

**TESTIMONY OF BRUCE JOHNSON
DIRECTOR OF CARRIER SERVICES
C. H. ROBINSON**

ON BEHALF OF THE TRANSPORTATION INTERMEDIARIES ASSOCIATION

**BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE**

SEPTEMBER 13, 2012

**HOW FMCSA'S CSA PROGRAM
IMPACTS FREIGHT BROKERS AND 3PL'S**



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ALEXANDRIA, VA 22314**

Chairman Duncan, Ranking Member DeFazio, and members of the Transportation and Infrastructure Committee, thank you for the invitation and the opportunity to testify at today's oversight hearing. The Federal Motor Carrier Safety Administration's (FMCSA) Compliance, Safety, and Accountability (CSA) initiative has had a significant impact on the carrier eligibility process that freight brokers and shippers conduct to ensure the hiring of safe, legally registered, and properly insured motor carriers. As one of the nation's largest freight transportation brokerages, C. H. Robinson has seen the risk of negligent hiring lawsuits based on carrier selection grow significantly since 2004.

Introduction of Bruce Johnson

My name is Bruce Johnson and I am the Director of Carrier Services for C. H. Robinson. I am also a member of the Transportation Intermediaries Association (TIA), member of the TIA Carrier Selection Framework Committee, and a member of the TIA Board of Directors. As the Director of Carrier Services, I am responsible for overseeing the establishment and execution of Robinson's carrier eligibility process and have been asked many times to describe how we select and assign carriers by both customers and the courts.

Introduction of TIA

TIA is the professional organization of the \$162 billion third-party logistics industry. TIA is the only organization exclusively representing transportation intermediaries of all disciplines doing business in domestic and international commerce. TIA represents over 1300 member companies of which over 70 percent of these companies are small family owned businesses.

Introduction of C.H. Robinson

C. H. Robinson was founded in 1905 and currently facilitates the movement of over 10 million shipments per year. C. H. Robinson is one of the world's most innovative third-party logistics companies. We are the 11th largest publicly held company headquartered in Minnesota. We have 165 offices across the United States with over 7,200 employees throughout the United States. All of our offices are networked through a common proprietary operating system with my department serving as our centralized carrier eligibility center. We monitor over 45,000 US-based motor carriers for proper authority, valid insurance, and other data points, including safety related data.

C. H. Robinson has attended and participated in most of the CSA listening sessions and provided feedback to FMCSA on how CSA is being used in contracting and carrier selection. While we do not operate any commercial trucks ourselves, we hire thousands of trucks daily, and we are committed to hiring safe motor carriers.

I am here to communicate to you that tremendous confusion exists in the industry about the risks of carrier eligibility and selection and what the BASICⁱ data and Safety Ratings mean for those hiring motor carriers. This confusion has added cost to freight brokers, motor carriers, manufacturers, importers, exporters, and consumers. Furthermore, the conflicting messages from FMCSA about what constitutes a safe motor carrier based on the available data have added significant legal risk to any entity that hires a motor carrier. FMCSA's primary purpose is motor carrier safety; it is their sole responsibility to keep our roads safe and authorize who is legally licensed to operate on the nation's highways.

The Role of the Freight Broker in the Supply Chain

Freight brokers, interchangeably referred to as “transportation intermediaries,” third party logistics companies (“3PLs”), and non-asset based logistics companies, are professional businesses that act similarly to “travel agents” for freight. Freight brokers serve hundreds of thousands of U.S. businesses and manufacturers (shippers), importers, exporters, and carriers, bringing together the shippers’ need to move cargo, with the corresponding capacity and equipment offered by rail, motor carriers, air, and ocean carriers.

Since we do not own and operate any power units ourselves, we must add value to both our customers and our carriers. By matching the right capacity to serve the shipper, we dramatically reduce the empty miles trucks drive between shipments, saving time and fuel and adding money to the bottom lines of carriers and shippers. Our industry has helped lower logistics costs as a percent of GDP by several percentage points since deregulation, to what is now estimated to be approximately 8.5 percent according to Rosalyn Wilson, author of the *23rd Annual State of the Logistics Report*.

