



November Legislative and Regulatory Report

LEGISLATIVE

No legislative updates for November 2022.

REGULATORY

FMCSA Issues Guidance on Broker and Bona Fide Agent Definitions

This month, the Federal Motor Carrier Association issued interim guidance clarifying its interpretation of the terms, “broker” and “bona fide agent.” The guidance, which became effective immediately on November 16, fulfills agency requirements set forth by the Bipartisan Infrastructure Law.

In developing the guidance, FMCSA considered stakeholder input evaluating the roles of brokers and bona fide agents to address inconsistencies in the current definitions and enforcement. FMCSA’s guidance is non-binding and intended only to provide information on existing requirements.

The BIL directed FMCSA to consider the extent that technology has impacted freight brokerage and additional aspects of freight transportation when developing the guidance. However, FMCSA stated that technology was not a considered factor in creating the guidance after stakeholders almost unanimously agreed that technology has not changed the fundamental nature of freight brokerage.

Upon reviewing stakeholder comments, FMCSA determined that the existing definition of “broker” remains adequate. However, some stakeholders disagreed on whether the handling of funds was a relevant consideration in determining if someone is a broker. FMCSA addressed these comments by noting that handling money exchanged between motor carriers and shippers strongly suggests the need for broker authority but is not an absolute requirement for someone to be considered a broker.

To clarify the definition of “bona fide agent,” FMCSA explained that representing more than one motor carrier does not necessarily mean the person is a broker rather than a bona fide agent. Instead, the determination involves evaluating “whether the person or company is engaged in the allocation of traffic between motor carriers.”



FMCSA concluded that there is no universal definition for “dispatch service” after receiving differing stakeholder comments. A coalition of stakeholders referred to it as an “invented term,” while others stated that dispatchers perform carrier support services, administrative duties, source shipments, and allocate shipments between motor carriers. In its guidance, FMCSA felt a dispatch service could be best identified based on whether it involved the following factors: they exclusively work for motor carriers, they source loads for motor carriers, and they provide supplementary services for motor carriers beyond sourcing shipments.

FMCSA also clarified when a dispatch service could be considered a broker and when it could be considered a bona fide agent. FMCSA concluded that a dispatch service is not a broker when it does not participate in arranging freight or when it represents a single motor carrier. On the other hand, a dispatch service should be classified as a broker if it arranges transportation for multiple motor carriers and is involved in allocating traffic. FMCSA added that making these distinctions must be done on a case-by-case basis. Dispatchers providing unauthorized brokerage services may be subject to civil penalties of up to \$10,000 for each violation. To determine if a dispatch service is a bona fide agent, FMCSA indicated one must analyze whether the service falls within the definition of a bona fide agent. According to this definition, a dispatch service is not a bona fide agent if it allocates traffic between two motor carriers.

Comments on the interim guidance are due by January 18 and may result in further clarification from FMCSA.

STB Extends Class I Reporting Requirements

To address reports of rail service challenges, the Surface Transportation Board, in May 2022, required four Class I carriers – BNSF, CSX, NS, and UP – to submit service recovery plans outlining the specific actions that each carrier will take to improve service and metrics to evaluate their progress, as well as biweekly progress reports, for a period of six months. STB also directed the four carriers, along with all other Class I carriers, to submit weekly reports on rail service, performance, and employment.

This month, STB issued a notice directing the four Class I carriers to continue submitting biweekly progress reports on their efforts to carry out service recovery plans until May 5, 2023. Additionally, STB extended the requirements for all seven Class I railroads to share weekly performance and monthly employment data until May 5. The Board acknowledged that while not all Class I carriers are experiencing the same level of service deficiencies, the rail system is an interconnected network. Therefore, STB



believes data from all Class carriers is necessary to thoroughly assess service issues across the entire U.S. rail system.

In the notice, STB noted that while some of the carriers' data indicates that specific key performance measures have improved, others, including velocity, terminal dwell, first-mile/last-mile service, operating inventory, and trip plan compliance, remain below pre-pandemic levels. STB added that the carriers' networks continue to experience widespread service challenges that have prevented them from reaching service on par with 2019 levels.

The Board also ordered the four carriers to submit interim updates by December 2. The update must include targets the carriers expect to meet at the end of the extended reporting period for each key performance indicator, explanations for any changes to labor force targets, and details on any changes to the service recovery plans that will help achieve long-term success.

Comments on the extension and modification of STB's information collection are due by January 3, 2023.