ECONOMIC COMMENTARY ON THE CURRENT PROPOSAL TO PROVIDE TRANSPARENCY FOR TRUCK BROKERAGE COSTS

JANUARY 1, 2025

Prepared by Noël Perry
Principal Transport Futures

Introduction: This paper addresses the current debate over broker cost transparency from the neutral viewpoint of an Austrian economist. As such an economist, I am examining the issue from an economic perspective, that is, looking at the effects of a possible regulatory change on all the stakeholders rather than from that of a particular interest group. If the analysis indicates an improvement across the entire market, then a regulatory change should be considered. If not, then the status quo should be chosen. Please note that this work has been commissioned by the Transportation Intermediaries Association, clearly an important player in the debate. That commission, however, included the direction for me to take the neutral viewpoint mentioned above. Importantly, my analysis of the effects of the proposed regulatory changes shows little sustained negative effect on brokerage with either outcome. That said, I believe my conclusions are worth study because they DO show significant negative effects on shipper costs, hence fundamental consumer costs, the broadest possible perspective. Such a conclusion leads me to urge against such increased regulatory burden on transportation. Finally, I conduct this analysis from the viewpoint of 51 years of transport regulatory analysis, including a position astride the monumental transport deregulation of 1979-80. That signal event is worth close study when considering any move back towards the tar baby of regulated transport economic matters.

An important qualification: The regulations under consideration in this paper apply to those transactions in the truckload market managed by brokers. Those people are the movers of the shipments that, for various reasons, lend themselves poorly to the conveniences of conventional carrier contracts, agreements that cover many loads over an extended period. In contrast, these shipments have a collection of characteristics that need extra care in capacity acquisition and management. Special service demands or varying volumes may require capacity individually provided on the spot. Because such transactions are labor-intensive, shippers and carriers delegate that work to a classic set of middlemen called 'brokers' in trucking (the regulations call them "property brokers, a name we inherit from the days of regulated transportation.) In the same way, a football fan wanting to attend the Super Bowl at the last minute will deal with an internet ticket broker rather than chancing a wait near the stadium entrance asking for 'extra tickets anyone.' As with entertainment brokers, truck brokers have broadened their services beyond the essential matching function, including managing the payment process between shipper and carrier. As part of that, the brokers will often provide factoring services that pay the carrier upon completion of the load, well before the shipper pays the bill. We will see in the discussion below that those ancillary services impose difficult complexities on any trucking accounting process, as they will in transparency regulation.

What's the economic theory at play here? Policymakers at the Federal Motor Carrier Safety Administration (FMCSA) believe that trucking brokers have conspired to restrict the availability of the 'perfect' information, a crucial requirement of an effective market. That fear originates in the regulated era for transportation when the beneficiaries of market power (particularly the railroads) would use that power, sometimes in the form of illegal rebates to distort market forces. In that era, the federal government, through its regulatory agency, the Interstate

Commerce Commission (ICC), attempted to improve the efficiency of the U.S. transportation system, protect shippers from ruinously high rates, and limit the frequency of illegal action as with the rebates mentioned above. After 93 years of increasingly cumbersome regulation, Congress decided that its freight market regulations degraded efficiency and raised prices, which was the opposite of their intent. It eliminated most of the regulations, even disbanding the Civil Aeronautics Board (1985) and the ICC (1995) altogether. Unable to completely abandon its historical distrust of the carriers and brokers, Congress retained a regulation passed on to the FMCSA, the new watchdog over the industry. That regulation was explained in 1980 by the following statement: "The primary purpose of our record-keeping requirements is to ascertain whether improper rebating activities are taking place." The 1980 federal commentary showed no evidence that such rebating remained a problem. The regulations, apparently, were a continuation of historical suspicion, nothing more. Note that shipper problems with high rates were referred to the Surface Transportation Board (STB) and are not in question in the current debate. This 1980 history gives us a useful, specific focus for the debate over the regulations: broadly, are the brokers cheating carriers or shippers? If so, can these regulations reduce such cheating. Importantly, the shippers, the owners of the broadest market perspective, are not concerned about cheating, lining up against the regulatory proposal. Only the small spot carriers support the FMCSA proposal.

The current FMCSA is also worried about something else: The 2024 proposed regulations add a new concern not mentioned in the 1980 commentary. The FMCSA likens the explosion of small fleet carriers (including many owner-operators) to a suspect class of entities falling victim to the asymmetries of the truckload spot market resulting from their negotiating with large, powerful brokers. Thus, the current federal commentary gives a second useful, specific focus for the debate: broadly, are brokers making the small carriers victims; if so, can these regulations level the playing field?

