BEFORE THE

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

DOCKET NO. FMCSA-2012-0377

COERCION OF COMMERCIAL MOTOR VEHICLE

DRIVERS; PROHIBITION

COMMENTS OF NASSTRAC, INC.

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I. INTRODUCTION

These Comments are filed by NASSTRAC, Inc., also known as National Shippers Strategic Transportation Council, in response to the NPRM issued in this docket by FMCSA on May 13, 2014 (79 Fed. Reg. 27265). NASSTRAC vigorously opposes unsafe operations by drivers of commercial motor vehicles, and does not condone violations of legal requirements for drivers, whether or not the result is dangerous operations or injury to persons or property. NASSTRAC nevertheless opposes FMCSA's proposed regulations in their current form as arbitrary and capricious, contrary to law, impracticable and certain to do more harm than good.

Even if the rules were legally sound and well-designed (and they are not), FMCSA cannot credibly assert that its proposed rules can be implemented with no costs or other adverse impacts to shippers and intermediaries, or to the transportation system of which the trucking industry is the most important part.

NASSTRAC has no sympathy for shippers or intermediaries who attempt to make truck drivers violate safety regulations of FMCSA or other governmental entities, but the propose rules constitute a stunning overreach and abuse of regulatory power. In effect, FMCSA seeks to deputize virtually all American businesses, along with federal, state and local governments, and individuals shipping personal property and household goods, as unofficial compliance personnel regulated by this agency.

II. IDENTITY OF NASSTRAC

NASSTRAC is a national trade association that, for more than 60 years, has represented the interests of its members in transportation, logistics and supply chain management issues, providing educational programs and participating in proceedings before federal and state regulatory agencies and courts, and before Congress and state legislatures. NASSTRAC has many shippers and

intermediaries, large and small, as regular members, and also has many transportation service providers, including many motor carriers, as associate members. Many NASSTRAC members are also members of NITL and/or TIA, and NASSTRAC also generally supports those associations' comments in this proceeding.

NASSTRAC has filed comments on, and continues to be concerned about, FMCSA's announced plans to extend its regulatory authority to shippers, receivers, brokers and forwarders of freight. Overregulation of such entities with no recognition of the important functions they are needed to perform, like overregulation of the trucking industry, adversely affects the efficient transportation of freight on which US consumers, businesses and the larger economy all depend.

We are particularly concerned about FMCSA's apparent indifference to costs and burdens imposed on customers of motor carriers, without whom the trucking (and rail, water and air cargo) industries would not exist. This was a problem when FMCSA considered changes to its Hours of Service rules, and calculated implementation costs for motor carriers but assumed that changes in driver hours would impose no costs on shippers and receivers. It is also a problem in this proceeding, as detailed below.

FMCSA proposes to saddle shippers, receivers and intermediaries with onerous new responsibilities (which many people are unequipped to shoulder), and exposure to penalties of up to $11,000 per offense, while claiming that the rule "does not affect industry productivity" and will impose no costs to speak of on individual shippers, small and large businesses, or state or local governments (many of which are shippers and receivers). FMCSA cannot rationally make these claims about new rules that apparently require, at a minimum, every trucking company customer to "inquire about the driver's time remaining" as to every shipment made by CMV for which there is a requested timetable.

The proposal is not entirely clear about all aspects of every shipper's, receiver's and intermediary's "duty to inquire". However, it also appears that every driver, for every movement, might also need to be queried by trucking company customers about whether the driver's equipment meets applicable requirements,

whether the driver is in compliance with alcohol and substance abuse rules, whether the driver has the required qualifications, whether needed parts and accessories are available, etc., etc. This requirement appears to apply whether or not there is a delivery schedule for the shipment. See proposed new 49 CFR Section 390.5(1), listing regulations as to which FMCSA would apply the "knew or should have known" standard that evidently triggers a duty to inquire by shippers, receivers and intermediaries. Many shippers, receivers and intermediaries lack the expertise to judge driver responses to many of these inquiries, and the idea that they will take no time and cost no money is unsupportable.

