BEFORE THE
UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

COMMENTS OF:
C.R. ENGLAND, INC.
CRST INTERNATIONAL, INC.
CENTRAL REFRIGERATED SERVICE, INC.
COWAN SYSTEMS, LLC
DART TRANSIT COMPANY
GREATWIDE TRUCKLOAD MANAGEMENT
LIQUID TRANSPORT CORP.
NATIONAL CARRIERS, INC.
OAKLEY TRUCKING, INC.
PGT TRUCKING, INC.
ROADRUNNER TRANSPORTATION SYSTEMS, INC.
SCHNEIDER NATIONAL, INC.

IN RESPONSE TO
NOTICE OF PROPOSED RULEMAKING
COERCION OF COMMERCIAL MOTOR VEHICLE DRIVERS; PROHIBITION

DOCKET NO. FMCSA-2012-0377

I. Introduction & Requested Relief

On May 13, 2014, the FMCSA published a Notice of Proposed Rulemaking (Docket No. FMCSA-2012-0377), alerting the public to regulations it intends to promulgate pertaining to the coercion of drivers who operate commercial motor vehicles ("CMVs"). Through its proposed rules, the FMCSA seeks to prohibit certain participants in the transportation industry from coercing drivers to violate safety regulations and/or operate CMVs in violation of commercial regulations—laudable goals, to be sure. These participants include motor carriers, shippers, receivers, transportation intermediaries and their "agents, officers, and representatives." These terms—"agents," "officers," and "representatives"—are undefined, which is certain to breed confusion about who, specifically, will be held responsible for violating the rules.

This is particularly true for motor carriers that engage independent contractor owner-operators to haul freight. If an owner-operator who employs other drivers[1] coerces his driver(s) to violate a safety regulation or to operate a CMV in violation of a commercial regulation, is it the owner-operator or the motor carrier with which the owner-operator has contracted that should be penalized? As they stand, the proposed rules offer no insight on this question. The FMCSA should consider revising the rules to better clarify to whom they apply. If it does not, there's a chance motor carriers could be unfairly stripped of their operating authority if an owner-operator, over whom they have no control, coerces its driver(s) to violate certain regulations.

II. Coalition Members

These comments are submitted on behalf of some of the nation's largest federally-authorized motor carriers (the "Coalition"). Though their individual operations are quite diverse, these carriers share at least one important characteristic: they are, or have operations that are, primarily non-asset-based entities that engage independent contractor owner-operators to haul freight for their customers.

Recent studies reveal that owner-operators make up a significant portion of the population of CMV operators in this country.[2] In many cases, these owner-operators are sophisticated entities in their own right: they incorporate their businesses, own multiple trucks, hire employees to operate the trucks, and lease their trucks and drivers to a number of motor carriers. They are fleet operators that engage in arm's-length transactions with the motor carriers under whose authority they operate. Or, on occasions, they may even secure their own operating authority, allowing them to solicit freight from shippers or brokers directly.

However they choose to run their businesses, the owner-operators, not the motor carriers to whom they lease their equipment and drivers, are responsible for overseeing the employees or subcontractors they engage to operate their CMVs. The owner-operators hire, train, schedule,

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[1] While many owner-operators are themselves the only driver of the CMV leased to a motor carrier under 49 C.F.R. Part 376, others may hire a co-driver to assist in a team operation or have multiple CMVs leased to a motor carrier and thus employ other drivers to operate them. These owner-operators are commonly known as fleet operators.

[2] *See, e.g.,* OOIDA.com, Owner-Operator and Independent Driver Facts, http://www.ooida.com/OOIDA%20Foundation/RecentResearch/OOfacts.asp (last visited Aug. 4, 2014) (reporting there are over 350,000 owner-operators in the U.S., the majority of whom lease on to large carriers).

pay, and, when necessary, fire these drivers. Beyond ensuring the drivers are qualified to operate CMVs and otherwise ensuring the drivers' compliance where required under the FMCSRs,[3] motor carriers, such as the Coalition members, have very little, if any, control over the owner-operators' drivers' day-to-day operations.

