

## Conduct by some who hold a Property Broker License, creates motor carrier liability

**Premise:** The only function of the Property Broker's License is to arrange transportation without motor carrier liability, because one motor carrier can hire another motor carrier without having a Property Broker's License. One Motor Carrier hiring another Motor Carrier is "brokering" legally without a License.

**Contention:** Most transportation "brokering" in the US is created by those who have a Property Broker's License, as well as a Motor Carrier Authority, conducting business as a motor carrier and TRUCK BROKER, while using the License to escape the "strict liability" of transportation as defined in "Common Law".

## Brokerage Operations Conduct - Compare and Contrast

### Truck Brokerage

**Getting Motor Carrier Authority & License- OP -1;** FMCSA.DOT.GOV, completes application and receives a decision, government awaits applicant's compliance to decision distinct requirements for both Authority & License; each App \$300: Becomes "Truck Broker" not a property broker.

**Insurance Requirements- Authority App requirement.** \$750K in BIPD/Auto Liability which requires the submission to Insurance Company of a VIN number and named Autos for Policy enumeration. Cargo Insurance Not required except of "Common Carrier" OP-1 but is usually provided for both Contract and Common carrier, and by the same insurer.

**Bonding Requirements – License App requirement** - requires a "Surety Bond" \$10K before License is granted.

**Making the Sale to a Shipper - Getting the Freight.** The Motor Carrier/Broker- commonly referred to as a "TRUCK BROKER" solicits shipper and offers to take possession of cargo, insure the same, provide for an agreed delivery time, possible providing General Liability policy and Indemnification agreement if Broker's driver is injured on shippers premise, and a lot of other trappings usually required of Motor carrier relationship, such a written Contracts for services provisions, including assessing and collecting a Fuel Surcharge of a motor carrier (brokers cannot assess fuel surcharge as they purchase no fuel themselves – see Ex Parte 666), where shipper is listed as "an Additionally Insured" on any Insurance Acord®. **NOTE:** Most Truck Brokers are not successful in separating their 100% Liable Authority" from that of a Non Liable Property Broker as defined in 49 CFR 371.2. Hence the prohibition in Regulation of using a Broker's License if that person is "Authorized" to make the delivery as a motor carrier, or their employees or bona fides.

**Here is my Rate; Take it or Leave it!** – The market position of a motor carrier – this is an "arms length" position, where the shipper is in the "inferior" bargaining position of "asking carrier" for a rate for trucking services. The Motor carrier can assess and collect Fuel Surcharges as they or their subhaulers are actually purchasing the fuel. The STB has found that it is "unfair pricing practice" for a mode of transportation to profit from a fuel surcharge.

**Freight Rate Development-** The Motor Carrier rates are based on costs of providing services, such as Fuel, Tires, Drivers, and equipment type. Motor Carriers are free from rate regulation and may quote what the market will bear. See Elkins Act of 1903: IN my opinion, Elkins is still alive in Intent. "Whatever occurs in interstate transportation must be deemed "Fair" to both parties."

**Making the Sale to a Carrier – Getting the Trucker –** Carriers solicit other authorized carriers. One carrier hires another carrier, they are said to be legally "Strictly Liable" for the consequences of that act (visit Southcote v Bennett;1601, and

### Licensed Property Brokerage

**Getting a License OP-1 – FMCSA.DOT.GOV** completes Property Broker's application; It is a "Fitness Only" Application, Applicant cannot be a felon, Decision awaits provision by applicant of \$300 plus BOC-3 & Bond.

**Bonding Requirements License App requirement** - requires a "Surety Bond" \$10K – Not "insurance" as described by Government website and FMCSA employees.

**No Insurance required for "License"** - Authority App requirement \$750K in BIPD/Auto Liability is not required. The Government mistakenly names a "Surety Bond" – "insurance" which it is not.

