they are tired, not when they are told to do so by some arbitrary rule, regulation, dispatcher. or electronic device.

Additionally, we ask the FMCSA to issue best practices guidelines to deter the harassing practice of waking drivers up to inspect their hours of service compliance and interfering with drivers' sleep under the guise of "enforcing hours of service regulations." In one instance, SBTC filed a pattern and practices complaint with the Department of Justice against a law enforcement agency that allowed its officer to wake the same sleeping team driver up to inspect his log book twice within a month for the claimed purpose of enforcing hours of service regulations. This is a form of driver harassment and can ultimately lead to a safety issue if drivers are not allowed to get solid hours of sleep because they are unnecessarily and insensitively awoken by law enforcement.

### **Broker Bond Issue**

Another issue that SBTC is concerned with is the freight broker bond issue. MAP-21 requires FMCSA to report to Congress on the adequacy of financial security of brokers every four years. In 2014, the agency filed a report but omitted the fact that the new \$75,000 bond had eliminated 40% of the intermediary industry, causing 9,800 small business transportation intermediaries to lose their licenses. It has now been 4 years since that report. SBTC is requesting FMCSA comply with its mandate to report to Congress as to the impact of the \$75,000 bond, including any "unintended consequences."

Additionally, prior to MAP-21, FMCSA had raised the household goods mover broker bond to \$25,000, suggesting during rulemaking that bonds more than \$25,000, which was an adjustment of the original \$10,000 bond for inflation, would, in its expert opinion, entail "anti-competitive effects." If that is still FMCSA's position, then Congress should act to lower the bond to \$25,000.

Some of the 9,800 entities formally licensed as brokers have continued to operate without a broker's license or bond calling themselves "Dispatch Services." which operate as non-exclusive agents of motor carriers. We suggest this business activity falls within the definition of regulated brokerage as defined in 49 CFR 371 and an old Interstate Commerce Commission decision.

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. The SBTC is concerned that the FMCSA has done nothing about these unlicensed rogue brokers calling themselves dispatch services. If the FMCSA continues to ignore this issue, we believe Congress should act to address this issue.

On September 5, 2013, the FMCSA issued regulatory guidance advising it would be developing a "comprehensive enforcement program" with respect to unlicensed property brokers and invited industry groups to report unlicensed brokerage activity through its online portal. In that guidance FMCSA promised:

*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).*

It is now 2018, and it has been nearly five years. During that time the predecessor trade group of SBTC, Association of Independent Brokers & Agents (AIPBA), filed a complaint with FMCSA on behalf of its then-membership of licensed brokers asking FMCSA to crack down on unlicensed brokers that are unfairly competing without a license and bond. SBTC is concerned that the FMCSA has not yet developed its “comprehensive enforcement program,” and if it has, it did not make that information public.

Additionally, we just learned recently that a link previously published by the FMCSA as the mechanism to report unlicensed brokers no longer works. We believe this is a serious issue because this prevents the public from reporting illegal brokers and members of industry from lodging complaints about these illegal operators calling themselves themselves “Dispatch Services.” SBTC believes that third parties who are paid to arrange transportation for multiple motor carriers are in fact unlicensed brokers, according to the statutory and regulatory definitions of broker and long-standing ICC precedent. It makes no sense to raise the bond and then allow those who do not secure the higher bond to operate nonetheless unlicensed with impunity due to lax enforcement.

We request an oversight hearing on the matter of FMCSA’s failure to report to Congress the devastating impact of the \$75,000 bond and on whether a \$25,000 would be adequate to fairly balance the playing field, including allowing our small carrier members to obtain brokers’ licenses to bring in more business on the side and outsource extra freight they cannot handle themselves.

### **Sunshine Act Compliance**

The SBTC has sued the Unified Carrier Registration Plan Board of Directors for failing to comply with the Sunshine Act for the past 10 years that it has existed and has been granted an injunction enjoining the Board from holding further subcommittee meetings without first complying with the open meetings law. FMCSA handles the Federal Register notices the Board is required to publish under the UCR Act. As recently as this month, FMCSA failed to publish the UCR Board's notice in the Federal Register and the Board had to cancel its meeting to avoid

a contempt of court situation. SBTC would ask that FMCSA commit to Congress to do a better job of helping facilitate proper notice to the public in accordance with the Sunshine Act.

Thank you for your attention, consideration and anticipated action on the issues I presented in this testimony. I am available to answer any questions you may have.

Respectfully submitted,

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