Before going further, NASSTRAC states that it supports compliance by truck drivers with all applicable legal requirements, including FMCSA safety regulations. NASSTRAC has recommended to its shipper members a provision in contracts with motor carriers to the effect that the shipper does not condone violations of safety regulations, and that if requests by a shipper employee are inconsistent with compliance with Hours of Service or other rules, such compliance will supersede any conflicting shipper directives. Many NASSTRAC members have adopted such provisions in their contracts.

NASSTRAC has also warned its members about increasingly aggressive members of the plaintiffs' tort bar, who seek to sue not just motor carriers but also intermediaries and shippers when filing lawsuits arising out of traffic accidents. It is highly likely that a truck driver charged with safety violations in such a case would seek to assign some blame to a shipper, receiver or intermediary who coerced the safety violations, and the possibility of false claims of coercion cannot be ruled out. The risk of increased exposure to liability gives intermediaries and shippers and receivers a strong incentive not to engage in such coercion. And, most importantly, personnel of shippers, and their families and friends share roads and highways with truck drivers. Unsafe driving of CMVs is in no one's interest, particularly in light of pervasive competition in the trucking industry. If one carrier cannot meet a shipper's delivery deadline, another carrier probably can.

An exception, of course, would be a shipper or intermediary or receiver who demands that a driver met a deadline that cannot be met unless the driver exceeds HOS rules, or exceeds speed limits, or both. Such customers may exist, but NASSTRAC believes that for every such shipper, receiver or intermediary who

might be deterred by FMCSA's new rule, there are thousands who will face new burdens, costs and delays for no good reason. A regulatory prohibition against such egregious conduct by the occasional shipper, receiver or intermediary would be far less controversial than the massive burdens FMCSA has proposed for all trucking industry customers.

III. THE PROPOSED RULES SHOULD NOT BE ADOPTED

A. There Appears to be No Need For the Proposed Rules

FMCSA cites MAP-21 as its statutory authority for its proposed rules, but goes on to assert (79 Fed. Reg. at 27267) that it has also decided on its own to interpret its authority so broadly as to prohibit, in addition, coercing a driver to operate a CMV in violation of FMCSA commercial regulations inherited from the STB. Ignored in FMCSA's NPRM is the fact that one such regulation, 49 CFR Section 390.13, provides "No person shall aid, abet, encourage or require a motor carrier or its employees to violate the rules of this chapter." FMCSA may already be able to penalize coercion under 49 CFR Section 390.13, and under 49 CFR Section 390.37. If so, the new regulations may be largely unnecessary.

FMCSA may regard its authority under 49 CFR Section 390.13 to be limited to situations in which the driver actually commits a violation aided, abetted or encouraged by a shipper, receiver or intermediary. If so, and if FMCSA intends its new rules to penalize unsuccessful coercion, i.e., customer requests that a driver ignores, or intends to penalize the failure of a shipper to fully exercise a duty to inquire when there is no driver violation, more fundamental issues arise. NASSTRAC does not consider such cases to be what Congress had in mind in 49 USC Section 31136(a)(5), cited as FMCSA's legal basis for this rulemaking.

Penalizing coercion resulting in violations better addresses the conduct Congress wanted to discourage. FMCSA has cited no analogous regulatory program that would penalize millions of Americans' words or requests even if they produce no actions. The Foreign Corrupt Practices Act and similar anti-bribery

laws penalize inducements to violate laws, but they generally require some direct or indirect payment in addition to an oral or written request.

In addition, penalizing shippers, receivers and intermediaries for words that produce no actions, let alone violations, implicates First Amendment considerations, as well as concerns about overkill.

Assume, for example, that Shipper A contacts Carrier B, making clear that it needs Carrier A to meet a reasonable delivery deadline, such as a truckload pickup at Allentown, PA Monday morning at 7am, followed by delivery in Pittsburgh by 7pm (i.e., 12 hours for a 284-mile haul). Now suppose Carrier B's driver shows up on time Monday morning at Shipper A's Allentown facility and says that his 34-hour restart must begin 5 hours later, so Shipper A's delivery deadline cannot be met, and Shipper A says in frustration "That's the last time I use Carrier B." Is Shipper A subject to a penalty of up to $11,000 just for saying those words, even if no safety violation occurs? How many penalties could Shipper A face if it makes no more use of Carrier B?