**Making the Sale to a Shipper - Getting the Freight.** The property broker must approach the shipper as a "travel agent" of freight. (Definition of Broker – a person who provides a service to another, that service they could do for themselves but choose NOT to!). This Broker must solicit and hold themselves out as Travel agents of freight, not motor carrier {see DOT Chief Counsel Kaleta; 92-1-RSPA; published 10/19/1992}: [see her conclusion on definition of "offeror or transporter". This shows the "dichotomy who is liable as a motor carrier and who is not liable as a broker for HAZ MAT];

**Hence,** a Broker may not pose as a "mode" of transportation as defined in Statute; May not declare an interest in a cargo as a "Holder" as defined in Statute; May not undertake the activities commonly reserved to an "Offeror or Transporter" as defined; cannot offer to "take possession" of cargo" or offer to deliver a cargo ( See Freeway Transportation Verdict opinion) as defined in Regulations, including offering insurance, as a motor carrier, general liability as a mode of transportation, or workman's comp or in any way provide other labor in pursuit of a transportation. In other words a Broker is defined a "shipper" in his relation to the actual transporter of the property as defined in the Negotiated Rates Acts of 1993 (see Summary of this Act, in Transportation Brokerage Operations Manual ©;Part 3.4 Copyrighted 2009)

**What do you want to pay?** – The position of the "Broker" providing market choices for shipper's purchase of transportation, just as a travel agent would quote ticket prices of the 29 airlines that serve metro Phoenix, AZ, for example. Broker who are not in possession of cargo, do not actually purchase fuel for the transportation purchased, and thus it is unfair pricing practice for them to deceive their purchasing client. Broker may assess a motor carriers quoted Fuel Surcharge, Collect on behalf of and identify that as a portion of a charge as a "Fuel Surcharge" and pass 100% of that receipt to the party actually purchasing fuel, without subjecting that "Surcharge" to a "Commission" deduction. The STB has deemed this practice as fair for a broker or any "intermediary" including Forwarders.

Coggs v Bernard;1703 for initiation of the word “Common Carrier” as opposed to a “Common Laborer” and the Common Law principle of “Strict Liability”. All Statutes and Reg 49 flow from these initial Liability decisions. 49 CFR 372.1 limits the use of the Broker’s License to those other than an “Authorized” motor carrier, their employees of bona fides. So when one Carrier hires another, the Property Broker’s License to limit liability cannot apply to the transportation act itself, preserving the public in that strict liability.

**Hence:** One carrier is the “principal, the subhauler is the “agent” and is a Common Law “joint venture” in the sharing of the liability, as they share revenue. The first carrier hires the second carrier controls their activity, and the “first” requires the “second” to subordinate (subrogate as an “additionally insured”) their public liability insurance to the insurance policy of the “first” carrier, for that purpose. The first carrier “takes possession” of the cargo and is thus a “holder” of an interest in that cargo. There are 28 additional points of “conduct” where those who “act” as a carrier to secure cargo for transport w/o “carrier Authority” create carrier liability where there was none and are said to be “strictly liable”. There are no rules regarding the relationship, as the principle can create any operational rules, but both carriers must comply and be registered for safety purposes with FMCSA and DOT. Contracts between the two generally say that one will hold harmless the other, but both parties are 100% Liable for any loss regardless of any conspiracy they may concoct together. There are other Regs and rules for a carrier to “hire” owner/operators (who are not carriers as defined) and are defined as “lessors”. Only those with “Authority” can hire other power units.

**Operational Conduct;** Common carrier practices are subscribed and or made a requirement to comply and includes among other things, that the subhauler subscribe to first carriers dispatch and safety rules, such as calling in at a specified time or paying a fine, and the appointments for pickup and delivery created by the first carrier for the second to attend. Any activities that involve first carrier controlling the conduct of the driver of the second carrier, such as second carrier identifying themselves to the shipper consignor, as being a driver for the first carrier. Carrier one may require carrier two to place placards and carry Insurance identification of the first carrier in the second carriers cab. The Truck Broker “first carrier” requires the second carrier to sign a lengthy written contract outlines a series of duties of an agent to his principal. There is no commission in this transaction, first motor carrier invoices shipper and remits an agreed portion of the realized proceeds to the subhauler (second carrier) traditionally a 70-30 split is embodied in the prior agreement, as they split the proceeds from a joint venture of the process.

**Credit & Qualification.** In common practice, the subhauler (second carrier) does not check the credit of the first motor carrier. Carrier one frequently advances fund to the second carrier after loading occurs. In common practice, the first carrier may give second carrier a series of consecutive shipments “to keep them moving”. First motor carriers incorporate second carrier’s equipment into their daily dispatch, and for all intents and purposes the second carrier is employed in the activities and corporate goals of the first. First carrier will require second carrier to submit their Authority, Insurance Acord® listing first carrier as an “Additionally Insured “for BIPD/Auto Liability and Cargo, and then conduct a safety due diligence on the Govt website, and verify how much second carrier is in compliance with safety regulation before the act of transportation occurs.