How, then, should we structure the debate? At its most fundamental level, the issue boils down to six questions:

1. Do the proposed regulations fall within the federal government's power and have a legitimate place in the economic regulation of trucking?
2. Without the new regulations, do the carriers have sufficient information to manage their businesses, understanding that no real-world market has the complete perfect information that theorists require?
3. If there is some shortfall from that ideal, does it result in asymmetrical negotiations or widespread, illegal collusion by the brokers?
4. Can the FMCSA promulgate regulations that improve information flow without imposing the negative side effects that ALWAYS accompany governmental regulation of economic matters?
5. Does the resulting cost-benefit analysis indicate an improvement or degradation of transport services to the consumer public?

6. What are the differing effects on the four interested parties: carriers, brokers, shippers and consumers?

The answers to these questions follow.

1. DOES THE FEDERAL GOVERNMENT HAVE A LEGITIMATE PLACE IN THE ECONOMIC REGULATION OF TRUCKING?

Of course, it is legitimate because our Congress has authorized that regulation: As an economist, I point out that economic regulation works best when it addresses issues seldom considered by the individual decision-makers that make up a market. Economists call them 'externalities'. In trucking, externalities include safety and emission regulation. Trucking is tightly and rightly regulated regarding those issues. Importantly to the contrary, regulation has a poor track record when it is applied to purely economic decisions within a market. Such regulations attempt to substitute the specific market decisions of individual players with the generalized decisions of Washington's regulatory staff members, producing results that mainly serve the interests of the lobbyists that surround the process. We saw in the original Interstate Commerce Act of 1887 regulations that were supposed to protect the interests of small shippers. In reality the regulations were quickly molded to protect the interests of the railroads, the dominant transport mode of those times. In the same way, the 1935 Motor Carrier Act was supposed to protect the interests of small truckers but was quickly molded again to protect the interests of the railroads. We are reminded also that, once imposed, market regulations remain in place regardless of whether they achieve their original goals – or adapt to changing market conditions. Their endurance is rather testimony to the political power of their beneficiaries, not their economic efficacy.

There is an important exception under particular economic conditions: I am talking about the presence of 'public utilities.' Such firms are the owners of expensive infrastructure that affords them significant monopoly power. Economists define 'Monopoly' as the ability to set prices, at least partly independent of market conditions. These firms possess this power because of large capital investment but also due to the governmental permission that allowed their founders to build the infrastructure, investments that frequently impose their presence over otherwise undisturbed land. While the investments usually confer major economic benefits on their neighbors, governments regulate them to ensure the firms provide the promised services at a reasonable cost. To perform this task, the government insists on visibility of the large firm's costs, a clear form of 'rate transparency'. We see this in electrical and water suppliers and, in this case, the railroads. I present this discussion to point out that the prime reason for economic regulation of transport is to, at least, partially control the behavior of powerful companies, companies with significant infrastructure and limited competition, some sole suppliers, otherwise as oligopolists, large companies sharing a market. Railroads call such conditions 'a franchise'. Those franchises are powerful, frequently earning 40% or more gross

margins. The trucking broker margins in question in this paper average 15%, hardly qualifying as 'franchises'.

That's the theory. What's the practice? Three things happen, sometimes making the process inefficient. First, as cited above, lobbies may defeat the purpose of the regulations. Second, the regulations seldom adapt to changes in the marketplace. We saw that post-WWII, the ICC refused to let the railroads abandon excess trackage and flex their pricing in response to new technology. Third, the regulations are sometimes applied to sectors that do not have the characteristics of utilities. That is what happened to trucking in 1935. The current debate over rate transparency is a legacy of that era.

Would you want your costs revealed to your competitors? Business privacy is central to broker and shipper objections to the proposed regulations. Firms work tirelessly to differentiate their costs and services from those of their competitors. What differentiation they achieve, they want to keep to themselves so that they have a leg up on those competitors. The new regulations would make what is normally confidential visible, devaluing their investment. What would be the point of innovation if it created no advantage? Economists recognize the importance of consequences in market structure. Where the consequence of innovation leads to financial rewards, innovation thrives. Where innovation leads nowhere, it dies. We see the latter in railroading with its slow growth and stagnant service. Trucking and railroad customers give the most telling testimony. Under the public utility environment of railroading, customers are constantly complaining about poor service and rising prices. That is why the Surface Transportation Board (STB) closely monitors rail service and regularly hears rates cases. Rate/cost transparency makes sense there. Under the open market environment of brokered trucking, participants aggressively compete against each other on rate and service grounds. Regulation requiring transparency is unnecessary in a hyper-competitive environment. Why should federal regulations suspend the normal rights of business privacy when that privacy works to enhance the competition the market wants? Keep in mind also that the proliferation of electronic tools will only broaden the potential for competitive mischief.

Where does current economic regulation of trucking stand? Remarkably, in 1980, Congress recognized the disappointing reality of trucking economic regulation and voted to deregulate trucking, indeed all commercial transport, restoring the primacy of individual market makers. Congress shifted the prime purpose of trucking regulations to the management of externalities. It is no coincidence that the regulatory body in play for this current issue is called the Federal Motor Carrier *Safety* Administration. The other regulatory body most commonly associated with trucking is the *Environmental* Protection Agency. Unfortunately, the regulatory traditionalists kept one holdover economic regulation in the new structure: the 'right' to rate and cost transparency, which is the current debate issue.

