

**TESTIMONY OF JEFFREY G. TUCKER, CTB
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**BEFORE THE
U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON SMALL BUSINESS**

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**Is FMCSA's CSA PROGRAM
DRIVING SMALL BUSINESS OFF THE ROAD?**



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Chairman Graves, Ranking Member Velázquez, and members of the Small Business Committee, thank you for the invitation and the opportunity to testify at today's oversight hearing. I am grateful for the opportunity to speak with you today regarding concerns affecting small businesses arising from the Federal Motor Carrier Safety Administration (FMCSA) Compliance, Safety, and Accountability (CSA) initiative. I am a small business owner of a transportation brokerage that daily faces the impending risk of vicarious liability and negligent hiring lawsuits based on carrier selection. This experience qualifies me to provide testimony on the topic of CSA and how industry stakeholders can work with the Agency and Congress to address concerns, while continuing to promote higher standards of safety within the transportation industry.

Introduction of Jeffrey G. Tucker, CTB

My name is Jeff Tucker and I am the Chief Executive Officer for the Tucker Company Worldwide. I am also a member of the Transportation Intermediaries Association (TIA), Chairman of the TIA Carrier Selection Framework Committee, a member of the TIA Board, and a Certified Transportation Broker (CTB).

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 1,200 member companies of which over 70 percent of these companies are small family owned businesses.

Tucker Company Worldwide is a family run, New Jersey based, corporation founded in 1961 by my grandfather Jacob A. Tucker, my brother Jim and I are the third generation business owners of the company. Today, Tucker Company Worldwide continues to build upon the solid reputation for service, professionalism and reliability that my grandfather and father work hard to achieve.

As a member of TIA our goal is safety. As an organization, we have sought to work with FMCSA to make CSA the best possible tool for the Agency to use to meet its statutory obligation to determine which carriers are unsafe.

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 tens of thousands of US businesses and manufacturers (shippers) and motor carriers (carriers), bringing together the shippers’ need to move cargo, with the corresponding capacity and equipment offered by rail and motor carriers, or, depending on a company’s authorities, air and ocean carriers too.

We are an incredibly “green” industry, and have contributed to U.S. economic growth in innumerable ways. Freight broker businesses are generally growth businesses, finding new ways to serve our manufacturing and distributing customers every year. By matching capacity with available shipments, we dramatically reduce the empty miles trucks drive between shipments, saving 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. They 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. Transportation intermediaries bring a targeted expertise to meet the shipper's transportation needs.

Many shippers in recent years have streamlined their acquisition and distribution operations. They have reduced their in-house transportation departments, and have chosen to deal with only a few "core carriers" directly. Increasingly, they have contracted out the function of arranging transportation to intermediaries or third party logistics experts. Every Fortune 100 Company now has at least one third party logistics company (3PL) as one of its core carriers. Since the intermediary or 3PL, in turn, may have relationships with dozens, or even thousands, of underlying carriers, the shipper has many service options available to it from a single source by employing an intermediary.

Shippers count on transportation intermediaries to arrange and report on the smooth and uninterrupted flow of goods from origin to destination. Most carriers rely upon brokers to operate as supplements to their sales force, and in some cases, their entire sales force. Whatever the case, brokers keep carriers' equipment filled and moving. There are

more than 15,000 licensed freight brokers in operation, and they range from small, family owned businesses to multi-billion dollar, publicly traded corporations.

Compliance, Safety, and Accountability

Launched in December 2010, CSA is the Federal Motor Carrier Safety Administration's initiative to improve safety and ultimately reduce the number of crashes, injuries, and fatalities that are associated with commercial motor vehicles and buses. The CSA program introduced a new enforcement compliance model that is designed to give the FMCSA and its State partners the ability to "touch" a larger number of carriers, to properly address safety and other concerns, and to do so earlier in the process.

1. Relative System

Under CSA, data is accumulated on carriers for every citation, warning, roadside inspection, and crash, regardless of causation from data entered by federal, state, and local police. This data is then placed into seven statistical fields or BASICS (Behavior Analysis and Safety Improvement Categories), where points are assessed, and based upon a weighted formula for the number of trucks and the number of "safety events." The carriers are ranked by peer groups and percentiles within the BASIC. The BASICS also include non-safety-related items, for example alimony and child support payments. Once the peer groups are determined and the carrier's safety performance is determined, the performance ratings are made public, so that anyone can see the data through the FMCSA's Safety Measurement System (SMS) website. FMCSA uses the SMS results and serious violations in these BASICS, and other data to prioritize its law enforcement resources—essentially helping FMCSA and their state law enforcement partners better focus their

resources, and decide if a carrier requires a letter, a visit, or what they call a compliance review or some other more serious action. It should be noted that two of seven BASICS are not able to be viewed by the public.

The SMS and its BASIC scores offer a “relative” system designed to prioritize FMCSA intervention. Relative means that if the Agency decided it could intervene with 25 carriers per year, and there were only 100 carriers, 25 would have a high score, even if they were totally safe and compliant. The only relevant data that the hundreds of thousands of small shippers, brokers, and carriers need to know is which carriers are actually unsafe, period.