**Taking the Order;** Shipper calls and places order for service, after motor carrier presents credentials as carrier and provide appropriate proof of insurance; BIPD/Auto and Cargo, and General liability and Workman’s comp coverage EXTENDED to shipper’s premises. Carrier is indicating they take possession of cargo, insures the risks, and assures delivery.

**Fuel Surcharge:** Motor carrier usually quotes a freight rate

**Freight Rate Development** – Broker may not publish a “tariff” or quote a freight rate- any more so than say a Real Estate Agent quotes the market condition as a “rate” to you for your home regardless of what you want for your house. Broker is always in the “inferior” market position of “asking” a motor carrier what their rate is to go from A to B, adding their commission for their service and quoting the shipper that rate. Thus freight rate may be a function of supply and demand, i.e. capacity and cargoes; as opposed to what the broker wants to make the transportation movement.

**Making the Sale to a Carrier – Getting the Trucker** – A Property Broker is a “travel agent” of freight and solicits motor carriers, in that they cannot “hire” anyone; they merely “arrange” transportation between a willing buyer (Shipper) and seller (carrier). Conduct of this brokerage {see DOT Chief Counsel Kaleta; 92-1-RSPA; published 10/19/1992}: is limited to activity that which is not considered by common practice to include the activities of an “offeror or transporter” as defined. The Broker is not a “mode” of transportation as defined in Statute and Regulations, but merely “arranges” transportation on authorized transportation modes including forwarders. Broker may not declare an interest in a cargo, as they will come liable as a motor carrier in doing so. A broker is not required to have insurance. Having insurance for either creates carrier liability as the broker’s intent is manifest, in obtaining the insurance, to accept liability for either public or cargo liability; having insurance actually invites a “lawsuit”. Conduct of the broker must be limited to arranging transportation only. Brokers may obtain an E&O insurance policy, which would be appropriate to the conduct anticipated.

**Hence:** a Property Broker may not “hire” anyone including owner operators, drivers, or any power units, rent equipment or in any way take possession or declare any interest in any cargo. The broker “asks” the mode of transportation for a “rate” and adds their commission to a “quote to a shipper of a Freight Rate”. The Broker is a “fiduciary of that mode, within State police powers” in that they collect the Freight Rate from the shipper, and pay the “mode”, less their commission. Broker’s may not pledge their receivables for a loan because those receivables are already encumbered by the BMC 85 Surety Bond .The broker is an “agent” of neither the shipper or the carrier, but is an agent for the “Transaction” only. (In Law, a Property Broker may be an agent of either, but not both); again, their conduct limits their activity to “arranging” transportation so the limitation is to the “arrangement” itself. To be an “agent” of either creates liability to act on behalf of that principal’s interests.

**Operational Conduct;** Property Broker’s limit their activities to the arrangement only. They do not dispatch or in any way control driver’s activities, they dispatch carrier’s dispatchers only. The Property Broker requires a written “Continuing Contract” (not required by Law {cite; Public Law 104-88} ) that memorializes their lack of liability, usually 1 page paper outlining the duty of the broker to collect and remit to the carrier all proceeds realized from the act of transportation, less an agreed reasonable commission.

**Credit & Qualification;** Property Broker has to credit qualify with the actual carrier (mode), and accomplishing that, the Broker must then “qualify” the “mode’s” transportation credentials, by examining the equipment inventory, the Authority Certificate and make sure it is an Authority of a Common or Contract carrier and not the Authority as a broker (double brokering), as well as the Insurance Acord® for BIPD/Auto Liability and Cargo policies, list Property Broker as a “Certificate holder”, in force at the time of the loading, and the W-9. Broker must then proceed to “verify” that carrier is Authorized by DOT for the days of the transportation act, to be on America’s highways. Brokers are not qualified to conduct

to a shipper "PLUS" fuel surcharge. The surcharge is assessed for the actual move based on that days prevailing price of diesel fuel (note DOE posts national price daily on website). They are supposed to pass on the Fuel Surcharge to any subhauler who is actually paying for the fuel (does the truck broker profit from a fuel surcharge?)

**Booking the Order:** Carrier may receive physical or verbal order from shipper. Accepts or rejects freight tender based on equipment availability at requested time for loading. A commitment to a contract is given at this moment in time.

**Commitments from Shipper,** Shipper has placed a purchase order with carrier as an arm's length transaction, no middleman, no additional negotiation required: deal is complete and sealed except for the provision of the service itself.