What happened after 1980? Transport deregulation is universally regarded as a spectacular success. By 2000, improvements in productivity and market access lowered truckload rates by 75% in real terms. While those reductions resulted from many factors, deregulation provided

the freedom to quickly and efficiently combine those factors into a radical new solution. Importantly, owner-operators, prime supporters of the current cost transparency proposals, have more than doubled their share of trucking since deregulation. Such aggressive entrepreneurs thrive under market freedoms. Consider what a trucking world operating under 1935 regulations would look like in an age of superhighways, sophisticated computers, instant communication, and online retailing. How would the industry have adapted to those changes while following regulations created in the depression conditions of 1935? Instead, the players in the trucking industry are free to forge their own adaptations, including the spot market players who have more than doubled their volumes since 1980. The market clearly likes deregulation.

Conclusion: *Economic theory and U.S. transport history urge great restraint in regulating truck economics save for the control of externalities like safety and emissions.*

2. DO THE CARRIERS HAVE SUFFICIENT INFORMATION TO MANAGE THEIR BUSINESSES?

What is the essential information? This question is at the root of the debate. Again, inheriting from its long regulation history, the FMCSA assumes that truckload carriage is 'fungible'. (According to the Oxford Dictionary, "of a product or commodity. replaceable by another identical item; mutually interchangeable…..) i.e., every load is the same. Therefore, if carriers or shippers can see their brokers' costs (the perfect information), they need only to compare those costs to standards developed by a study of many transactions. This assumption is the first of several incorrect assumptions leading to the regulatory proposal. While it may have been true in the crude supply chains of 1887, it is far from the truth in today's complex and sophisticated logistical world.

Load economics differ dramatically in two fundamental ways. First is the matter of the carriers' costs. Empty miles; loading delays; service requirements; time of day, week or year; all dramatically affect carrier costs, hence their prices. This is important to this debate because brokers compete on their ability to consistently match carriers to loads that lower their costs or who will gladly pay the carrier premiums required to move the low-productivity freight. In the same way, brokers favor those carriers with superior performance in the variables that affect the broker's costs. Neither loads nor carriers are fungible. These same realities govern the tendering of loads by shippers. After all, the loads offered to carriers derive their characteristics from the shippers' logistical needs. Second is the matter of the brokers' value. It follows that the best brokers are those who efficiently match the complicated needs of carriers and shippers. That's why brokers are in business. Finally, the brokers offer carriers and shippers a long list of additional logistical services. From the carrier's perspective, a broker's price quote results from the long supply chain that stands behind it. This view of the market is distinct from the regulator's, which sees the price quote as a simple shipper quote with a broker's margin tacked on. Importantly, that view assumes that the broker's margin is primarily a function of

the regulatory authority the broker holds. The primacy of lawyers before 1980 makes that view an accurate historical case. That assumption can't be farther from the truth in 2025, a world where the FMCSA grants broker authority to almost anybody who applies.

How does the above complexity apply to price negotiation? While a negotiating carrier needs to know the service requirements of the load in question, it needs only to know the summary price offered by the extended value chain of that load. That combination of price and service requirements is sufficient information for the carrier to accept or reject the price offer. The carrier need not see the blizzard of cost details that determine the broker's offer. The carrier has an asking price. The broker offers to pay a certain amount. So the negotiation goes. This presentation of information is a constant in any market. Both parties also need to know if accessorial costs apply, if there are special service requirements, and whether the carrier at hand can meet them. Again, these are market essentials. When buying a car, a consumer needs to know the vehicle's price, performance, and condition. The dealer needs to know if the consumer will pay if agreement on the other factors is reached. Neither are interested in the details of their negotiating partner's business. Ever asked what your auto dealer's profit margin is? Of course not. It's the same for trucking. If the price is right, the carrier accepts and carries the load -- on the spot!

How do you know there isn't a better price, or how to find a new party if the last transaction turns out bad? In the auto example, one solicits price quotes from the dealer's competitors. Who asks the government for such information? Nobody with any sense, even if it were available. So it is with trucking. There are more than 20,000 licensed transport brokers, averaging more than 400 per state. The brokers have the choice of 102,000 carriers.[1] Moreover, load boards like Truckstop.com publish minute-by-minute loading opportunities (with prices), adding up to hundreds of thousands of data points daily. This suggests that the negotiating challenge for the trucker is sorting through the flood of data. Sometimes, perfect information is overwhelming. Carriers solve this problem by specializing in a limited collection of lanes and, over time, sorting through the available brokers to find the ones who provide the best and most accurate pricing. Of course, brokers do the same thing when finding the best carriers. That is implicitly what the shippers pay the brokers to do. We see, then, the necessary presence of workable choices in the spot trucking market, which is the principal characteristic of an effective market. That is the opposite of the choices available in a public utility market, the kind of market that requires economic regulation.