Transportation intermediaries are primarily, non-asset based companies whose expertise is providing mode and carrier neutral transportation arrangements for shippers with the underlying asset owning and operating carriers. We get to know the details of a shipper’s business, then tailor a package of transportation services, sometimes by various modes of transportation, to meet those needs. In many cases, shippers outsource the majority of their freight management to freight brokers. Shippers count on transportation

intermediaries to arrange, report, and improve on the smooth and uninterrupted flow of goods from origin to destination.

Freight brokers provide carriers access to services like consistent and rapid payment, fuel discounts and user friendly websites to search for and manage loads, paperwork, and receivables. Brokers keep carriers' equipment filled and moving. There are more than 15,000 licensed freight brokers in operation, and they range from one-person shops, to family owned businesses to multi-billion dollar, publicly traded corporations like C. H. Robinson. The market is very open and fragmented.

Compliance, Safety, and Accountability

In December of 2010, FMCSA launched CSA and the Safety Measurement System (SMS) became comprised of the BASIC data collected. There is no question that BASIC data and the associated screen shots are much more user friendly than its predecessor; from the category descriptions of "Fatigued Driving" and "Unsafe Driving", to the triangle and exclamation point indicating a score exceeding an arbitrary threshold, the BASIC data is presented crisply. FMCSA will readily admit, however, that while the format is a tremendous improvement, the purpose of the data remains the same: to assist FMCSA in prioritizing carriers for Agency compliance reviews, interventions, and inspections. In fact, FMCSA has attached the following warning to the BASIC data- it reads:

Readers should not draw conclusions about a carrier's overall safety condition simply based on the data displayed in this system. Unless a motor carrier in the SMS has received an UNSATISFACTORY safety rating pursuant to CFR Part 385,

or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways.

While the BASIC data is used as a compass to guide enforcement actions by FMCSA, the Safety Fitness Determination or Safety Rating is widely seen as the safety seal of approval by those who hire trucks. The Safety Ratings have equally user friendly names, and a carrier can be labeled Satisfactory, Conditional, and Unsatisfactory, or may be listed as having no safety rating at all because FMCSA has not prioritized its resources to perform a full compliance review on them. The Safety Rating, however, does not appear on the same screen as the BASIC data.

Currently, the BASIC data is not directly linked to the Safety Rating, and the industry is waiting for a rulemaking to draw clear lines and correlations between the two. When FMCSA implemented the BASIC's in December 2010, many in the industry and within FMCSA anticipated that a rulemaking linking BASIC data directly to the safety rating would occur quickly. What was supposed to be temporary, however, continues to be delayed by the Agency. While the industry anticipates that the SFD rulemaking will be released for public comments in January 2013, as we are all aware the federal rulemaking process takes time and a final rule may not be issued in 2013. This is due in part to legitimate concerns with the BASIC data accuracy and consistency by motor carriers. Every day that goes by without the Agency developing a fair and accurate SFD, the transportation industry will continue to be negatively impacted.

With user-friendly BASIC data and the official Safety Rating both visible, but in completely different systems, this has led to confusion amongst shippers and attorneys on

what constitutes a safe carrier to hire. There are often cases where satisfactory rated carriers have one or more BASIC alerts. FMCSA has added to that confusion by occasionally encouraging the use of BASIC data as a part of the carrier selection process, while at the same time maintaining a strict warning on the BASIC data that it not be used to exclude carriers from operating on the nation's roadways. For example, in May 2012, FMCSA released CSA factsheets targeted towards shippers and brokers. This information highlighted the difference between the BASIC data and the Safety Rating including the warning label. However, the factsheet confused the industry by saying in notes, that:

A Satisfactory or Conditional rating does not mean, however, that the public should ignore all other reasonably available information about the motor carrier's operations. CSA's SMS data ... are one of many possible resources that the public can use to assess a motor carrier's safety performance record.

We encourage FMCSA to be clear and consistent with shippers and brokers on which carriers and which information should be used to select truckers to haul freight. What the industry needs is a bright line differentiation of which carriers are unsafe.