**Contracting Process** – Most of this type of brokering is verbal contract. More and more written Contracts are being required but they are lengthy typical 16 to 24 pages, and deal with every aspect of the control of the load and the duty of the subhauler (agent) to the initiating motor carrier (principal). Several paragraphs deal with agents responsibilities to report to shipper as (principal's truck) and the handling of cargo and claims should they arise. No consignment will occur until the subhauler has provided the initiating motor carrier with Insurance Acord® specifying the subhauler has subordinated their insurance (subrogation) to the insurance of the initiating motor carrier. Owner Operation Contracts call "permanent lease" will require owner/operator to place funds in control of the initiating motor carrier possession; (unregulated franchise).

**The Contract-** A written Contract is not required by LAW (Public Law 104-88). Some are a typical "Trip Lease" or a lease arrangement where the Regulations regarding Leasee/Lessor will not apply usually when subhauler has their own "Authority". If subhauler has no "Authority" then Leasee (initiating motor carrier) and the Lessor (owner/operator who owns power equipment) then all regulations governing this Leasee/Lessor relationship apply. Many initiating motor carrier have adopted the "Brokering Continuing Contract" in false hope of trying to further distance themselves from their own liability. Strict Liability governs liability extension in all of the above cases. Both parties 100% liable for loss, regardless of verbiage assigning liability in the Contract itself. Initiating motor carrier has a non delegable duty to public safety. This Contract can only be described as a principle/agent contract where the agent is completely subordinated to the interests and cargo interest of the initiating motor carrier, and in certain States a Joint Venture partnership. Revenue from this venture is shared and is not a "commission" arrangement. Subhauler may have no rights to know what the shipper is invoiced or what shipper actually paid to initiating motor carrier.

**The Bill of Lading – The Consignment-** The Bill of Lading is the instrument of "title" in interstate commerce. This is a generally "non negotiable" contract between the consignor/shipper and the motor carrier, outlining specific rights and duties of these signatories and possibly the rights of a third party and are all considered "holders" within the definition, of an interest in the cargo consigned. The initiating Motor carrier's name will appear at the top, and possibly also the name of the subhauler. Responsibilities and duties of each party and one to the other are clear and well established in Law. The condition of the goods and the means of payment and redemption at the time of the consignment are outlined in the body of the Bill of lading and agreed to by the party giving up possession of the cargo (consignor) to the possession of the motor carrier, and serves the function of a "receipt" for the process. Is the Property of the Motor carrier of record and does not need to be surrendered to anyone without payment in full for the transportation undertaken. Truck Broker's interest in the cargo and its handling a perfectly preserved in a Bill of Lading.

**Collection of the A/R by Invoice** – Certain regulations

a "safety" review, or even read a log book and do not want to be qualified to measure the degree of safety compliance as they are untrained, and after all not in possession of cargo. In common practice, this act of transportation, and the use of this carrier by the broker is on a spot market basis, and brokers generally cannot reload the same carrier because they are not in control of other loads.

**Taking the Order;** Brokers receives market quote request, proffers estimate of costs of putting a truck under shippers load. (Broker goes to market place and gets carriers to quote a price, Broker calls shipper offer carrier freight rate and a commission as a freight rate to the shipper. Broker receives order for service. Broker goes to market place (TransCore or Internet Truck Stop) and places load for carriers to bid on. Broker books interested carrier and contracts for the service on behalf of the shipper. Broker cannot assure delivery or undertake activities of "transporter" in the pursuit of his booking.

**No Fuel Surcharge:** Broker can only add commission to carrier's freight which will include a fuel surcharge, add their commission and quote the combination to the shipper as "his" rate. Brokers may not honestly quote a fuel surcharge to a shipper because they do not "pay" for the Fuel (visit Ex Parte 666 of STB)

**Booking the Order:** Broker who does not equipment under contract can only commits to look for bookable equipment, and must "reserve the right to return the load to the shipper if not successful booking achieved.

**Commitments from Carrier & Shipper:** Broker has received a commitment from the shipper and must match their order with a congruent commitment from an Authorized Motor Carrier. Broker must find and negotiate a motor carrier onto shippers order.