However, the FMCSA thinks small carriers are deficient in evaluating those choices: Such an assumption flies in the face of several facts. First, despite the repeated predictions of experts over the 50 years of the modern truckload market, there has been no grand consolidation. This industry remains fragmented because there are only the smallest economies of scale. For instance, studies show that drivers consistently prefer to work for small fleets. That is why

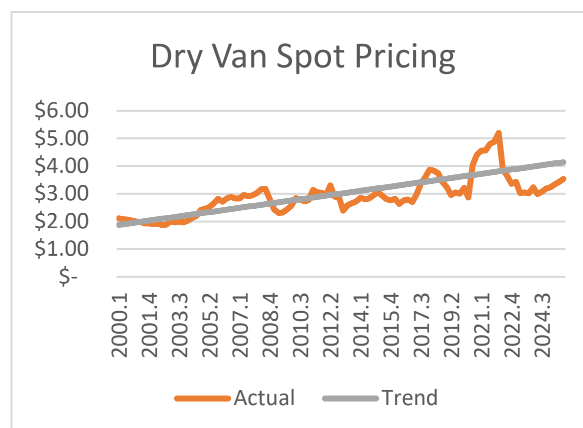
[1] This number represents those carriers that specialize in the spot market. Since contract-oriented carriers will sometimes accept spot loads, the theoretical total is closed to 300,000 carriers.

there are somewhere north of 500,00 carriers, at least 100,000 of which specialize in the spot market. Second, there are a host of suppliers that provide the benefits of scale that support the small fleets. Brokers do this, as do fuel suppliers and large load boards like Truckstop.com. Third is the independence of owner-operator trucking, a condition that sometimes trades financial benefits for personal values. The chrome air filters, gleaming outboard on a long-nosed Peterbuilt, cost the owner fuel economy. But my, they look good! Finally, the spot market is, by its nature, a high-risk segment. When it is hot, it is really hot; when not, watch out! Truckers then qualify as gamblers when compared to the staid big fleets specializing in dedicated contract carriage. In a free market, they are allowed to make that choice. Knowing these facts explains why there is no shortage of entrepreneurs putting up $100,000 or more to enter this market. During the recent boom, 80,000 owner-operators entered this market, doubling their numbers. Of course, they did so at their own risk. That is how markets work. I conclude that the FMCSA's concern for small carriers has much more to do with the condescension of highly educated experts than any economic realities.

Conclusion: *All a carrier needs to negotiate a successful move is a firm price and an accurate understanding of the service parameters. Brokers routinely provide that information. When the carrier is unsure of one broker's offer, it has access to sufficient competitive alternatives. When a move proves unsatisfactory because of the information provided, the carrier has access to sufficient competitive alternatives for its next moves. Importantly, much of the information required by the FMCSA's proposed regulations is irrelevant to a successful transaction. That information, especially the 'gross margin' requirement is an artifact of a bygone utility-focused era concerned about rebates that no longer exist.*

3. IF THERE IS SOME SHORTFALL FROM THAT IDEAL, IS IT THE RESULT OF WIDESPREAD, ILLEGAL COLLUSION BY THE BROKERS?

The current accusation is based on something else entirely: By its nature, spot market pricing is an inherently cyclical phenomenon. Because changes in supply lag changes in demand by a year or more, pricing goes from well above trend to well below trend during the cycle. The phenomenon is easily seen in the owner-operators' demand for regulatory relief. Twice in the last eight years, the market has cycled from very tight conditions to very loose conditions with the expected effects on pricing. In 2018, pricing went from 17.0% above trend during the ELD boom to 18.1% below trend in 2019. In 2022, the spot market

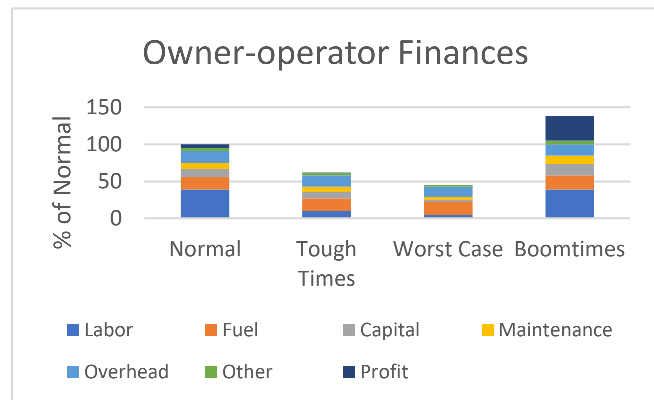


repeated that volatility -- with gusto -- going from 34.3% above trend to 16.0% below. Put differently, spot carriers went quickly from windfall profits to losses, with many carriers barely hanging on in early 2025. One can see this pattern in the historical graph of dry van spot pricing. Prices cycle rapidly above and below the long-term trend, including the current low point well below trend.

