

**FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION  
U.S. DEPARTMENT OF TRANSPORTATION  
DOCKET # FMCSA-2012-0377**

**COERCION OF COMMERCIAL MOTOR VEHICLE  
DRIVERS; PROHIBITION**

**SUBMITTED BY:  
American Trucking Associations, Inc.  
950 North Glebe Road  
Suite 210  
Arlington, VA 22203**

**August 8, 2014**

**I. INTRODUCTION**

The American Trucking Associations, Inc. (ATA) submits the following comments to the Federal Motor Carrier Safety Administration's (FMCSA) Notice of Public Proposed Rulemaking on Prohibition of Coercion of Commercial Motor Vehicle Drivers.<sup>1</sup>

ATA is the national trade association representing the American trucking industry's interests before the Executive branch, Congress, and the courts.<sup>2</sup> ATA is vitally interested in matters affecting commercial motor vehicle drivers and the safety of transportation by truck.

**II. SUMMARY OF ATA'S POSITION**

ATA is a strong proponent of effective measures to increase safety on the nation's public roadways and understands the truck driver's vital role in safe transportation. ATA also recognizes that shippers, receivers, and intermediaries, as part of a single supply chain, can have an impact on driver and carrier safety. ATA members have long worked in a commercial setting with these parties to better ensure the safe transportation of goods. To the extent that these shippers, receivers, and intermediaries continue to take actions that force driver and carrier violations of the Federal Motor Carrier Safety Regulations (FMSCRs), ATA welcomes the proposal to extend jurisdiction and subject them to FMCSA enforcement. Likewise, ATA unequivocally opposes actions by motor carriers that force drivers to violate the FMCSR's. Therefore, as a general matter, ATA supports the concept of prohibiting coercion of drivers as

---

<sup>1</sup> 79 Fed. Reg. 27265 (May 13, 2014).

<sup>2</sup> ATA is a united federation of motor carriers, state trucking associations, and national trucking conferences created to promote and protect the interests of the trucking industry. Its membership includes more than 2,000 trucking companies and industry suppliers of equipment and services. Directly and indirectly through its affiliated organizations, ATA encompasses over 34,000 companies and every type and class of motor carrier operation.



set forth in section 32911 of the Moving Ahead for Progress in the 21<sup>st</sup> Century Act (MAP-21), Pub. L. 112-141 (July 6, 2012). Similarly, ATA generally supports FMCSA's proposed implementation of section 32911 of MAP-21 but, as further set forth below, has reservations about the potential impact the rulemaking could have on commercial relations between motor carriers and shippers, receivers, and intermediaries and the potential for abuse of the complaint process by drivers.

### **III. SPECIFIC CONSIDERATIONS**

A. Reporting an allegation of coercion. The first potential avenue for abuse of the proposed prohibitions entails the driver's perception of being coerced. For there to be an instance of coercion, the proposed definition of coercion and the new section 390.6 of title 49, Code of Federal Regulations, require drivers to object to operation of a commercial motor vehicle (CMV) because such operation would require violation of certain FMCSRs or commercial regulations. Section 390.6 authorizes the driver to file a complaint under new section 396.12(e) within sixty days of the event. In order to ensure relevant evidence regarding the alleged incident is preserved, and in order to better avoid he said/she said scenarios, ATA recommends that the rule require a driver alleging coercion to make the objection at a time contemporaneous with the incident in a writing that identifies the regulation(s) that would be violated if the driver operated the CMV. ATA agrees with FMCSA's statement that drivers alleging coercion under new section 390.6 "bear a substantial burden of proof."<sup>3</sup> ATA suggests that FMCSA clarify this substantial burden even further by adopting a clear and convincing evidentiary standard with respect to review of coercion claims by drivers. As the jury instructions for the U.S. Court of Appeals for the Ninth Circuit state, the clear and convincing standard "is a higher standard of proof than proof by a preponderance of the evidence."<sup>4</sup> Together with the suggestion that the driver make the objection in writing in a contemporaneous manner, the carriers' concern about drivers abusing the section 390.6 protections may be lessened. ATA does not believe this additional driver responsibility will detract from the benefits of prohibiting coercion.

