



August 9, 2019

Via Express U.S. Mail & Email  
Attachments by Hardcopy Only

The Honorable Raymond Martinez, Administrator  
Federal Motor Carrier Safety Administration  
1200 New Jersey Avenue SE  
Washington, DC 20590

**Re: Docket No. FMCSA-2018-0180; RESUBMISSION OF ELD EXEMPTION APPLICATION PURSUANT TO 49 U.S. Code § 31315(b)(3) & 49 CFR 381.317; REQUIRED TO BE PUBLISHED IN THE FEDERAL REGISTER “UPON RECEIPT” PURSUANT TO 49 U.S. CODE § 31315**

Dear Mr. Martinez,

Pursuant to 49 U.S. Code § 31315(b)(3) and 49 CFR 381.317, the Small Business in Transportation Coalition hereby **resubmits** to you --pursuant to your authority delegated by the Secretary of Transportation --its ELD Exemption Application in the matter of Docket No. FMCSA-2018-0180. We offer this letter, which we contend “reasonably address(es) the reasons for denial.” We hereby request reconsideration of said denial.

### **Background**

The SBTC first submitted its ELD Exemption Application on November 20, 2017 (Exhibit A). FMCSA rejected said application, without publication in the Federal Register, by letter of January 5, 2018 (Exhibit B) stating our original submission did not conform to the requirements of 49 CFR 381.310. Thereafter, SBTC resubmitted the application on February 1, 2018 (Exhibit C) addressing the requirements that call for carrier-specific information as best it could; SBTC noticed FMCSA that it is unreasonable to expect that a trade group filing a class exemption can address all aspects of these procedural requirements. We note SBTC even went as far as to petition the FMCSA for rulemaking on this issue thereafter on June 8, 2018 (Exhibit D) asking for the agency to promulgate rules for the submission of class exemptions; that the FMCSA on its website, pursuant to its FAST Act obligations, recorded receipt of this application as of June 14, 2018 (Exhibit E); but noted, strangely, that a response to SBTC acknowledging receipt was “N/A” in this instance despite FAST Act requirements to the contrary.

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We contend that by publishing the application in the Federal Register thereafter on June 5, 2018--rather than return the application again, the FMCSA **conceded** that we had substantially complied with 49 CFR 381.310, to the extent that such compliance is possible, given the fact that we are a trade group submitting a class exemption and the rule is clearly geared toward individual drivers/carriers.

We request these documents all be incorporated into this application by reference, including, but not limited to, the original request for the exemption.

**Federal Lawsuit**

SBTC filed a Federal Lawsuit SMALL BUSINESS IN TRANSPORTATION COALITION v. U.S. DEPARTMENT OF TRANSPORTATION et al in District of Columbia District Court (1:2019cv01311) on May 6, 2019 seeking the Court to compel agency action on the ELD Exemption Application after more than twice the 180 day period Congress requires FMCSA to decide on these matters had elapsed. Thereafter, FMCSA finally ruled on this matter on July 17, 2019, we contend, haphazardly. We note a competitor trade group’s (OOIDA) application filed one day after ours on November 21, 2017 was processed by the agency within 180 days.

**The FMCSA Decision**

*“For the reasons given below, FMCSA denies the SBTC application for exemption. The SBTC application does not meet the regulatory standards for an exemption. SBTC failed to provide “[t]he name of the individual or motor carrier that would be responsible for the use or operation of CMVs” under the exemption [49 CFR 381.310(b)(2)]. SBTC did not provide the name of a single motor carrier. SBTC failed to “[p]rovide[] an estimate of the total number of drivers and CMVs that would be operated under the terms and conditions of the exemption” [§ 381.310(c)(3)]. Instead, SBTC said “we defer to FMCSA to determine the total number of drivers and CMVs that would be operated under the exemption.” SBTC failed to “[e]xplain[] how you would ensure that you could achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained by complying with the regulation” [§ 381.310(c)(5)]. The application said “we believe the level of safety is already assured by the pre-existing Hours of Service rule as opposed to this ELD enforcement mechanism rule.*