What was to blame? An economist would hazard that the 12% increase in spot market tractor capacity between the beginning of 2017 and the beginning of 2019, compounded by a further 30% increase in capacity by the end of 2022, had something to do with the pricing. These numbers suggest that the two pricing booms, which inflated carrier profits by 220% and 500%, respectively, fueled a euphoric overbuying of capacity. Now, with demand 18% below its early 2022 peak and capacity still within 5% of its 2020 peak, prices have plummeted. It is human nature for distressed business people to search for a scapegoat rather than acknowledge their own mistaken behavior. Accordingly, the owner-operators and some small fleets have targeted their brokers, accusing them of passing on the market stress to the carriers, while protecting their own profits. We know from publicly available data that broker gross margins, (the difference between what the shipper pays and what they pay the carriers) have fallen almost 25% since the peak. But that estimate assumes that brokers need to retain most of their assets, especially their people. Broker profit, what the owner takes home, has certainly fallen more, likely as much as 40%. That puts the broker profit reduction in the same ballpark as those of the carriers. Consider also this different calculation. Since the beginning of the current era of price volatility in early 2017, spot prices have been up 25%, yet broker gross margins have been down 4%. One only needs to look at the trade press to find the truth about these economics. Several major digitally based broker startups have declared bankruptcy, while industry-leading CHRobinson had removed its CEO and slashed its salesforce by 50%.

How would broker predatory behavior be possible? Even if this accounting missed some crucial factor, ponder these two questions. First, if selfish broker behavior is the cause of the current low market, would not broker behavior also be responsible for the carrier boom markets? Why would anyone encourage such volatility? Second, how could brokers prey on carriers in a clearly open market? Remember that the shippers pay the brokers to secure reliable capacity. They, in the end, pay the brokers' gross margins. A broker who regularly stiffs its carriers would quickly lose its reliable capacity base. With unreliable capacity, it would quickly lose its shipper customers. Markets work!

With such extreme volatility, is this a viable market? The FMCSA's concern for carrier profitability is a return to the federal government's historical concern for such matters. The 1887 act attempted to shelter small shippers. The 1935 Act attempted to shelter small carriers. Putting aside the fact that neither attempt worked, one asks whether the current crisis in small carrier finances is a significant threat to trucking capacity, hence, supply chains. Two quantitative views suggest that, as in every cycle before, the industry will survive. The first is that small spot capacity remains 26% above normal. An economist would say that the market needs to continue to shed capacity as it has been doing for more than two years. It is down 16% from its peak. Second, we see in the accompanying chart two things as owner-operators manage *through* the cycle. They economize on everything, especially their salaries. A driver with a working spouse may need no salary beyond meal expenses. In addition, we already know that the broker's take ('overhead') in this chart also declines. This chart shows why such carriers survive in the current market. The right-hand column shows what happens during boom times. History tells us that the extra profits from the good times more than fund the bad times. That happened in the 2004-2010 cycle and the current cycle. Of course, some carriers squander their profits in the good times, leaving themselves with inadequate resources now. Is the FMCSA responsible for offsetting a carrier's bad judgment? Sadly, federal regulation sometimes attempts that -- always with bad results.



But what if the brokers could collude on what they offer the carriers? That is what some owner-operators, and, apparently, the FMCSA staffers think. The proposed regulation is aimed at exposing such collusion. Of course, such collusion is a criminal offense under federal anti-trust law. Moreover, should the 20,000 competing brokers[2] miraculously collude, some would always decide to cheat on their cheating partners, starting a downward pricing spiral that would defeat the collusion. The members of the OPEC cartel do this all the time. Finally, the fluid nature of the spot markets makes such coordinated action impractical even if allowed. If two or three brokers succeed in agreeing to cheat, the freight will have already been squirted to other providers. Note that brokers can acquire authorities with very little effort, hence the large population. This market has ample opportunity for competitors to win share from brokers charging above-market prices. The FMCSA's supposition that 'asymmetrical' market forces make victims of the carriers does not fit the facts. What was the asymmetry in January of 2022 when shipper costs were up 34% while carrier profits were up 500%?

[2] The FMCSA broker authority count puts this number at more than 20,000 liscenced brokers. That total, however, includes numerous authorities that move little or no traffic. Most experts estimate that the count of active brokers is 15,000.

Conclusion: *There is no case for either predation or collusion among brokers. Both practices are practically impossible, plus broker finances have suffered the same declines as spot carriers. The FMCSA concerns remain a heritage from the pre-deregulatory era.*

4. CAN THE FMCSA PROMULGATE REGULATIONS, INDEED, IMPROVE INFORMATION FLOW – WITHOUT IMPOSING THE NEGATIVE SIDE EFFECTS THAT ALWAYS ACCOMPANY GOVERNMENTAL REGULATION OF ECONOMIC MATTERS?