**Contracting Process** – Most brokers want a written Contract to memorialize the fact that the Broker's License may extend some form of immunity from motor carrier liability. They call the first contract a "Continuing Contract after the initiation of the process in the Negotiated Rates Acts of 1993, and an "addendum contract called the Rate Confirmation" will follow after each party has qualified to each other. Broker sends copy of "License and Bond" along with credit credentials to motor carrier of record. If approved by carrier, carrier returns their Authority, Insurance Acord®, and W-9. Broker has shippers obligation to due diligence of verifying motor carrier of records ability to be trucking America's highways before loading occurs

**The Contract** – A "Continuing Contract" outlined in the Negotiated Rates Acts of 1993, calling for among other things "for a carrier to meet the distinct needs of the shipper" is what is typically used in the broker-motor carrier relationship, although it is NOT required by Law (ibid;104-88). Conduct of this Broker must be that of a travel agent, and not including or undertaking any activities of an "offeror or transporter" (ibid: RSPA 92-1). This contract is a simple statement of fact that is giving "notice" to motor carrier that funds will be collected on behalf of motor carrier's freight bill, less any agreed commission. Both parties (shipper or carrier) to this broker's transaction have a right to know what was billed and what was taken as a commission. (49 CFR 370 et seq). This contract generally does not exceed 3 pages (see [Transportation Brokerage Operations Manual](#) © 1987-2010, where a 1 paragraph Continuing Contract is outlined. Thus it may not include language about cargo, claims resolution, or any conduct reserved for the actual transporter (remember Property Broker may NOT declare an interest in any Cargo). Carmack and

have applied in the past, but because of deregulation, some consider they no longer apply. Principally, that motor carrier must properly identify themselves, their appropriate (lead MC number), in addition to normal customary business practices. There have been provisions for the listing of other Authorized "specialized division" within the parent company or enumeration of "Interline MC numbers. There are no and never have been provisions requiring the enumeration of "subhauler". 100% of the receipt is the property of the Authorized motor carrier, and may be encumbered in any way by that motor carrier, and possibly by a subhauler if allowed in the contract.

**Forwarder as a "broker"**. It is worthwhile to note that a Forwarders' "brokering" activity is well defined in Law, requiring a separate License (FF#), separate Insurance and the Forwarder is generally considered "liable for loss of the cargo having the same liability as the receiving AND delivering motor carrier. Their Public BIPD/Auto Liability for is less clear and ill defined. There are many case studies to examine about this issue. Generally, The Forwarder may not act as a Property Broker because of these added liabilities. Property broker's conducting their operations and representation to others, can clearly escape liability for loss if there "conduct" is correct; i.e. that of a travel agent needing no insurance of any kind

or Elkins Amendments may not apply although I would dispute the assertion. Shipper's rights are preserved regardless of interpretations by some. The Intent of Congress is clear "whatever happens in interstate commerce must be reasonable and fair to both sides." Jurisprudence over the years has generally favored the rights of those who take the risk vs. those who pay for transportation service. The Property Broker, then can only be considered a "shipper" by definition, not a "motor carrier"

**The Bill of Lading – The Consignment-** all of the rights of the Bill of Lading outlined opposite DO NOT apply to the Property Broker who may not declare an interest in a cargo without becoming liable for its loss (incorrect conduct). A Property Broker's name can appear in the Body of the document itself as "a Third Party for Billing purposes" without declaring an Interest or becoming a "holder" as defined, in the cargo. A Property Broker is not a "mode" of transportation, can not appear as the carrier, consignor/shipper, or the consignee, without being considered an - or undertaking the activities of, an "offeror or transporter" as defined (ibid: RS PA 92-1). A Property Broker who is named as the "carrier" by a consignor/shipper has been memorialized as having obtained the cargo tender by posing as, or otherwise conducting themselves as, an Authorized motor carrier. Property Broker's who undertake offeror or transporter activities risk being considered, and are liable as a "motor carrier" in the event of a loss. They are certainly liable for Haz Mat registration and the prescribed conduct there in. Licensed Property Brokers are "shippers" within the meaning of the Law, and may not delegate their duty to protect the public and preserve "safety" as they are considered an "officer of the court"

**Collection of A/R –** Property broker's invoice should list the motor carrier of record, subhauler, or interline, as part of that invoice. Remember both parties to a Property Broker's transaction are entitled to know details of the transaction. The Property Broker is the "Fiduciary" of the motor carrier they are collecting transportation receipts for. They cannot encumber or in any way consider the motor carrier's portion of that receipt to be their property, only their commission is their property

**Disbursement of A/P record –** Records are required by Law, showing the separation of the A/R received from shipper and A/P amounts due to motor carrier, from any other funds the Property Broker collects, the dates paid, and the POD (can be a executed BOL) or other form of delivery receipt, such as a brown plastic box..