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*Nor did SBTC meet the statutory requirement in 49 U.S.C. 31315(b)(5)(D) to describe "[t]he specific countermeasures the person would undertake to ensure an equivalent or greater level of safety than would be achieved absent the requested exemption." SBTC proposed no countermeasures at all.*

*For all of these reasons, FMCSA denies SBTC's request for exemption."*

**Comes Now, SBTC to 'Reasonably Address the Reasons for Denial'**

***FMCSA Claim One: "The SBTC application does not meet the regulatory standards for an exemption. SBTC failed to provide "[t]he name of the individual or motor carrier that would be responsible for the use or operation of CMVs" under the exemption [49 CFR 381.310(b)(2)]. SBTC did not provide the name of a single motor carrier."***

SBTC Response to FMCSA Claim One: As previously stated herein, this issue was previously invoked by the agency in its January 5, 2018 rejection letter; SBTC responded to this issue in its February 1, 2018 supplement to its November 20, 2017 application; FMCSA conceded that SBTC had addressed this matter as the application was thereafter deemed worthy of publication in the Federal Register. Had this still been a bona fide issue for FMCSA, FMCSA would have rejected the application yet again. FMCSA's claim, here, neglects to acknowledge the fact that this is an application for a **class exemption...** that FMCSA has **failed** to promulgate procedural rules for the submission of class exemptions such as this one applied for by a **trade group**, and that the name of a specific motor carrier is not applicable to class exemptions submitted by trade groups. The agency is holding apples accountable for rules set for oranges.

FMCSA is simply misguided in relying on a regulation grounded in a statute that deals with its authority to issue individual drivers' hearing and vision type applications for exemption. Class exemptions are not the same as individual exemptions. The law recognizes that not all exemption applications are the same and specifically makes this distinction by references class exemptions. FMCSA never promulgated such regulations for this category of regulations and it is trying to make the glove fit an oversized hand.

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This response as a basis to reject our application by FMCSA is arbitrary and capricious, frustrates what should be a legitimate application process, and suggests that a trade group may never submit a class exemption application under the agency’s rules because it is not an individual motor carrier. This response is also discriminatory as this requirement was not imposed upon OOIDA in the matter of their ELD Class Exemption Application that, again, was filed on November 21, 2017, the day after we submitted ours.<sup>1</sup> SBTC has properly identified and defined the class in terms of all interstate motor carriers with 50 or less employees.<sup>2</sup> In pointing this out, SBTC has already reasonably addressed this point.

***FMCSA Claim Two: SBTC failed to “[p]rovide[] an estimate of the total number of drivers and CMVs that would be operated under the terms and conditions of the exemption” [§ 381.310(c)(3)]. Instead, SBTC said “we defer to FMCSA to determine the total number of drivers and CMVs that would be operated under the exemption.”***

SBTC Response to FMCSA Claim Two: As indicated in our original application, because this is not an application by a single carrier that would know the number of employee drivers it has, but a trade group, SBTC properly deferred to the agency, which is the custodian of MCS-150 industry data. SBTC as a trade group does not possess these data and cannot possibly be expected to furnish same as a condition for approval.

Even if SBTC filed a FOIA request for said data in November of 2017, FMCSA does not process such requests in a timely manner. For instance, the undersigned is still waiting as of mid-2019 for the agency to respond to a FOIA request submitted in 2016. It is unreasonable to expect SBTC to furnish such industry-wide data known only to the agency; again, this rule is intended to apply to an individual carrier that would have access to its own employee numbers and it is wrongly being misapplied here.

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<sup>1</sup> FMCSA decided the OOIDA application within 180 days as required by law. Our application went more than a year without a decision necessitating the filing of a Federal Lawsuit in May 2019 to compel agency action. This decision was nothing more than a shoddy attempt to posture in defense of that suit and show compliance with the law to a Federal Judge. SBTC believes but not for that lawsuit, this matter would still be pending.