It depends on the kind of information flow: Let's take gross margin first or the profit within those margins. To do that, one must address the elephant in the room. The proposed regulations would have a very significant negative side effect as they would require all the parties to make their prices public and require the brokers to reveal their internal cost structure. No business wants that. Such information would practically eliminate the universal practice of seeking pricing discounts that give the recipient a competitive advantage. That is why most transport moves are priced through confidential contracts. It is also why brokers, at the request of their shippers, require carriers to waive their regulatory right to cost transparency. Those requests extend the confidentiality that rules in 70% of the market to the remaining 30%, spot moves.

Information has value. Threatening that value has consequences: Three related sets of valuable information are at risk under the terms of the proposed regulation. Lost in the lobbying of the owner-operators is the fact that their prices would be revealed. A carrier who earns a good return on a piece of business would face increased competition the next time that move occurs. Its broker may also ask for a lower price next time round. The same dynamics threaten broker market value. Brokers compete on their ability to supply superior matches. The newly exposed data would allow competitors to copy their techniques or disrupt their relationships with poorly considered pricing discounts. Finally, the shippers obviously compete on supply chain cost and efficiency. None wants their competitors to see the details of their supply chains. In all the cases, the valuable information goes well beyond narrow transport pricing. All the actors compete on service and other enhanced values. None want their competitors to see and copy those services. The potential loss of valuable information has major consequences for this proposal. All three actors will go to great lengths to keep their competitors from seeing their hitherto private information. Hence, the discussion presented in the next paragraph.

Unpopular regulation ALWAYS encourages workarounds. The exhibit below illustrates the complexities of truckload prices. It tells us that a move may require accounting for 23 or more activities. Such a complex soup would be a fertile field for clever accountants. Note the common overlap of factors between brokers and carriers. A broker wanting to minimize gross margin reporting must account for all shared costs as a carrier expense. The costs wouldn't change, but the gross margin would fall. In the same way, shippers could use accounting strategies to obscure the true costs of their spot

Logistical Costs To Shipper																						
Freight Rate To Shipper																						
				Broker Margin																		
Carrier Rate																						
Ops Costs	Profit	Broker Qual.	Tolls	Cargo Insuramce	Special services	Telemetry	Lumping	Detention	Performance bonuses/penalties	Rate negotition	Freight Match	Payments	Ops. Costs	Profit	Carrier Qual.	Shipper Sales	Value Added Services	Warehousing	TMS	WMS	Logistics Admin. Costs	Logistical Risks

transportation. Such practices would multiply in the growing share of brokered moves where a contract covers the shipper side of the transaction, and a spot transaction covers the carrier side. The extreme of such strategies would be for the broker to take title for the freight in question, making it a shipper. Some shippers would shift their freight out of the brokered space to be included in already confidential contracts with carriers. Carriers would have access to that freight only as subcontractors, with no visibility to the margins the asset carriers collect on that freight. The other solution could be a new brokered market based on loopholes in the transparency regulations. Consider, for instance, the position of a broker already in the 'third party logistics' (3PL) business, something most already do. Under those conditions, the 3PL can negotiate a flat fee for its universal services, becoming an in-house traffic department with the specialized skills to handle the spot market and contract moves. To avoid even the appearance of brokerage that 3PL would identify itself as a carrier or a shipper. Whatever the solution, the freight would move, but less efficiently, with more administrative cost.

Regulations are always most vulnerable around their edges: That is true about these proposed regulations regarding the fluid boundaries between spot and contract business. Freight moves freely between spot and contract markets because of changing business conditions. Since the beginning of 2017, the spot share has cycled from 19% to 24%, then back to 19%. Each percentage point change represents 11 million loads. This process is important for two reasons. First, many organizations have both carrier and broker authority. Those firms will easily shift traffic from one mode to another to avoid regulatory pressures. Second, this regulation will only negatively affect brokered loads, leaving contracted loads untouched. Such asymmetrical policy would permanently shift share towards contract transactions and away from where unconstrained market forces put it. This policy would reverse the natural, market-based trend towards spot transactions that has increased the spot share by more than 30 million loads since 2000. That shift results from a change in the dynamics between shippers and all providers of

capacity, not the dynamics between brokers and their carriers. Those latter dynamics simply follow the insistence of logistical economics.

Don't forget about enforcement: Even if you believe that federal regulations could best the strategies of a legion of lawyers and accounts, enforcing the regulations governing 2.5 million loads per day remains.

What about transparency regarding charges beyond the basic rate? The current method is for the broker to advise the carrier about such issues – to the best of its knowledge. Remember that most of the extra costs are determined when the move occurs, not during the negotiation. The proposed regulations are vague about this timing issue, stating only that an electronic record be available within 48 hours. It follows that the carrier still has to trust the broker's judgment and integrity. That is a necessity when both parties are betting on the come. Where surprises occur, charges are usually settled amicably. It is true, however, that an effective regulation would provide more detailed ex-post factor disclosure. Such disclosure might make resolving difficult-to-quantify disputes between carriers, brokers, and the many other actors in this play easier. Also, such disclosure would help expose those brokers who practice fraud. Remember, though, that those fraudulent brokers would be the most creative users of the workaround accounting mentioned above.