B. Definition of Coercion. In its proposal, FMCSA defines coercion as involving a "threat . . . to withhold, or the actual withholding of, current or future business, employment, or work opportunities from a driver for objecting . . ."<sup>5</sup> It is unclear what this means in practice, but ATA suggests that FMCSA clarify the meaning so as not to inadvertently encompass legitimate business decisions. For example, a driver may allege coercion for objecting to operation of a CMV on day 1 and thereafter receiving a less lucrative route on day 10. The explanation for the

---

<sup>3</sup> 79 Fed. Reg. at 27268.

<sup>4</sup> See Manual of Model Civil Jury Instructions, § 1.4 (9<sup>th</sup> Cir.) at <http://www3.ce9.uscourts.gov/jury-instructions/node/48> (last visited Aug. 8, 2014).

<sup>5</sup> Id. at 27273.





**Comments of American Trucking Associations on  
Prohibition of Coercion of Commercial Motor Vehicle Drivers**

---

less lucrative route may range from scheduling optimization/necessity, lack of loads, or perhaps due to poor safety performance on unrelated loads. All of the foregoing are legitimate, commercial reasons for the load assignment that are not tied to the driver's objecting to operation of a CMV on day 1. As suggested above, a clear and convincing standard of proof would help protect against interference with legitimate, commercial business judgment without eroding the protection offered by the prohibition on coercion. Failure to account for legitimate commercial decisions would add untold costs to the proposed rule and may have the perverse effect of detracting from safety overall.

While the previous paragraph notes an over-inclusiveness issue with the definition of "coercion," the definition also suffers from an under-inclusiveness issue. The focus, in the context of shippers, receivers, and intermediaries, is the withholding or threat to withhold business or work opportunities from drivers. In practice, when a carrier's driver objects to being forced to operate a vehicle in violation of an applicable safety regulation, any withholding of business will more likely be targeted at the carrier than the driver. Shippers, receivers, and intermediaries far more frequently have contractual arrangements with motor carriers rather than individual drivers. Such targeted actions against the motor carrier fall outside the scope of the rules as currently drafted and present a significant loophole. ATA urges FMCSA to consider amending the proposed definition in section 390.5 to cover not only the driver as the target of withholding or coercion, respectively, but also his/her employer (as currently defined in 49 C.F.R. § 390.5).<sup>6</sup>

C. Expansion to include commercial regulations. The thrust of the proposed rulemaking is the implementation of section 32911 of MAP-21. FMCSA claims to use its residual safety authority and former Interstate Commerce Commission authorities to extend the prohibition on motor carrier coercion of drivers to violations of commercial regulations. ATA does not believe the commercial regulations have a significant, direct impact on safety worthy of being included in this rulemaking. Furthermore, it is difficult to imagine a situation in which a driver would be coerced by a motor carrier to violate a commercial regulation. The agency cites an example where a for-hire motor carrier requires a driver to operate a vehicle when the motor carrier had neither obtained operating authority nor filed proof of insurance. In such case, the primary concern should be the failure of the carrier to obtain authority and its illegal operation.

D. Overlap between OSHA authority and FMCSA authority. In its proposal, FMCSA admits "[t]here may be some overlap between the anti-coercion provisions of this proposed rule and the employee protection provision of the Surface Transportation Assistance Act (STAA),

---

<sup>6</sup> The proposed definition of "Coerce" or "Coercion" would now read, "(1) a threat by a motor carrier . . . to withhold, or the actual withholding of . . . from a driver *or the driver's employer as defined in this Part* for objecting . . ." (new language in italics).





**Comments of American Trucking Associations on  
Prohibition of Coercion of Commercial Motor Vehicle Drivers**

---

administered by the Labor Department.”<sup>7</sup> This overlap covers the regime applicable to motor carriers. Under the STAA provision, 49 U.S.C. § 31105, the Labor Department is charged with enforcing a prohibition against discharging, disciplining, or discriminating against a driver with respect to pay or terms of employment because of the driver’s refusal to operate a vehicle if doing so would violate a federal CMV rule related to safety, health, or security or if the safety or security condition of the vehicle gives the driver reasonable apprehension of serious injury to him/herself or to the public. It is conceivable given the overlap – and probably more frequently than not – that an alleged complaint by a driver would implicate the STAA regime and the proposed prohibition on coercion. ATA does not believe dual enforcement related to the same incident is an efficient use of government resources.

