



July 11, 2022

Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Avenue SE, Room W12-140
Washington, DC 20590-0001

Submitted electronically via www.regulations.gov

Re: Docket number FMCSA-2022-0134
Definitions of *Broker* and *Bona Fide Agents*

Deputy Administrator Hutcheson:

The Intermodal Association of North America (“IANA”) submits the following in response to the request of the Federal Motor Carrier Safety Administration (“FMCSA”) for comments and further guidance on, among other things, the definitions of “broker” and “bona fide agents.” As described in further detail below, IANA supports the agency in its efforts to clarify, in part, the definitions of what constitutes a “broker” and a “bona fide agent,” and encourages the agency to require companies that provide so-called dispatch services to register and obtain broker operating authority if they are providing such services to more than a single motor carrier.

IANA’s Interest in the Proposed Rulemaking

IANA is North America’s leading industry trade association representing the combined interests of the intermodal freight industry. IANA’s membership roster of over 1,000 corporate members includes intermodal and over-the-road motor carriers, brokers, railroads (Class I, short-line and regional), water carriers, stacktrain operators, port authorities, intermodal marketing, and logistics companies, and suppliers to the industry such as equipment manufacturers, intermodal leasing companies, and consulting firms. IANA’s associate (non-voting) members include shippers (defined as the beneficial owners of the freight to be shipped), academic institutions, government entities, and non-profit associations.

IANA’s mission is to promote the growth of efficient intermodal freight transportation through innovation, education, and dialogue. IANA is a “mode neutral” organization and focuses on furthering the intermodal industry’s role and impact on freight transportation. Brokers, which are sometimes referred to in the intermodal industry as “intermodal marketing companies,” provide a valuable service to the entire intermodal industry, in part due to their unique capacity to connect shippers with motor carriers while simultaneously arranging for rail transportation.

Consequently, as good brokers are a crucial link in the nation’s intermodal network, and in light of the fact that both steamship lines and railroads benefit from the use of reliable and efficient motor carriers, IANA highly values regulatory changes that eliminate the risks associated with unqualified companies acting as unlicensed brokers. IANA believes that certain modifications to the definitions of broker and bona fide agent could benefit the transportation industry generally and the intermodal industry in particular.

Definitional clarity is especially critical at a time when IANA expects to see an increase in brokers entering the intermodal market due to the U.S. Supreme Court's recent denial of certiorari in *California Trucking Association, Inc., et al. v. Robert Bonta, et al.*, Case No. 21-194. As the State of California can now enforce Assembly Bill No. 5 ("AB5") against motor carriers operating in California, a number of motor carriers who have been heavily reliant on independent contractor drivers will now try to comply with AB5 by pivoting to an operating model where the motor carrier will form an affiliated broker in order to tender loads from that affiliated broker to individual drivers who have themselves will become licensed motor carriers.

IANA offers its comments below in response to eight of the questions posed by the FMCSA.

Question 1: What evaluation criteria should FMCSA use when determining whether a business model/entity meets the definition of a broker?

The existing definitions of broker in federal statutes and regulations provide reasonably clear guidance as to what criteria make a given company a broker. 49 U.S.C. § 13102(2) defines a "broker" as:

... a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation.

Similarly, 49 C.F.R. § 371.2(a) adds a further gloss to the definition of "broker" by defining it as:

... 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.

Thus, in order to evaluate whether a given person or company falls within the current definition of a "broker," FMCSA should continue to consider the following criteria:

- Does the person or company sell or arrange for the transportation of property?
- Will the person or company be arranging for a motor carrier to perform the actual transportation?
- Is the transportation in question interstate?
- Is the person or company compensated for selling or arranging for the transportation of property?
- Does the person or company qualify for an exemption to the rule as a motor carrier, employee of a motor carrier, or bona fide agent of a motor carrier?

IANA supports the continued use of the existing criteria above, but also supports additional clarification to the exemption for "bona fide agents."

Question 2: Provide examples of operations that meet the definition of *broker* in 49 CFR 371.2 and examples of operations that do not meet the definition in 49 CFR 371.2.

Operations that **do** meet the definition of a broker include:

- Selling domestic ground transportation services as an employee of any company other than the motor carrier providing the transportation.
- Offering the services of a motor carrier to a third party and arranging for the motor carrier to transport the third party's property.
- Choosing which motor carrier provides the transportation needs for a customer.
- One motor carrier "sharing" a shipment with another motor carrier and allowing the other motor carrier to handle the entirety of the transportation.

Operations that do **not** meet the definition include:

- Selling transportation services as an employee of the motor carrier that will provide the transportation.
- Selling transportation services under contract as an agent of the motor carrier that will provide the transportation, as long as the agent does not represent multiple motor carriers and does not, as a result, make decisions on which of the motor carriers will provide transportation on any given shipment.
- Selling services related in some fashion to the transportation of property without any input or influence on who provides the transportation. For example: website operators like electronic bulletin boards, technology vendors, freight payment companies, and fulfillment or distribution centers are generally not brokers.
- Arranging exclusively for transportation by rail.

Question 3: What role should the possession of money exchanged between shippers and motor carriers in a brokered transaction play in determining whether one is conducting brokerage or not?

