

THIS IS A COPY OF THE LETTER, FROM DAVID G. DWINELL TO TRANSPORT TOPICS, A WEEKLY MAGAZINE OF THE AMERICAN TRUCKING ASSOCIATION, ALEXANDRIA, VIRGINIA. THIS IS REPRINTED WITH THE PERMISSION OF DAVID G. DWINELL, MASTER BROKER, AUTHOR OF THE LETTER WHICH APPEARED IN THE OPINION SECTION OF THE MAY 29, 2006 ISSUE OF TRANSPORT TOPICS.

I read with interest the front-page article in TRANSPORT TOPICS April 17 issue headlined “TIA to Offer Model Broker Contract.”

I have taught brokering to motor carriers and others since 1987 and can say that market demands are now such that one cannot be a successful over-the-road trucker without brokering. Owner-operators must get their own authority to survive and be successful. A large number are applying for that authority, thereby ceasing to be owner-operators.

I have been a motor carrier, a motor carrier/broker and a pure broker. Presently, I am a broker’s agent. From that background, I would like to provide a little history regarding the motor carrier-broker contract as I have lived it.

The Negotiated Rates Act of 1993 required a “written contract between a motor carrier and shipper.” The act was later modified by the Negotiated Rates Act of 1995, wherein the word “must” in the 1993 act was changed to “may,” making the requirement for a written contract optional.

I liked the idea presented in the article of having a model contract. I provide my students with a one-paragraph motor carrier/broker contract that meets all the requirements of the 1993 law and creates no additional liability for the broker.

The Transportation Intermediaries Association has advertised and recommended language and wording for membership broker/motor carrier contracts on their Web site. However, the language is clearly illegal in that TIA recommends that brokers declare an interest in the motor carrier’s cargo.

TIA is clearly mixing forwarding regulations and extending cargo interest to property broker licensees. The language would require motor carriers to give up any interest in their cargo for collection purposes. Motor carriers by law are capable of invoicing the consignor (shipper) directly in the event of non-payment by the broker to the motor carrier. The law is very clear about motor carriers and their interests in their own cargo — and their rights to bill the consignor and/or consignee in the event of broker nonpayment.

The Negotiated Rates Act makes the broker a shipper, but does not empower the broker to assume a shipper’s rights and role in creating or executing a bill of lading. A broker whose name is listed on the bill of lading as a “motor carrier” willfully misrepresents himself in law and creates immediate liability for cargo loss and/or public liability.

Remember, brokers are not required to have insurance — a point on which the government would disagree, as it wrongly classifies a surety bond as insurance when it is no such thing.

The industry is plagued by 16- to 32-page broker/motor carrier contracts that create enormous liabilities for the broker, who is in it for a 15% to 25% commission.

During class, I receive and review hundreds of broker/motor carrier contracts from my students. It is quite apparent to me that most people brokering loads or receiving them don’t understand the purpose of a contract. Allow me to illustrate a few contract basics:

First, a broker may not declare an interest in a cargo. Brokering is *not* a mode of transportation as defined by the Federal Motor Carrier Safety Administration’s regulations and enabling legislation. This makes the broker a travel agent of freight — exempt from safety issues and insurance liability. (Some insurance companies are successfully selling contingent cargo insurance for those brokers who create all kinds of “interest” in a cargo.)

Note that brokering can occur between two motor carriers, but the contract should read “motor carrier to motor carrier.” Most of these brokered loads are offered by large motor carriers to other motor carriers. This brokering creates equal liability both for public liability and cargo through subrogation. One motor carrier does not become “not liable” in doing so; both parties are equally liable, as a lessor and leasee would be.

A large number of broker/motor carrier contracts I have reviewed are in fact motor carrier to motor carrier contracts, and even though they paint the hauling motor carrier as an “independent contractor,” the originating motor carrier will never escape liability, because these contracts retain driver control — i.e., driver must call in for dispatch and call in every morning or pay a fine — and declare an interest in the cargo — i.e., if cargo is damaged, consign it to a public warehouse in the originating motor carrier’s name — among several other clauses that bind both motor carriers to equal liability.

Second, a broker may not quote a freight rate from a tariff or in any way represent himself as a mode of transportation any more than a real-estate agent sets a “rate” for the sale of a home. Brokers may only quote motor carrier (a mode) freight rates, plus their commissions, to a shipper, except forwarding, which requires a separate freight forwarder license).

There are hundreds of ways the originating broker retains and even unknowingly volunteers for liability, even when not required to accept liability. My suggestion is that the shorter contract, the better and the less driver control, the better.

In fact, I would advise all motor carriers accepting brokered loads to cross out the broker’s name in the carrier’s spot and install your motor carrier’s name.

A broker is not entitled to be listed as “additionally insured” on any insurance accord form, as that is an illegal declaration of interest in a cargo that violates the spirit of the regulations. A broker may be listed as a “certificate holder” only, and receive “notice” of cancellation of listed insurance policies. This type of incident is common among the many encountered by brokers wading into the minefield of liability.

Broker Office Training, Youngtown, Ariz., is a national school with classes leading to the master broker certificate.