Conclusion: *Given the powerful resistance of any regulation that reveals prices, there is little, if any, chance that usable information about broker margins would emerge from the proposed changes. Although the requirement for a detailed accounting of extra charges would add some modest value, it would necessarily come well after the original price negotiation. Its value would be limited to identifying fraudulent brokers unskilled in managing around the regulations.*

5. DOES A REASONABLE COST-BENEFIT ANALYSIS INDICATE AN IMPROVEMENT OR DEGRADATION OF TRANSPORT SERVICES TO THE CONSUMER PUBLIC?

Let's consider the costs first: They fall into two categories: Most obviously, the brokers will incur IT costs. At a minimum, their information will have to be formatted for transmission to the carriers. Carriers could ignore the opportunity. If not, they will need some platform to receive the data. That will carry a fee. The shippers may also enter the fray, wishing to monitor the release of sensitive data or to discover the data regarding their competitors. The brokers will do the same thing. Each entity will have to build, modify, or purchase electronic tools to do the new work at a cost, conservatively, of $30 million in capital summed over the 400,000 firms affected. That investment amortized over five years equates to $33 million yearly or $.15 per load. When one considers the sensitivity of the pricing data, brokers and shippers will undoubtedly invest considerable additional legal and accounting resources in protecting their interests.

That's the small cost: One must also factor in analytical time. Consider an owner-operator, a business person whose time is worth about $50/hour. Should they analyze the new data for each load, the extra work would take perhaps two minutes or almost $2/load (plus dispute time). That time comes out of the driver's productive time -- unless you would have the driver do such analysis and negotiating when driving. Of course, the brokers and shippers, who have more to lose, would use the data more, albeit with more efficient methods. Adding a similar time investment for the other actors would swell the cost to over $4/load. Across the 230 million spot loads annually, that cost reaches $1.1 billion annually. While it is true that such an estimate is highly speculative. I present it to introduce the significant costs of regulatory compliance.

The FMCSA's analysis is based on a very different set of assumptions. The estimate quotes 'minimal' costs without supporting quantitative analysis. It is based on the belief that the brokers already keep such records electronically and routinely transmit information to carriers. If so, why is there a need for new regulation? Yet, the FMCSA explicitly wants brokers to increase the amount of information transmitted. Its accusation of broker predation proves that the additional information is sensitive, thus a target for broker and shipper obfuscation. Such data handling has costs, not to mention the additional move-by-move cost of evaluating the data. We are reminded of the truism concerning any unpopular regulation. The industry relatively quickly adapts to new situations through a collection of new procedures, sometimes called 'runarounds. Business continues, but with increased complexity and cost.

What are the benefits? I'll start by highlighting the contradiction in the FMCSA's benefit statements. On the one hand, it says of brokers: "This business model can also lead to an asymmetry of information between parties, which in turn can affect the contracting process by limiting parties' ability to negotiate for their desired terms.[1] These risks can lead to market inefficiencies, such as decreased freight capacity or decreased market competition, which can arise when parties lack material information about the transaction." This language translates to the belief that brokers make more money than carriers because of their monopoly on information – classic pre-deregulation economics. And yet, apparently agreeing with the analysis of this paper, the FMCSA also says, "The Agency believes that broker information would offer limited utility in securing more favorable rates." The FMCSA also agrees that the current profitability problems of spot carriers are market-driven. "…. the pricing of brokered contracts is primarily driven by prevailing market forces. Factors such as the overall economic climate, supply and demand dynamics within the brokerage industry, and other relevant market conditions, as discussed in Section VIII.A.3. Costs, exert a great influence on brokered contract pricing." In addition, the FMCSA concedes that the new regulations would have little or no effect on price negotiation, agreeing with this paper's concerns over the timing of any new information. "……….the information itself would become available only after the contractual obligations have been fulfilled." These two quotes from their latest Federal Register filing admit that the exposure of the sensitive information revealing broker margins and shipper prices would provide no benefit to commerce.

Their admissions go further: Having apparently surrendered their arguments for comprehensive cost transparency, they emphasize benefits to the dispute-resolution process regarding accessorial revenue. This position dismisses the existing practice for such disputes, where the broker routinely supplies the carrier with documentation supporting its case. If so, the remaining benefit would supposedly apply to expose those dishonest brokers attempting to cheat their carriers. However, such fraudulent brokers would supply the same falsified information, now transmitted directly through the information in the regulatory-required transmittal. Even with honest disputes, the FMCSA acknowledges that the transmittals would have little benefit. This quotation acknowledges that. "Because brokered contracts are highly specific, with variation in terms, length, and conditions, information on past contracts would be only minimally applicable for direct comparison in future contract negotiations." Finally, the variety and complexity of this market referenced in that quote call into question any attempt to regulate its information flows. The FMCSA attempts to fashion a single generalized regulation to fit the information flow across 230 million highly variable transactions yearly. The U.S. has 41,701 significant origins and destinations, translating to 1.7 billion individual lanes. Many types of trucks, services, and capacity requirements exist in any lane. Conservatively, those requirements create 26 trillion individual move conditions. That is the complexity the market deals with daily in our supply chains. Since about a third of all moves are spot moves, that complexity could require 8.6 trillion 'broker margin calculations'.