The possession and transfer of money from a shipper and ultimately to a motor carrier should be a significant factor in determining whether brokerage services are being performed. Regardless of how many intermediaries may participate in the transaction, ultimately the motor carrier must be paid for transporting a load. The motor carrier has a right to be compensated for a service rendered. A motor carrier's right to compensation is protected in part by the requirement that a broker have a security bond in place as a condition of its operating authority. As a result, any party who is responsible for paying the motor carrier, and who is not in fact the owner of the property at any point during the transaction, is a broker and should be required to post a bond to protect the motor carrier from that party's default in connection with its payment obligation.

However, the absence of a transfer of money does not necessarily insulate a party from being deemed a broker. While a broker is defined under federal law as a party receiving compensation, the law does not require that the compensation flow to the broker in any particular way from any particular party or even require that the broker be compensated in the form of money (*i.e.*, other value provided by a payor could constitute "compensation").

Question 4: How would you define the term *dispatch service*? Is there a commonly accepted definition? What role do dispatch services play in the transportation industry?

IANA defines a dispatch service as a person or company that sources shipments for motor carriers and offers shipments to multiple motor carriers. A dispatch service has discretion to choose to which motor carrier among many it will offer the shipment.

The most beneficial role that a dispatch service may provide is the outsourcing of resources for small motor carriers who cannot afford an employee to perform this function. They can help to ensure that the motor carrier has a steady stream of business while allowing the motor carrier to focus on its core mission of providing quality transportation services.

Unfortunately, some dispatch services take advantage of the motor carriers they work for by absconding with funds that should be paid to the motor carrier. This risk increases with mathematical certainty if a dispatch service is providing its services to more than one motor carrier. Some dispatch services also facilitate the operation of “chameleon carriers” or otherwise enable unscrupulous motor carriers to take advantage of shippers and brokers. A motor carrier may have a poor reputation in the industry but, by hiring a dispatch service, it may be able to mask its involvement on a shipment and induce a broker to use a given motor carrier when it otherwise would not.

As a result, IANA would support the FMCSA clarifying that a dispatch service that serves more than a single motor carrier does function as a broker and should be bound by the federal obligations (financial and otherwise) that come with broker operations.

Question 6: Some “dispatch services” cite 49 CFR 371.2(b) as the reason they do not obtain FMCSA brokerage authority registration in order to conduct their operations. As noted above, section 371.2(b) states that 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 pre-existing 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.” Some dispatch services interpret this regulation as allowing them to represent more than one carrier yet not obtain broker operating authority registration. Others interpret this regulation to argue that a dispatch service can only represent one carrier without obtaining broker authority. What should FMCSA consider when determining if a dispatch service needs to obtain broker operating authority?

IANA recommends the FMCSA treat all dispatch services as brokers unless the dispatch service in question is a bona fide agent (i.e., serving only a single motor carrier) as further described below in response to Questions 7 and 8.

At the very least, FMCSA should look closely at the relationship between the dispatch service and their motor carrier clients. Does the dispatch service collect money and redistribute it to the motor carrier? Does the dispatch service have the right to decide to which carrier it will offer a shipment? Do all of the dispatch service’s clients know that the dispatch service has other clients? How does the dispatch service identify itself when sourcing shipments? Does it hold itself out as a broker, or does it immediately name the specific motor carrier that it is representing? Does the dispatch service participate in the shipment process in any manner other than as a referral agent? In other words, does the dispatch service remain in contact with the shipper, serve as a communication intermediary between the shipper and carrier, follow-up with the carrier to ensure that the shipment is delivered, etc.?

Again, IANA maintains that modest edits to the existing definitions in 49 C.F.R. § 371.2 can eliminate any existing ambiguity.

Question 7: If a dispatch service represents more than one carrier, does this in and of itself make it a broker operating without authority?

Yes.

Question 8: When should a dispatch service be considered a *bona fide agent*?

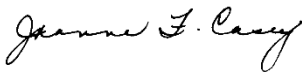
A dispatch service should be considered a bona fide agent only if it represents a single motor carrier under a contractual arrangement, and the contract stipulates that any shipments the dispatch service sources will be offered to that carrier. In other words, a legitimate “dispatch service” and a “bona fide agent” are essentially synonymous.

Question 9: What role do bona fide agents play in the transportation of freight?

Bona fide agents serve a valuable role for motor carriers that wish to outsource part of their operations to a specialist. It gives the motor carrier the flexibility of using an independent contractor for this role instead of an employee. As stated above, a bona fide agent permits a motor carrier to focus on its core competency.

In conclusion, IANA encourages the FMCSA to provide clear guidance that dispatch services must register for broker operating authority unless they satisfy a very specific, unambiguous definition of bona fide agent. As the voice of the intermodal freight industry, including both motor carriers that may use dispatch services, brokers that hire such carriers, and steamship lines and railroads that value reliable motor carrier transportation to and from ports, terminals, and container yards, IANA requests that the FMCSA clarify the permitted actions of dispatch services and protect the industry from businesses that seek to bypass federal regulations in an improper, and often unscrupulous, manner.

Respectfully submitted,



Joanne F. Casey
President and Chief Executive Officer
Intermodal Association of North America

cc. Marc Blubaugh, IANA General Counsel