<sup>2</sup> “Employees” was thereafter clarified in a meeting between SBTC Lobbyist Laurence Socci and Associate Administrator Larry Minor to mean Driver employees during the pendency of this proceeding.

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Furthermore, FMCSA’s own rulemaking record shows it already possesses and is well aware of these types of data. As indicated in Exhibit A, on December 16, 2015, FMCSA referenced the steps it had taken to minimize adverse economic impacts on small entities (see: <https://www.gpo.gov/fdsys/pkg/FR-2015-12-16/pdf/2015-31336.pdf>). As we noted in our original application, a reading of the FMCSA analysis suggests that FMCSA has essentially ignored and disregarded the impact of the ELD rule on the smallest of industry players in an overbroad assessment that places one-man interstate owner-operators into the same category as other “small businesses” within the trucking industry. For instance, in referencing North American Industry Classification System (“NAICS”) codes 484110 through 484230 (Freight Trucking), the FMCSA makes no distinction whatsoever between businesses with annual revenues of \$27.5 million and mere one-man operators of commercial motor vehicles. That is, FMCSA stated:

*“Of the population of motor carriers that FMCSA regulates, 99 percent are considered small entities under SBA’s definition. Because small businesses constitute a large part of the demographic the Agency regulates, providing exemptions to small business to permit noncompliance with safety regulations is not feasible and not consistent with good public policy. The safe operation of CMVs on the Nation’s highways depends on compliance with all of FMCSA’s safety regulations. Accordingly, the Agency will not allow any motor carriers to be exempt from coverage of the rule based solely on a status as a small entity. Furthermore, exempting small businesses from coverage would be inconsistent with the explicit statutory mandate contained in MAP–21.”*

Notwithstanding passenger carriers, we note here that truckinfo.net (<https://www.truckinfo.net/trucking/stats.htm>) estimates that there are 1.2 million trucking companies in the U.S. and of that figure, 97% operate 20 or fewer trucks, while 90% operate 6 or fewer trucks. We could extrapolate from this to infer numbers of drivers. However, we are not aware of exact statistics that estimate how many companies operate with 50 or fewer drivers per se. Logic would dictate that it is probably somewhere in between the 97% referred to by truckinfo.net and the 99% put forth by FMCSA above. But that still does not address “total number of drivers and CMVs.” How many drivers work for carriers between 20 trucks and 50 trucks remain an FMCSA secret FMCSA does not seem willing to share. Just because a carrier has, say, only one truck, does not necessarily mean it does not have more than one driver.

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This response as a basis to reject our application by FMCSA is also arbitrary and capricious, frustrates what should be a legitimate application process, and suggests that a trade group may **never** submit a class exemption application because it is not an individual motor carrier and does not have unfettered access to exact wide-spread industry data in the custody and control of FMCSA. This response is also discriminatory as this rule was not imposed upon OOIDA in the matter of their ELD Class Exemption Application that was filed on November 21, 2017, the day after we submitted ours.

Nonetheless, SBTC believes that it has now further identified the percentage of carriers that would be affected by the class exemption herein. But we do not know of a way to accurately extrapolate the number of drivers that would be impacted by this class exemption from the estimated 3.5 million truck drivers in the United States, without further data in the custody and control of FMCSA and we again defer to FMCSA to assess the “total number of drivers and CMVs” as it usually does when engaging in rulemaking.” In pointing this out, SBTC has reasonably addressed this point.

***FMCSA Claim Three:* SBTC failed to “[e]xplain[] how you would ensure that you could achieve a level of safety that is equivalent to, or greater than, the level of safety that would be obtained by complying with the regulation” [§ 381.310(c)(5)]. The application said “we believe the level of safety is already assured by the pre-existing Hours of Service rule as opposed to this ELD enforcement mechanism rule.”**

SBTC Response to FMCSA Claim Three: Again, this claim places the onus on “you” as in ‘you individual carrier, you,’ as opposed to a 501(c)(6) trade group acting on behalf of its constituency.