How BASIC data is used in Court

1. New Standard of Care

Prior to 2004, freight brokers were not overly concerned that they would be involved in a lawsuit if a motor carrier that was fully authorized to operate on the roads by FMCSA was selected to haul a load, and was subsequently in a tragic accident. Would you

be concerned about being sued if you hailed a fully licensed taxi, and through the negligence of the taxi driver a pedestrian was injured? Similarly, it should not be the responsibility of the travel agency to ensure that a particular airline is safe to operate, that is and should be determined by the Federal Aviation Administration (FAA). Furthermore, a travel agency should not have to second guess the FAA, and they should not be held liable for millions of dollars in potential lawsuits for booking a passenger on an “unsafe” airline.

In a series of court cases, however, some of which I provided testimony for, the court established a new interpretation of the responsibility, known as the duty of reasonable care. Subsequent court cases expanded and redefined the responsibilities of parties engaging independent contractors, and settlement and/or jury awards have grown substantially. In almost every case, the motor carrier’s public liability insurance is exhausted, the carrier has filed bankruptcy, and those with deep pockets, like the broker or shipper, are sought to fill the loss and make the injured person or family whole. A common theme in most negligent hire cases is that brokers and shippers should second guess the FMCSA’s decision of which carriers are safe to operate by examining the detailed safety record of each carrier before use. This second guessing scenario is why the conflicting interpretations of BASIC data and Safety Rating is of such great importance to freight brokers. Is a carrier with a score of 62 more dangerous than one with a score of 60? If that is true, then why not use only carriers with a score below 50 and shut all the other carriers down? The reason not to do this is that a relative safety system is fine for internal prioritization use, but damaging to market participants when made public. Brokers and shippers will continue to be sued because they used a carrier with a BASIC score that solely prioritizes them for an internal Agency compliance review. Until FMCSA provides firm

guidance on what BASIC thresholds constitutes a safe carrier, differing opinions will proliferate and the courts will arbitrate those opinions.

2. New Standard of Relationship

In a separate and distinct type of claim from negligent hiring, in some cases, courts have also changed the nature of the relationship between 3PLs and carriers from independent contractor to that of an agency, thereby, creating a vicarious liability scenario. These agency cases attempt to re-interpret the arrangements between the broker and carrier alleging that the broker exercised enough control over the carrier to make the carrier a part of the broker. The travel agent does not become the agent of the airline in an aviation accident. The lawsuits are becoming more frequent and the verdicts vary greatly between federal and state courts from \$1 million to more than \$20 million.

While C. H. Robinson has been successful overall at managing our risks of negligent hiring and vicarious liability lawsuits, we have spent considerable resources managing that risk. All brokers fear that they will be blind-sided someday when they think they have hired FMCSA authorized motor carriers.

There can be no question that the brokerage industry seeks to promote higher safety standards for our nation's highways. That being said, the brokerage industry is displeased with the current state of affairs with courts holding 3PLs and shippers to an ever changing standard in carrier selection. Congress and the FMCSA can re-set this standard to one that is more reasonable and static. It should not be the responsibility of industry stakeholders and companies like C. H. Robinson to determine which carriers are safe to operate on American highways. It should be the sole responsibility of the Agency

charged with issuing licenses to carriers and making sure those carriers adhere to safety standards established by the Agency to tell the public which carriers are safe-to-use and which carriers are not.

CSA and the Safety Fitness Determination (SFD)

As an industry that is made up of both multi-national companies and thousands of small businesses, we need a single, clear cut safety standard from the Federal agency which was established to reduce the number of highway accidents. There is a great misunderstanding of how the BASICs within the CSA system for each carrier are determined, and these BASICs are relative scores with considerable doubts and questions about data accuracy, consistency, and direct crash risk. We feel this information is for the Agency's internal use, not for public consumption, which makes it difficult for the public to understand if a carrier is safe or unsafe to operate on the nation's highways.

There is no question that the CSA initiative is helping FMCSA and the data regarding roadside compliance is improving; however there is still confusion regarding what constitutes a safe carrier to hire. FMCSA has shifted a tremendous burden of risk, in the form of negligent hiring lawsuits, onto shippers and brokers. With the threat of significant lawsuits, the industry is often faced with the choice of second guessing the Agency. It is not the responsibility of shippers or the brokerage industry to make the safety fitness determination of motor carriers. The only way to accomplish this task is for FMCSA to complete the new Safety Fitness Determination (SFD) rulemaking and fully link the BASIC data to the Safety Rating. However, we do not want FMCSA to develop a SFD, prior to

addressing industry concerns regarding the methodology used to evaluate carriers BASIC scores and percentages.