III. Concern With the Proposed Rules

According to the NPRM, the FMCSA proposes to amend certain regulations and adopt others that have the effect of prohibiting "motor carriers, shippers, receivers, or transportation intermediaries from coercing drivers to operate CMVs in violation of certain provisions of the FMCSRs" and "anyone who operates a CMV in interstate commerce from coercing a driver to violate the commercial regulations." 79 Fed. Reg. 27,265 (May 13, 2014). In this respect, the NPRM can be split into two parts: (1) those amendments/regulations that prohibit carriers, shippers, receivers, and transportation intermediaries from coercing drivers to violate the safety regulations and (2) those that prohibit carriers from coercing drivers to operate CMVs in violation of the commercial regulations. The FMCSA intends to accomplish these goals by amending 49 C.F.R. Parts 385, 386, and 390 and by adding § 390.6.

The proposed § 390.6 provides:

> (a) Prohibition.
>
> > (1) A motor carrier, shipper, receiver, or transportation intermediary, **including their respective agents, officers, or representatives,** may not coerce a driver of a commercial motor vehicle to operate such vehicle in violation of 49 CFR parts 171-173, 177-180, 380-383 or 390-399, or §§ 385.105(b), 385.111(a), (c)(1), or (g), 385.415, or 385.421;
> >
> > (2) A motor carrier **or its agents, officers, or representatives,** may not coerce a driver of a commercial motor vehicle to operate such vehicle in violation of 49 CFR parts 356, 360, or 365-379.
>
> (b) Complaint process.
>
> > (1) A driver who believes he or she was coerced to violate a regulation described in paragraph (a)(1) or (2) of this section may file a written complaint under § 386.12(e) of this subchapter.
> >
> > (2) A complaint under paragraph (b)(1) of this section shall describe the specific action that the driver claims constitutes coercion and identify the specific regulation the driver was coerced to violate.

[3] Importantly, the FMCSRs (specifically, 49 C.F.R. §§ 390.3 and 390.5) obligate motor carriers to ensure the qualifications and regulatory compliance *of any driver* operating a CMV under the carriers' operating authority, including drivers directly employed by an owner-operator. They *do not* require motor carriers to oversee the regulatory compliance of owner-operators who do not personally drive a CMV that is leased to them.

> (3) A complaint under paragraph (b)(1) of this section may include any supporting evidence that will assist the Division Administrator in determining the merits of the complaint.

79 Fed. Reg. 27,265, 27,273-74 (May 13, 2014) (emphasis added).

According to the NPRM, those entities found to have violated § 390.6 are subject to a number of penalties including: (1) a fine of up to $11,000 per offense (applicable to motor carriers, shippers, receivers, transportation intermediaries and their agents, officers, or representatives); (2) suspension or revocation of operating authority for willful violations (applicable to motor carriers, brokers, freight forwarders and their agents, officers, or representatives); and (3) an "acute" violation under Appendix B of Part 385, which could potentially impact a motor carrier's safety rating (applicable to motor carriers and their agents, officers, or representatives). *Id.* at 27,268.

Throughout the NPRM, the FMCSA uses the catch-all terms "agents," "officers," and "representatives" when describing to whom the proposed prohibitions against coercion apply. These terms are undefined, and this lack of clarity could result in some unexpected consequences, particularly for motor carriers such as the Coalition members. As an initial matter, these terms appear to be superfluous, particularly when used in conjunction with the term "motor carrier" in § 390.6(a)(2), since those very terms are already included in the definition of a "motor carrier" in § 390.5.[4] For this reason, these terms add nothing to the substance of the proposed regulations, but their inclusion could, very well, be detrimental to motor carriers whose owner-operators are found to have independently violated the regulations.[5]

Take this example:

> ABC Transportation, Inc. (an authorized motor carrier) engages John Doe Trucking (an independent contractor owner-operator). John Doe Trucking hires an employee driver to haul freight under ABC Transportation, Inc.'s operating authority and DOT number. John Doe Trucking coerces its driver to violate the hours-of-service regulations without the knowledge or consent of ABC Transportation, Inc.

Against which entity in this scenario and under the proposed regulation would the FMCSA take enforcement action? One would expect John Doe Trucking. After all, it is the entity responsible for the coercive behavior. But if John Doe Trucking is considered an "agent, officer, or representative" of ABC Transportation, Inc., ABC could, in fact, be on the hook.