However, we will offer information that we have already supplied the agency elsewhere that was not previously attached to our application that we believe shows that ELDs have caused reckless speeding and pose national security threats that are resulting consequences contrary to the agency’s mission and Congressional mandate to ensure public safety.

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SBTC contends FMCSA must look carefully at the unintended consequences of the ELD rule when deciding whether or not to grant the exemption. We would suggest FMCSA should grant the exemption at least temporarily if for no other reason than to press the pause button while it studies these unintended consequences and their adverse effects on safety. We contend this would indeed achieve a greater level of overall safety than the current status quo. Our previous pleas to the agency to this effect have fallen upon deaf ears. We ask the agency to lend us their ears now.

The true problem, here, is that the biggest carriers in the industry pay drivers by the mile and the agency governs driving by the clock. We offer the attached articles, comment, and poll results (Exhibit F), which assert that FMCSA should address the underlying premise that has caused some drivers to cheat on paper logs in the past and/or recklessly speed. And we suggest that even if speed governors are enacted as a matter of law or regulation, this will not address the problem of speeding in school and construction zones. Regulation is not the real answer to the safety problems of driver fatigue and speeding. A paradigm shift in the method of driver compensation is.

The relentless tightening of the noose on drivers with ELDs and speed limiters to the degree that they are overly stressed about the ability to make money and feed their families is simply not in the public interest. It causes drivers to act **erratically** due to **emotional distress**, which translates into such drivers being a downright nervous wreck menace on the road, and we believe it adversely affects industry's already-abysmal retention rates. This is neither in accordance with the National Transportation Policy nor in the best economic interest of consumers dependant on a healthy supply chain nor public safety.

We also point to the **national security** threat in Exhibit F posed by telematic devices.

**FMCSA Claim Four: Nor did SBTC meet the statutory requirement in 49 U.S.C. 31315(b)(5)(D) to describe "[t]he specific countermeasures the person would undertake to ensure an equivalent or greater level of safety than would be achieved absent the requested exemption." SBTC proposed no countermeasures at all.**

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SBTC Response to FMCSA Claim Four: This is simply false and leaves us wondering if the decision-maker even read our application or if it was merely rubber-stamped. SBTC suggested a return to paper logs as a countermeasure. We echo that countermeasure here.

Paper logs were deemed sufficient to ensure adequate levels of safety for generations, more than 80 years. And the FMCSA has already issued numerous exemptions that require carriers to revert to tracking their hours of service using paper logs in lieu of ELDs; specifically, in the area of transportation of livestock. To suggest that it is somehow "safe" for transporters of pigs to revert back to paper logs, but it is not safe for transporters of general commodities to use paper logs as a countermeasure simply defies logic. The commodity does not dictate what is safe. What's good for the goose...

The fact that FMCSA missed this countermeasure in our application proves our point that this application was issued in haste despite the enormous amount of time that passed since it was filed and that it was not given due consideration; obviously, this application and the comments in support (over 90% of nearly 2,000 comments filed) were simply skimmed over and this application was arbitrarily denied on a whim contrary to the spirit of the Administrative Procedure Act and Administrative Law.

It is clear that after failing to issue a determination all this time, nearly a year after the 180 day processing deadline expired, the only reason this denial was hurriedly issued was to report that FMCSA finally complied with the law to a Federal Judge.

**FMCSA Decision Failed to Give Due Consideration and Failed to Address Matters Required to be Addressed by Law**

FMCSA's decision fails to address its own statutory obligations under 49 USC 13541, the actual applicable statute here, to show we are wrong when we assert that the ELD rule is not necessary to carry out the transportation policy of section 13101; is not needed to protect shippers from the abuse of market power or that the transaction or service is of limited scope; and that the exemption is in the public interest. On that last item, we have repeatedly asserted that ELDs have caused excessive speeding, which results in far more deaths ELDs would ever save by combating fatigue.



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Absent such a showing, the law actually requires FMCSA to issue the exemption given the word "shall" in the enabling statute. As you have made no showing to the contrary, we contend you **must** issue the exemption as a matter of law.