Recommendations

Until the Safety Fitness Determination (SFD) rulemaking is developed for public comment and ultimately developed into a final rule, we recommend:

1. FMCSA should immediately add the current compliance review based Safety Rating to all screenshots that display a carrier's BASIC data so there is no confusion about the two systems.
2. FMCSA should remove any language from its website and outreach that encourages shippers, brokers, or the public to use the BASIC data for their own purposes. FMCSA should not encourage the use of unproven, relative data, except for internal use.

Going forward in the middle term, we recommend the following:

3. When the SFD rulemaking is posted in the Federal Register and open to public comment, the industry will seek a rating system from FMCSA that rates all unsafe carriers as unfit to operate, and thus eliminate any confusion on which motor carriers are safe to hire. FMCSA officials have publicly indicated that this is the direction the Agency is currently considering in the development of the SFD rulemaking; the brokerage industry would strongly support this position.

4. We ask Congress to develop a legislative fix similar to the Graves Amendment enacted in 2005 as part of the SAFETEA-LU highway bill. The statute abolished the vicarious liability of companies that rent or lease motor vehicles based on the negligent driving of their customers. This amendment would create a uniform standard against liability without fault by preempting state vicarious liability laws imposing liability on non-negligent transportation brokers and shippers.

Conclusion and Legislative Fix

In conclusion, we fully support FMCSA and its mission to improve motor carrier safety on the nation's roadways. TIA and C.H. Robinson will work productively with industry participants, FMCSA and Congress to ensure that FMCSA publishes a safety fitness determination for all motor carriers that is based on accurate and fair data, and that does not discriminate based on carrier size or type. When the SFD rulemaking process begins, the industry asks Congress to carefully review the Agency's actions to ensure that quality data is utilized and fair and impartial processes are followed, and that a clear safety fitness determination is established for every carrier.

I appreciate the opportunity to testify before the committee today on the concerns of CSA and its effects on the transportation brokerage industry.

ⁱ Behavior Analysis and Safety Improvement Categories (BASICs)

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
Truth in Testimony Disclosure

Pursuant to clause 2(g)(5) of House Rule XI, in the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include: (1) a curriculum vitae; and (2) a disclosure of the amount and source (by agency and program) of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) received during the current fiscal year or either of the two previous fiscal years by the witness or by an entity represented by the witness. Such statements, with appropriate redaction to protect the privacy of the witness, shall be made publicly available in electronic form not later than one day after the witness appears.

(1) Name:

Bruce W. Johnson

(2) Other than yourself, name of entity you are representing:

C.H. ROBINSON and TRANSPORTATION INTERMEDIARIES ASSOC.

(3) Are you testifying on behalf of an entity other than a Government (federal, state, local) entity?

YES

If yes, please provide the information requested below and attach your curriculum vitae.

NO

(4) Please list the amount and source (by agency and program) of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) received during the current fiscal year or either of the two previous fiscal years by you or by the entity you are representing:

United States Postal Service Contract:
Gross Revenues: 2010 - \$622,351.99
2011 - \$27,007,346.33
2012 - \$21,572,140.51
Year to date

Signature

Bruce W. Johnson

Date

9-6-12

Mr. Bruce Johnson, Director of Carrier Services, C.H. Robinson

Mr. Johnson is the Director of Carrier Services for C. H. Robinson. Mr. Johnson has been at C.H. Robinson for 21 years and has been in his current role for the past 12 years. During his career, Mr. Johnson has seen C.H. Robinson grow into a Fortune 300 company with revenues over \$10 billion, almost 8,500 employees and 230 offices across the United States and globally. He oversees a staff of 80 professionals, some of whom are vetting, qualifying and monitoring over 45,000 motor carriers of all sizes on a daily basis. Mr. Johnson serves on the TIA board of directors and is a member of the TIA Carrier Selection Framework Committee. He was also a member of the Minnesota Trucking Association's CSA 2010 Task Force.