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[4] 49 C.F.R. § 390.5 provides that the term "motor carrier" "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." This definition would apply to proposed § 390.6.

[5] To be clear, the Coalition members do not mean to suggest that motor carriers that engage owner-operators could *never* be liable under the proposed regulations. Certainly, if the motor carrier itself, or someone else at the motor carrier's direction, coerces drivers to violate certain regulations, the motor carrier should be penalized.

And what specifically is at stake in this hypothetical? Again, if John Doe Trucking is deemed an "agent, officer, or representative" of ABC Transportation, Inc., ABC could be liable not only for an $11,000 civil penalty but also an "acute" violation and a potential downgrade in safety rating and/or revocation of its operating authority. This is true despite the fact that ABC had nothing to do with the coercive behavior, no knowledge that it occurred, and no obligation under the FMCSRs to oversee John Doe Trucking's compliance with the proposed rule. Surely the FMCSA does not intend such an inequitable result, but if it does not clarify its proposed rule, it leaves this possibility open.

IV. Requested Relief

In order to avoid the inequitable situation described above, the FMCSA should clarify to whom the proposed rules apply. Specifically, it should consider narrowly defining the terms "agents," "officers," and "representatives" to specifically exclude independent contractors with whom motor carriers contract to haul freight and who are not specifically authorized to act on their behalf. Presumably, by including these terms, the FMCSA intended the proposed rules to apply to motor carriers, shippers, receivers, third party intermediaries, and *anyone who is authorized to act for or in their stead.* In this respect, the agency is merely adopting the common law understanding or dictionary definition of an "agent."[6] But, as noted, by broadening its rules to include not only agents but also "officers, and representatives," and without clarifying that it intended to capture only true "agents," the FMCSA leaves open the possibility that an independent contractor owner-operator's actions could be attributed to a motor carrier. By revising the proposed rules to specify that the agency intends to adopt the common law definition of an "agent," and that this definition does not include independent contractor owner-operators who are not authorized to act on the motor carrier's behalf, the agency can avoid any confusion that might otherwise occur when it comes time to enforce the regulations.

In addition to, or alternatively, the FMCSA should consider clarifying that a motor carrier will only be assessed an "acute" violation under the new regulations if the motor carrier itself, not an independent contractor owner-operator that leases equipment and/or drivers to the motor carrier, is responsible for the coercion. Again, it is simply inequitable (and not likely the FMCSA's intent) to place a motor carrier's safety rating and operating authority at risk based on the independent and intentionally coercive conduct of the owner-operators with whom they contract. In such circumstances, the agency's enforcement action should be directed at the owner-operator, not the motor carrier. In this sense, the FMCSA would be treating the owner-operator just like any other shipper, receiver, or transportation intermediary that "has assumed the role normally reserved to the driver's employer." *See* 49 Fed. Reg. 27,265, 27,267 (May 13, 2014). Except in this case, the owner-operator would, in fact, be the driver's employer.

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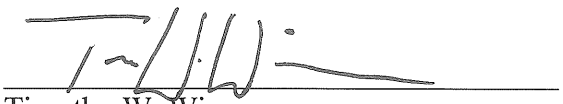
[6] Black's Law Dictionary defines an agent as "one who is authorized to act for or in place of another; a representative." Similarly, the Restatement (Third) of Agency § 1.01 provides that "agency" is "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."

V. Conclusion

Because the rules, as proposed, are likely to cause confusion regarding to whom they apply and could result in the inequitable suspension or revocation of a motor carrier's operating authority, the FMCSA should consider revising the regulations to promote clarity. Specifically, the agency should consider clarifying that in instances when an independent contractor owner-operator is the entity responsible for the coercion, the owner-operator, not the motor carrier which leases his equipment and/or drivers, will be subject to enforcement action.

Respectfully submitted,



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On behalf of
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CRST International, Inc.
Central Refrigerated Service, Inc.
Cowan Systems, LLC
Dart Transit Company
Greatwide Truckload Management
Liquid Transport Corp.
National Carriers, Inc.
Oakley Trucking, Inc.
PGT Trucking, Inc.
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