2. Internal Tool

The BASICS are internal FMCSA tools with the express design and purpose to help FMCSA decide where and how it would spend most of its limited time, and resources. No combination of BASICS—even considering all seven BASICS—give even the FMCSA a clear-cut overall carrier safety assessment. BASICS were never intended, nor designed to be used by private industry for carrier selection. By Federal law, a Safety Rating—not the BASICS or any combination of them—is FMCSA’s ultimate determination of a carrier’s fitness or overall safety. You need only look to FMCSA’s own disclaimer language¹ on their website to plainly see that the SMS and its predecessor system were designed specifically and exclusively for law enforcement purposes and not intended for use by non-law enforcement personnel.

¹ FMCSA SMS Disclaimer: The SMS results displayed on the SMS website are not intended to imply any federal safety rating of the carrier pursuant to 49 USC 31144. 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 49 CFR Part 385, or has otherwise been ordered to discontinue operations by the FMCSA, it is authorized to operate on the nation's roadways.

Statistical ratios, with “alert” symbols, and other overly descriptive internal law enforcement language is not needed or wanted, nor does it provide business with anything positive. Quite the contrary, they only add gasoline to a bonfire already stoked by accident lawyers.

3. Slow Expansion

Another major concern of the freight brokerage industry is the very slow expansion of CSA and the vastly large gaps of information in the system. For example, according to FMCSA’s data, approximately 77 percent of for-hire carriers in business today, have no Safety Rating. As for the CSA program, 66 percent of for-hire carriers in business today have no visible BASIC score whatsoever. Fourteen months into the CSA program, only about 900-1,000 for hire carriers had at least one visible BASIC score. Many of these unrated carriers are small businesses.

The problems with CSA data and implementation are well documented and are being addressed here at this hearing as well. My remarks will be centered around the specific issue of vicarious liability and negligent hiring.

How the Courts Changed the Game

1. New Standard of Care

The company that my grandfather built from the ground up is similar to every licensed proper broker registered with the FMCSA. Every time my company contracts a load with a carrier, I find myself holding my breath hoping that this is not the time that I am subject to a vicarious liability or negligent hiring lawsuit that would place my company out

of business. The major catalyst that led to these crippling lawsuits was the *Schramm v. Foster* decision in 2004. In Schramm, the court established a new interpretation of the responsibility, known as the duty of reasonable care. Subsequent courts expanded and redefined the responsibilities of parties engaging independent contractors, and settlement and/or jury awards have grown exponentially. These succeeding cases build upon the Schramm case, which basically established an aberrant precedent that contends that brokers and shippers should second guess the FMCSA's decision of which carriers are safe to operate by examining the safety record of each carrier before use. Doing something less, may be deemed by certain courts in certain districts, or in certain states as "negligent entrustment" or "negligent hiring." This second guessing scenario is why the relative scores of CSA and SMS are so dangerous. Is a carrier with a score of 62 more dangerous than one with a score of 60, for example? If that is true than 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 use, but dangerous when made public. Good carriers will be hurt by shippers and brokers refusing to use them because their score may seem high. Good brokers and shippers will be sued because they used a carrier with a high score. Again, these are relational scores to trigger audits. Does the Internal Revenue Service make public their audit ratios? The answer is no, and it should be no for FMCSA as well.

2. New Standard of Relationship

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 are twisting 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. Verdicts have ranged from \$1 million to more than \$20 million.

The situation that I have described above can be directly compared to that of a travel agency. 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.

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. Only a higher court or Congress 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 mine 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 thousands of small businesses we need a single, clear cut safety standard from the Federal agency which was established to reduce the number of accidents, and is responsible for the overall safety of motor carriers – the Federal Motor Carrier Safety Administration (FMCSA). FMCSA itself seeks to utilize CSA to establish a clear cut safety determination. The CSA process, however, has been unsettling, and has raised much concern in the entire transportation industry. 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 only a passing correlation to actual safety. These scores are to determine intervention targets. 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, but for its possible uses by the public it has a long way to go. How are companies like mine supposed to determine which carriers are safe to operate on our nation's highways when over 80 percent of carriers are unrated? FMCSA needs to get back to addressing their primary mission of safety by providing industry with accurate and reliable data, and from this data telling the public who is safe to operate and who is not. It is not the responsibility of industry to make the safety fitness determination of motor carriers. The only way to accomplish this task is for FMCSA to develop a Safety Fitness Determination (SFD). 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.

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

1. That FMCSA define “high risk” carriers; make it clear which carriers belong in this category; and provide this information to the public on a daily basis in an electronic format. Safety would improve because consumers of carrier services would avoid using such carriers.
2. That FMCSA immediately convene a CSA subcommittee of the Motor Carrier Safety Advisory Committee involving all relative stakeholders to work with the Agency to bring industry perspective on how to “fix” CSA before moving into a formal rulemaking.
3. When the SFD is posted in the Federal Register and open to public comment, the industry will seek a rating system from FMCSA that rates all carriers as either safe to use or unsafe to use, and thus eliminate the traps that exist with a three of four-tiered ranking system.
4. We request that this Committee as the General Accountability Office to review CSA in light of their review of the Agency’s previous relative safety system.

Conclusion and Legislative Fix

In conclusion, TIA supports FMCSA and its mission to improve motor carrier safety on the nation’s roadways. TIA appreciates the economic strength our nation gains from small business motor carriers, brokers, and manufacturers. TIA 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.

While the industry views the SFD as an important corrective action to alleviate the vicarious liability concerns, unfortunately, it is not the only action that is necessary. 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.

I appreciate the opportunity to testify before the committee today on the concerns of CSA and its effects on small business owners whether that is the third-party logistics provider, small carriers, or the entire supply chain. I would be happy to answer any questions.