Before the Subcommittee on Highways and Transit

Committee on Transportation and Infrastructure

FREIGHT FORWARD:

OVERCOMING SUPPLY CHAIN CHALLENGES

TO DELIVER FOR AMERICA

Comments Submitted by

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The Small Business in Transportation Coalition (SBTC) is a 501(c)(6) nonprofit trade organization representing small businesses motor carriers, independent truckers, small property (freight") brokers and other transportation professionals in the industry. The SBTC respectfully offers these comments to bring the perspective of small players to Congress' attention with respect to the supply chain's current challenges.

Chairman Crawford, Ranking Member Norton, and distinguished member of the subcommittee, SBTC comes now, to report that the state of the motor carrier transportation industry in America is not good. As the Transportation Intermediaries Association (TIA) will tell you, C.H. Robinson has released to investors their dire and disappointing First Quarter 2023 financials as compared to the First Quarter of 2022:

> *Total revenues decreased 32.3% to $4.6 billion, primarily driven by lower pricing in our ocean and truckload services.*
>
> *Gross profits decreased 24.7% to $678.3 million. Adjusted gross profits decreased 24.3% to $685.6 million, primarily driven by lower adjusted gross profit per transaction in ocean and truckload.*
>
> *Operating expenses decreased 6.4% to $524.6 million. Personnel expenses decreased 7.3% to $383.1 million, primarily due to cost optimization efforts, including reduced headcount, and lower variable compensation. Selling, general and administrative ("SG&A") expenses of $141.5 million decreased 4.0%, primarily due to a decrease in credit losses.*

> *Income from operations totaled $161.0 million, down 53.4% due to the decrease in adjusted gross profits, partially offset by the decline in operating expenses. Adjusted operating margin of 23.5% declined 1,460 basis points.*
>
> *Interest and other income/expense, net totaled $28.3 million of expense, consisting primarily of $23.5 million of interest expense, which increased $9.0 million versus last year due primarily to higher variable interest rates, and $9.6 million of foreign currency revaluation and realized foreign currency gains and losses, which increased $8.1 million versus last year primarily due to foreign currency revaluation on intercompany assets and liabilities.*
>
> *The effective tax rate in the quarter was 13.5% compared to 18.4% in the first quarter last year. The lower rate in the first quarter of this year was driven by incremental tax benefits of stock-based compensation deliveries and U.S. tax credits and the impact of those benefits in proportion to lower pre-tax income.*
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> *Net income totaled $114.9 million, down 57.5% from a year ago. Diluted EPS of $0.96 decreased 53.2%. Adjusted EPS of $0.98 decreased 52.2%.*

Big freight brokers are therefore in sheer panic. As a result, we believe these 3PLs are under extreme pressure to squeeze every bit of profit they can out of small business motor carriers and independent truckers to mitigate their 2023 losses, satisfy investors, and save their own employees' jobs. We contend their efforts to do so are seen in the rates truckers have been offered by big brokers over the past 30 days.

In April, rates offered to truckers by brokers dropped under $1.00 per mile. On some lanes, as low as 53 cents per mile.

At the end of April, Freightwaves reported:

"America's $875 billion trucking industry is struggling… The number of authorized interstate trucking fleets in the U.S. declined by nearly 9,000 in the first quarter of 2023, according to federal data analyzed by Motive, a fleet management technology company. Several midsized fleets have already shuttered this year, including Florida's Flagship Transport and North Carolina's FreightWorks Transport. And major freight brokerages have laid off 1,000 employees in 2023 alone…Per FreightWaves' Outbound Tender Rejection Index, trucking fleets are rejecting about 2.8% of load requests. That makes "early 2023 the softest sustained truckload market since the tender data history began in early 2018…"

As the truckers who protested on May 1, 2023 outside USDOT HQ told the FMCSA Administrator -- reminiscent of the May 1, 2020 protest outside the White House exactly three years ago—you simply cannot run a truck and earn a profit under $2.00 per mile, especially in these days plagued by inflation and high fuel prices. Drivers accepting these loads are slowly drowning, mitigating deadhead miles trying to stay afloat and just get home. More and more trucks are likely to remain parked and eventually sold when owner-operators can't meet their monthly payments. They are being ruthlessly punished by big brokers who are trying to save themselves and keep up their outrageous, secret "profit margins."

Three years ago, Robert Voltmann, then-CEO at TIA, wanted the industry and public to believe that those margins averaged 16% among his big broker members. But documents released on social media at the time showed that big brokers in the midst of that last COVID-induced economic crisis were still trying to score up to a 57% take on loads as truckers heroically risked their own safety, suffered through COVID on the road way from their families, and kept America stocked… all while most Americans were hunkering down at home.

But big brokers should not be making “margins.” They should be earning set commissions like brokers in every other industry, and those commissions should be disclosed to their shipper clients upfront and be made available to truckers upon request as is the current 49 CFR 371.3 rule.

None of us would allow a realtor to sell our homes without a contract that states they will charge us say a 4% commission. None of us, would allow a stock broker to execute a trade on our behalf without us knowing upfront, they will take 1-2%. Yet that is how the 3PL industry operates in America circa 2023. Under a cloak of secrecy thumbing their nose at the very notion of rate transparency that is already a Federal rule under 49 CFR 371.3 and has been the regulatory wisdom for 70 years dating back to the ICC.

This may come as a shock, but the SBTC has recently suggested that third party transportation intermediaries in America are not actually brokers at all. They are investors following a service arbitrage-style strategy of simultaneously buying and selling truck transportation to score a profit. When times get tough for everyone, they get especially ruthless and it is unclear if their activities constitute price-gouging, profiteering, and/or price-fixing in violation of antitrust law and restraint of trade. It is also unclear what ever happened to the Department of Justice investigation that former President Trump directed after President Biden was sworn in.