**Resubmission Process**

FMCSA has promulgated a rule which affords an applicant the right to resubmit an exemption application if denied:

*§ 381.317 May I resubmit my application for exemption if it is denied?*

*If the Administrator denies your application for exemption and you can reasonably address the reasons for denial, you may resubmit your application following the procedures in § 381.310.*

This rule essentially restarts the application process as per the reference to § 381.310, which then invokes, § 381.315(a).

*§ 381.315 What will the FMCSA do after the agency receives my application for an exemption?*

*(a) The Federal Motor Carrier Safety Administration will review your application and prepare, for the Administrator's signature, a Federal Register notice requesting public comment on your application for an exemption. The notice will give the public an opportunity to review your request and your safety assessment or analysis (required by § 381.310) and any other relevant information known to the agency.*

This rule therefore requires FMCSA to now republish this application in the Federal Register **and again open this matter up for public notice and comment.**

Furthermore, Federal Law codified at 49 U.S. Code § 31315(b)(6) also requires FMCSA to now publish the application in the Federal Register "upon receipt:"

*(6)Notice and comment.—*

*(A)Upon receipt of a request.—*

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*Upon receipt of an exemption request, the Secretary **shall** publish in the Federal Register (or, in the case of a request for an exemption from the physical qualification standards for commercial motor vehicle drivers, post on a web site established by the Secretary to implement the requirements of section 31149) a notice explaining the request that has been filed and shall give the public an opportunity to inspect the safety analysis and any other relevant information known to the Secretary and to comment on the request. This subparagraph does not require the release of information protected by law from public disclosure (emphasis added).*

And, the statute requires FMCSA to rule on the application within 180 days:

*49 U.S. Code § 31315(b)(7) Applications to be dealt with promptly.—*

*The Secretary shall grant or deny an exemption request after a thorough review of its safety implications, but in no case later than 180 days after the filing date of such request.*

SBTC therefore requests that FMCSA process this resubmitted application in accordance with the law.

### **Court Supervision**

As FMCSA has a history and pattern of failing to publish the SBTC's applications for exemptions in the Federal Register “upon receipt” as is required by Federal Law on two prior occasions, and the SBTC is currently suing FMCSA in Federal Court over FMCSA's failure to comply with the aforementioned statute, SBTC intends to request court supervision over this process to ensure FMCSA complies with procedural requirements of the aforementioned statute.

In closing, FMCSA clearly failed to afford us the diligent consideration that was due. FMCSA has maliciously and unethically relied on the same rule it used to kick back our November 20, 2017 submission; its reliance on this rule is specious and misguided at best. FMCSA either knows --or should know --a trade group cannot possibly comply with a rule that pertains to individual drivers and carriers.

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And FMCSA alone bears the responsibility for its failure to promulgate rules for class exemptions as previously directed by Congress. It cannot now transfer and project responsibility for its failure to do so onto the SBTC with impunity.

Lastly, we offer the attached January 2018 letter from FMCSA to SBA (Exhibit G), which was written in response to our complaint to SBA, which shows the agency was in fact pre-disposed to denying our application before it ever even published it in the Federal Register and opened it up for comment. That is, we were summarily dismissed before the proceeding ever began, making this whole proceeding, including the collection of nearly 2,000 comments from industry, one big misleading sham. This letter shows the agency fraudulently led the industry to believe it would listen to their comments if they took the time to write in, when in fact this matter was decided way before the first person filed a comment. In other words, this whole process was rigged from the onset.

In summary, the SBTC finds the FMCSA's handling of its ELD exemption application... from start to finish... totally and absolutely corrupt in each and every respect. Clearly, a fair and impartial "do-over" is warranted in this instance, one which results in the granting of the application to make the industry whole and properly reconciles the principles of public safety, national security, productivity and justice.

Sincerely,

/s/JAMES LAMB, President

Small Business in Transportation Coalition ("SBTC")

[www.Truckers.com](http://www.Truckers.com)