In the foregoing example, Carrier B has failed to fulfill what FMCSA's NPRM describes as its "affirmative duty before assigning a trip to ensure that the driver has sufficient time left under the HOS rules to complete that run". 79 Fed. Reg. at 27267. Assuming no HOS violation, if Shipper A must give more business to Carrier B to avoid a coercion penalty, doesn't the rule reward Carrier B for its malfeasance? That question aside, how will FMCSA differentiate between coercion and "letting off steam" when a reasonable service request goes wrong?

FMCSA may take the position that if its new rules sweep so broadly that almost every shipper could be exposed to liability sooner or later, this is unobjectionable because FMCSA will never abuse its power to impose penalties. Shippers might be more inclined to give the agency the benefit of the doubt if it had shown the slightest awareness of the costs and burdens it is proposing to require motor carrier customers to bear. As it is, NASSTRAC contends that the proposal's overreach and chilling of freedom of speech make it arbitrary and capricious and contrary to law.

B. The "Duty to Inquire" is Arbitrary, Capricious and Contrary to Law

The aspect of the proposed rules that will cost the most (far more than the zero dollars FMCSA projects), and which is most contrary to established law, is the "duty to inquire". As noted above, this duty appears not to be limited to asking drivers whether it is possible for them to meet delivery schedules without violating HOS rules, but may involve a lengthy checklist of legal requirements that FMCSA wants shippers, receivers and intermediaries to police.

Even if the duty to inquire were limited to HOS status (and it is not), the burdens could be significant for two reasons. First, the driver's answer may often be "It depends", necessitating a certain amount of discussion of shipper needs and driver capabilities. And second, the number of required inquiries appears enormous, in light of the fact that the trucking industry handles hundreds of millions of shipments per day, many of which are subject to timetables requested by shippers, intermediaries or receivers.

Assume, for simplicity, that the answer is always straightforward, the driver either clearly can or clearly cannot make the run within the time available under HOS rules, and no other subjects necessitate a more lengthy conversation (assumptions which are plainly counterfactual). It remains the case that every shipper would have to discuss HOS status for every scheduled shipment with every driver. Other safety requirements could necessitate a driver inquiry even for non-scheduled shipments. There do not appear to be any exclusions, so the requirement would apply to every individual shipping household goods, every small business shipping anything for any distance, every large business for every CMV shipment it makes.

FMCSA has asserted that state and local governments would be unaffected, as would Indian Tribal Governments. However, Indian Tribal Governments, and state and local governments (and federal government entities) are shippers and receivers of freight transported by CMVs. The Department of Defense ships and receives large volumes every year. All of these shippers would apparently have a duty to inquire as to HOS and other compliance by every driver, even though many probably have no idea that HOS rules even exist. For them, FMCSA is proposing a huge trap for the unwary.

To make matters worse, most shipments have different shippers and receivers, and many involve a shipper, intermediary and receiver. However, FMCSA's proposal does not make an exception for receivers where shippers have already inquired about driver compliance, or make an exception for shippers where an intermediary has already interviewed the driver. Two or three inquiries per shipment are apparently necessary for protection against potentially severe penalties. Each inquiry may take several minutes of busy peoples' time, once systems have been implemented and training has occurred (which will also cost money and take time).

As shown below, even one inquiry per shipment is impracticable, given the huge number of truck shipments per day. Multiple inquiries compound the unreasonableness. And drivers have better things to do with their limited time than to respond to multiple inquiries per shipment covering ground presumably already covered by the motor carriers they work for. A driver in LTL service, with multiple pickups and deliveries per day, would face multiple inquiries producing significant delays.