We know the large freight broker lobby has a PAC and that they donate to many members of Congress in the hopes of influencing public policy. Forty-seven members of Congress in the last cycle received such money. Dating back to 2000, Over $900,000 has been spent to influence their desire to raise the bar of entry, not to protect truckers from broker fraud, as they have purported to Congress, the industry, and public, but to protect these big brokers from competition, defeat attempts to enforce rate transparency, and sell more of their bonds.

Truckers cannot offer as much money as a trade group funded by its multi-billion third party logistics members, but their power is in their numbers… and ultimately in their votes. They are understanding more and more what is happening in Washington, are acquiring more insight and are becoming more politically sophisticated and astute. There are about 3.9 million truck drivers in America. Those of them that operate as independent owner-operators and drivers for small and midsized fleets need your help. Their livelihood is on the line. The time is now to help America's blue collar working class.

TIA hypocritically argues they are brokers when it comes to controlling entrance to the freight broker industry to keep competition for their big broker members low and outlawing "dispatchers" as unlicensed brokers, yet then suggests they shippers when they try to evade regulation. The FMCSA denied that argument on March 17, 2023 when they said they would not be opening up rulemaking at TIA's August 2020 request. TIA is now likely to appeal to you because they think they have bought and paid for friends who will just throw 70 years of conventional wisdom aimed at ensuring a level playing field and avoiding anticompetitive policies. We ask you tell them you you appreciate their support but they are misguided if they think you can be bought and are for sale to the highest lobbyist.

FMCSA has also defended transparency as of March 1, 2020 when they wrote us advising brokers must abide by the 49 CFR Part 371 regulations as FMCSA considered requests from SBTC and OOIDA to open rulemaking to strengthen rulemaking to prohibit the coercing of truckers to waive their rights to transparency as a condition for doing business. And they approved both SBTC and OOIDA's requests to commence such rulemaking on March 16, 2023, the day before the dismissed TIA's request to repeal the rate transparency rule.

There is therefore a consensus that rate transparency should not only endure but be enhanced.

The challenges to the supply chain are clear. The root causes of drivers' challenges couldn't be more obvious. Sadly, America is not on actually track to "Freight Forward." We are inside the DeLorean travelling backwards in time back to 2009. Indeed, all signs point to a new GREAT RECESSION as indicators always pop up in trucking before the economists make their formal declarations. But you can put the supply chain on the right track. We have written the playbook and we just need members of Congress to pick up the ball, run with it, and score touchdowns for small business and the American consumer.

The SBTC has written and proposed the **Transportation Intermediaries Accountability Act of 2023** as a common-sense solution to the tackle and address head on the problem of big brokers circumventing and evading transparency. Despite 49 CFR 371.3, multiple big brokers have used the almost-identical --and we contend illegal and anticompetitive-- language in their contracts that induce truckers who need loads to waive their rights to transparency:

> *"BROKER and CARRIER shall use commercially reasonable efforts to verify the accuracy of all freight charge billings invoiced by BROKER to CUSTOMERS for the Services performed by CARRIER. BROKER shall have the right to audit, from time to time, CARRIER's freight charges, and CARRIER shall fully cooperate with any audit. BROKER is not required to disclose its charges to CUSTOMERS, commissions, or brokerage revenue, and CARRIER waives its right to receive, audit, and/or review information and documents to be kept as provided in 49 C.F.R. § 371.3."*

We all have to wonder how this language wound up in all of these different contracts issued by all these different companies. The odds of there not having been coordination are very slim. TIA has in the past even publicly encouraged *"collaboration in pricing"* among their members. That language scares us because it awfully close to price-fixing. Congress needs to investigate whether meetings have been held by 3PLs and/or their trade group that involve setting prices under $1.00 a mile through the use of online rate making tools offered by "load boards" and through other means and encouraging brokers to use language to illegally manipulate the market to defeat transparency regulations, evade regulation, and circumvent America's antitrust laws.

We found one article that pointed out then FMCSA Administrator Jim Mullen was using the almost identical talking points as Voltmann was in 2020 about Pepsi not wanting Coca-Cola to know what their shipping costs were to be very alarming. Shortly thereafter Mullen moved on to the private sector and Voltmann "retired."

This all reeks of at best an appearance of impropriety in the form of conspiracy, corruption, and/or collusion worth of Congressional hearings.

We believe the business practices of these big brokers also clearly entail evasion of regulation in violation of 49 USC 14906, which states:

> *"A person, or an officer, employee, or agent of that person, that by any means tries to evade regulation provided under this part for carriers or brokers is liable to the United States for a civil penalty of at least $2,000 for the first violation and at least $5,000 for a subsequent violation, and may be subject to criminal penalties."*

Yet that law is not enforced by any USDOT agency, including OIG, and evasion of broker transparency happens daily.

You should ask the Secretary why.

Congress also knows that 15 USC §1 states:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."

It is time for Congress to conduct evasion of regulation hearings and deem it in the national interest for big brokers to actually be --and act like brokers-- rather than mere investors. We are looking for our champions on both sides of the aisle who will co-sponsor this legislation which would include a private right of action for broker transparency violations above and beyond the restraint of trade private cause of action so carriers and truckers can seek relief in court if regulatory and law enforcement won't enforce the law. It is indeed high time for Congress to keep and fulfill its promises to America already codified in the Nation Transportation Policy.

Thank you for listening to the perspective of the little guys and gals. The SBTC and its members would be happy to appear before you and/or Senate Commerce to testify in Evasion of Regulation and Restraint of Trade hearings.

Respectfully submitted,

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Small Business in Transportation Coalition, Inc.