Both OSHA and FMCSA will be required to expend valuable resources investigating an allegation and substantiating the allegation of a driver. The dual expenditure of resources necessarily results in lessened ability to thoroughly investigate driver allegations by both agencies – not to mention unfairly punitive to the motor carrier involved in both investigations. ATA understands that on June 8, 2014, FMCSA and OSHA entered into a Memorandum of Understanding (MOU) “to facilitate coordination and cooperation between [FMCSA and OSHA] concerning the anti-retaliation provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105, and the anti-coercion provision, in 49 U.S.C. § 31136(a)(5)” and “to facilitate the exchange of safety and health allegations, when received by one agency, which are under the authority of the other.” That MOU is the ideal mechanism by which the agencies can assign exclusive jurisdiction over a particular driver allegation against a motor carrier to one agency or the other and avoid the unnecessary duplication of investigation and enforcement. Exclusive assignment of an allegation to one agency will allow both agencies to more widely protect against improper retaliation and coercion.

E. Violation of 390.6 as an acute violation. FMCSA proposes to make a violation by a motor carrier of the prohibition on coercion an acute violation. This blanket approach may provide for administrative ease but is no substitute for a thoughtful enforcement scheme. The prohibition on coercion applies to acts by, in this instance motor carriers, that coerce the driver to violate a broad range of the FMCSRs. Those FMCSRs are broken down into acute and critical violations as set forth in Appendix B, section VII of part 385 of the CFR. Where FMCSA has already determined that violation of the underlying safety regulation is a critical violation, e.g. 49 C.F.R. § 392.2 (operating a motor vehicle not in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated), it makes little sense to characterize coercing a driver to violate that same regulation as an acute violation. Since proposed section 396.12(e)(1)(iii) requires a driver filing a complaint to identify the specific regulations the driver

---

<sup>7</sup> Id. at 27268.





**Comments of American Trucking Associations on  
Prohibition of Coercion of Commercial Motor Vehicle Drivers**

---

alleges he/she was coerced to violate, FMCSA's existing categorization of those regulations as set forth in Appendix B should control whether a coercion violation is acute or critical.

F. Application to agents, officer, or representatives. As discussed more thoroughly in the comments filed on behalf of a coalition of motor carriers, ATA is concerned that the use of the terms "their respective agents, officers or representatives" with reference to motor carriers in the proposed definition of "coercion" and proposed section 390.6 could lead to enforcement of violations against the wrong party. The issue arises in the context of a motor carrier that leases equipment and a driver from an independent contractor. In that context, the proposal's inclusion of the terms "agents, officer or representatives" may lead some to erroneously believe that motor carrier to whom the equipment and driver is leased should be liable for violation of proposed section 390.6 even if it was the independent contracting entity that engaged in the act of coercion. ATA cannot fathom a justification for why that would have been Congress's intent – nor FMCSA's for that matter – and urges FMCSA to clarify that, for purposes of the definition of "coercion" and proposed section 390.6, a motor carrier's agents, officers or representatives only include anyone who is authorized to act on behalf of a motor carrier. In the instance where an independent contracting entity engaged in the act of coercion against one of its drivers, only that entity should be liable under proposed section 390.6 – not the motor carrier to whom the equipment and driver are leased.

#### IV. CONCLUSION

ATA recognizes the important roles that various members of the supply chain play in ensuring safe transportation on the public roadways. Likewise, ATA has long championed the driver's critical role in the safety effort. Therefore, ATA supports the laudable goals behind section 32911 of MAP-21 and FMCSA's proposed implementation of that provision. However, by raising the issues and making the suggestions set forth above, ATA requests FMCSA help limit the potential for this provision to be abused by drivers while protecting the driver from coercion at the same time.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Prasad Sharma", is written over a horizontal line.

Prasad Sharma

Senior Vice President and General Counsel