However, unless shippers and others make such inquiries, and keep records of making such inquiries and being told that no violations existed, there would apparently be no protection if a driver caught violating FMCSA rules falsely blamed the trucking company's customers. FMCSA seems to assume, based on past history, that its proposal will not produce many such instances, but widespread implementation of electronic logging device rules make that assumption unreasonable. FMCSA also apparently believes that its penalty regime is not draconian because its fines "are usually subject to a maximum of 2 percent of a firm's gross revenue." 79 Fed. Reg. at 27270. There are many small businesses for which 2% of gross revenues will be a major portion (or all) of the firm's net revenues after payment of expenses. Small businesses are the most vulnerable to inadvertent errors, and most likely to face difficulty mounting a defense in enforcement proceedings due to lack of expertise and specialized counsel.

FMCSA may think that every shipper interacts with every driver as to every shipment in the normal course of business, so adding a compliance interview to each such interaction is unobjectionable. But any such assumption is not just unsupported but incorrect. Many corporations make hundreds or thousands of

shipments per day (Amazon almost certainly makes millions of shipments per day). And yet, corporate logistics departments may have only a handful of people who deal with motor carriers, and an inquiry taking as little as 30 seconds with each driver for each shipment becomes a physical impossibility, and prohibitively costly.

The reality is that even large corporations will rely on their logistics departments, or their intermediaries, to negotiate contracts with a number of motor carriers. As noted above, many such contracts already prohibit the coercion FMCSA seeks to deter, but for most shippers, interaction of logistics professionals with drivers is minimal or nonexistent. In many cases, no shipper personnel interact with a driver because the freight is pre-loaded in trailers by the shipper and staged in a yard for pickup by the driver, who may do no more than sign in and out with a gate guard. Many shipments are picked up and delivered on weekends, when few shipper or receiver personnel are available for inquiries as to drivers' HOS and other compliance status. Meeting FMCSA's duty to inquire will present major challenges for shippers, and impose costs far in excess of FMCSA's estimate of an aggregate amount below $100 million for the nation as a whole.

Shippers, receivers and intermediaries do not have the necessary systems in place for driver inquiries for two simple reasons. The first is that billions of shipments occur each year, and the second is that shippers expect trucking companies to police regulatory compliance by their drivers, because the drivers are not employees of, and are not answerable to, shippers, receivers or intermediaries. This too is spelled out in many if not most contracts with carriers.

FMCSA attempts to justify its duty to inquire theory by citing the principle of respondeat superior, and arguing that, under this principle, customers of trucking companies can be deemed by FMCSA to be driver employers subject to liability if they knew or should have known of compliance problems. Since motor carrier customers rarely have actual knowledge of such compliance issues, FMCSA is required to impute knowledge to shippers, receivers and intermediaries based on a "should have known" theory, and a "duty to inquire" for which FMCSA cites no authority. Somehow all of this is supposed to add up to employer status for hundreds of millions of Americans.

This reasoning is contrary to law, because shippers can rarely, if ever, legitimately be deemed "employers" of drivers hired, managed and paid by motor carriers (which are far better positioned than their customers to make the compliance inquiries FMCSA calls for). These facts, well established in countless court cases, are not changed by the fact that shippers may have some say in where their freight is to go, when it should be delivered, and how it should be protected from harm. To contend otherwise would amount to claiming, for example, that waiters employed by restaurants, construction workers employed by building contractors, cleaning crews employed by janitorial services, computer specialists employed by IT contractors, nurses employed by hospitals, etc., etc., are also somehow employees of every customer of the actual employers of record of these employees.[1]

As a matter of law, FMCSA's respondeat superior theory is untenable. As a matter of fact, FMCSA's duty to inquire is impracticable. It is one thing to promulgate a regulation saying that shippers, receivers and intermediaries must not do something that the vast majority of them do not do anyway. Legal justification aside, the cost of compliance for shippers, receivers and intermediaries might well be low.

However, when FMCSA adds an affirmative duty to inquire, such that every trucking company customer is required to make burdensome new inquiries into specialized regulatory areas never before regarded as the province of such customers, FMCSA's attempt to dismiss compliance costs as negligible is fatally flawed.

According to federal government data, motor carriers transport some 60-70% of US shipments, by weight and by value.[2] It is not easy to determine how many shipments make up the roughly 8-12 billion tons of freight transported by truck

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[1] FMCSA seems to be thinking along the same lines as the NLRB General Counsel, who recently concluded that McDonald's is a joint employer with its franchisees. FMCSA's theory is even more objectionable because trucking company customers have far less influence over drivers that McDonald's has over franchise employees, and because far more people would be erroneously deemed employers by FMCSA.