Conclusions: *On the critical issue of price negotiation/gross margin, we see substantial increases in information handling costs balanced against NO benefit – a ratio clearly implied by the FMCSA's analysis: some cost against no benefit. On the secondary issue of dispute resolution, we see minimal theoretical benefits balanced against another trance of informational handling costs – a ratio also supported by FMCSA's analysis. The economics of this issue strongly urge the withdrawal of the regulatory proposal. The proposal would clearly increase transportation costs, leading to increased consumer goods prices, the ultimate standard for results.*

6. WHAT ARE THE DIFFERING EFFECTS ON THE FOUR INTERESTED PARTIES: CARRIERS, BROKERS, SHIPPERS AND CONSUMERS?

Carriers: Given the above conclusions about pricing and dispute resolution, the carriers would realize no profit increase. Note that any cost increases would be passed on to their customers, which is ALWAYS true when regulation increases costs in highly competitive markets. We can see also that any new transparency of THEIR rates would increase competition, leveling margins. The ineffective pricers would see what the effective pricers were charging, cutting into the latter's margins. In summary, the current regulation advocates would receive little or no benefit. There are two major downsides for the small carriers who support the new regulations: First, it is a constant in transport markets that increased complexity favors the large

competitors. Second, if the regulations were written tightly and somehow enforced, the market response would likely move small carriers more closely under the influence of shippers and brokers, robbing many of their treasured independence.

Brokers**:** Because the facts thoroughly reveal the absence of predator/asymmetrical pricing power, the bottom-line effects on brokerage are very small. Yes, all would have to increase IT spending and deal with greater analysis complexity. However, like with the carriers, since all competitors bear those costs, they will be quickly passed on to the shippers. Also, as with the carriers, the prime area of interest would be dramatic organizational changes should the regulations be strict and enforced. Importantly, the industry structure is already moving in that direction. Most brokers now call themselves "logistics" companies or "3PLs."

Shippers**:** This sector might experience a short-run burst of price competition if the regulations somehow increase the production of usable information. However, in the long run, the shippers will experience the same forces as the two entities already analyzed. Complexity will increase along with cost. As always, such costs will be passed on to the consumer. Importantly, the proposed regulations would expose shippers' prices for logistical services. That is sensitive information shippers DO NOT want revealed.

Consumers: Given the absence of significant operating or cost benefits, the effects on consumers will be negative – in two ways. Obviously, the cost of goods will increase. While the increase will be small, perhaps $.04 on a pair of $50 blue jeans, the law of big numbers reminds us that the total across all consumer purchases is significant. More important, though, is the second negative effect. The spot market is, by its nature, the swing provider of transport capacity. The spot market boomed during the 2021 COVID recovery when all retailers cried for capacity to fill empty shelves. The added logistical friction resulting from workarounds will reduce the flexibility of the critical, most flexible part of the market. As a result, during the next crisis, shortages of goods could bid up prices more than before, adding a major risk to such ill-considered influences on supply chains. It is certain that the high inflation of late 2021 and early 2022 had at least partial roots in logistics. These regulations will raise the risk of future inflations.

ONE IMPORTANT LOOSE END

There IS a problem in spot market trucking, indeed all trucking: A collection of practices ranging from unethical double brokering of loads to the outright theft of cargo and equipment is rapidly expanding, thought by some to be approaching $1 billion a year in extra cost. The FMCSA currently has no program to address this very real problem with spot AND contracted traffic. While the problem's solution is difficult, any reasonable attempt to mitigate the losses would earn support from the entire industry. Note that this issue is consistent with the predatory fears that concern the FMCSA regarding information transparency. Only the costs of this predation are more than sufficient to stimulate action.

About the Author:

Noël Perry is an industrial economist best known for his work in transportation and machinery markets. Entering the professional world in 1976, Noël built and managed forecasting processes in three major companies: Cummins Engine, CSX, and Schneider National. He has been in private practice since 2008, working with clients in four modes, investment analysis and the shipper community. Frequently quoted in the national logistics media and heard widely on the speaking circuit, he also serves as chief economist to Truckstop.com. Perry's forecasting practice includes groundbreaking work in volume, pricing, and capacity, with a particular emphasis on risk analysis. In addition to his national and industry analysis, Perry has extensive experience in pricing transaction support and the analysis of federal regulation.

Perry holds degrees from the University of Pennsylvania and Harvard University (Honors) and navigated USAF KC-135 air refueling aircraft during the Vietnam War. He and his wife Ginny live in the historic iron mining village of Cornwall, Pa. In his spare time, Noël is a gardener, singer, golfer, WWII historian and is a member of the Society for American Baseball Research.