[2] See US Census data at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=CFS_2012_OOP1&prodType+table. See also US DOT, FHWA, Office of Freight Management and Operations, Freight Analysis Framework, version 3.4, 2012.

each year, but UPS alone, according to the Fact Sheet on its website, handles almost 17 million packages and documents per day, for 9.4 million customers (1.5 million pick-up, 7.9 million delivery). Excluding daily volumes for air and international shipments (some of may involve CMVs) leaves 12 million shipments per day, most of which move by truck, and most of which are scheduled.

UPS has some 318,000 employees, many of whom are drivers. UPS drivers are highly unlikely to be subject to coercion by UPS customers, assuming there are any who would want such drivers to violate safety regulations. And yet nothing in FMCSA's NPRM would relieve shippers and receivers of UPS shipments from the duty to inquire as to each driver's HOS status and compliance with 19 other Parts in 49 CFR, along with a few other CFR sections. Add all the other drivers of all the other motor carriers and all of their shippers, receivers and intermediaries, and the enormity of the costs and burdens FMCSA would impose on Americans and their businesses becomes apparent.

Most trucking industry customers either never or rarely complain about their service as to the vast majority of shipments, and most complaints occur after delivery, if there turns out to have been loss or damage to cargo in transit. FMCSA's new rules would create a vast new pre-shipment inquiry system, with incalculable adverse impacts in the form of costs, burdens, wasted time and delays. If FMCSA wanted to prove to its critics that the agency is indifferent or hostile to the trucking industry and its customers, it could hardly have come up with a better approach.

To the extent compliance can be made practicable, the closest approximation will probably be widespread use of some sort of release form that all shippers, receivers and intermediaries can ask all drivers to sign as to all shipments, in which the driver will state that the shipment raises no compliance issues, or if it does, the driver will raise those issues with appropriate personnel. Maybe such a form could become part of each bill of lading or other shipping paper, with a process for electronic execution.

Eventually, after modifying millions of documents, this approach might become the norm, especially among major corporations with knowledgeable logistics staffs. Small businesses would probably take many more years to follow suit, after

they find out about their exposure, and most individuals may never realize what they need to do to satisfy FMCSA. But if this is FMCSA's goal, it should abandon its specious respondeat superior theory and develop proposed rules under which carriers would incorporate the required verbiage, approved in advance by FMCSA, into standard shipping documents.

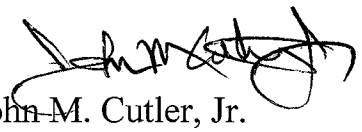
Theoretically, shippers, receivers and intermediaries might be able to avoid a duty to inquire is they stop using delivery schedules, letting carriers drivers make deliveries whenever it is convenient for them. But this "option" would result in even more costs for trucking company customers, for whom just-in-time supply chains would become a thing of the past. And what of individuals who specify next day or second day delivery when they order goods as shippers and receivers? Must those aspects of their purchases be foregone in order to avoid the duty to inquire?

Another problem with FMCSA's respondeat superior theory is that it will further embolden tort lawyers, who can be expected to cite FMCSA as supporting lawsuits that routinely name as defendants not just drivers and the motor carriers they work for, but also shippers, receivers and intermediaries. The shippers, receivers and intermediaries will be forced to defend themselves in countless court actions involving events for which they are blameless. It is not enough to say that innocent shippers will not be found liable. Additional costs, burdens, and payments to settle meritless lawsuits are a certainty.

IV. CONCLUSION

FMCSA's fundamental error in this proceeding is its assumption that customers of trucking companies have a duty to inquire as to the compliance status of truck drivers whom they do not employ, that hundreds of millions of people who may have no more connection with trucking than that they ship or receive goods with a deliver schedule in mind can be forced to assist FMCSA in carrying out its responsibilities, and that the resulting costs and burdens are negligible. FMCSA is wrong on all three counts.

Respectfully submitted,



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