

Double Brokered or Double Crossed?

Carrier411 Article

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During the TIA seminar on April 5, 2006 in Tucson ("What Every Third Party Needs to Know About the Law"), one nagging problem kept surfacing through questions from the audience:

"What protection does a broker have against being held liable for negligent hiring of a trucker when the carrier selected by the broker double brokered or gave the load to a different trucker, without the broker's knowledge or consent, and the hired trucker caused an accident?"

If the broker diligently checked the motor carrier's FMCSA safety record, safety rating, registration and insurance filings before hiring it, the broker probably would be protected. A plaintiff's attorney, however, would probably allege that the broker failed to be assured that the carrier would not substitute a different carrier with an unknown safety record.

Double brokering of freight has become an all-too-frequent practice, probably due to the truck and driver shortages. It seriously complicates the legal issues when an accident occurs en route. To understand these issues, one must start with the basic contract of carriage.

When a broker calls a carrier and the carrier agrees to haul the load, a contract of carriage is formed between the carrier and the broker, whether it is in writing or not. The original carrier agrees to assume liability for the safe and timely delivery of the load with reasonable dispatch. **The fact that the carrier hires a different trucker to deliver the load does not change the contract of carriage.** The original carrier is still liable to the shipper and to the broker for its own acts and omissions. It is also liable for the acts and omissions of its agent, the second carrier hired by the original carrier. Nor does it change the broker's common law responsibility to use due diligence in checking into the original carrier's safety record and other factors required by law.

a relationship between persons who successively have a legal interest in the same right or property b : an interest in a transaction, contract, or legal action to which one is not a party arising out of a relationship to one of the parties.

The carrier may lawfully trip-lease equipment, or use longer term leased equipment, owner-operators or company equipment. When a second carrier is hired, it is in privity of contract with the first carrier, not the broker or shipper.

Once the second carrier accepts the load, it is also responsible for that load until delivered. In truck accident cases resulting in personal injuries and death, the courts may look to the name on the tractor cab to identify the carrier that had control over the performance of that truck and hold that carrier liable for any damages incurred as a result of the operation of that truck. It is commonly referred to as the "logo liability" rule. The paperwork may also have a bearing on who controlled the performance of the services at the time of an accident. **It is important, therefore, that brokers not allow their name to be shown as the "carrier" on bills of lading, rate quote sheets, dispatch memos and other documents.**

The FMCSA's regulations clearly state that: "Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport." 49 C.F.R. § 371.2 (a).

Therefore, brokers should obtain documentation from the carrier indicating that it agrees to transport a load under its registered motor carrier authority, and that it agrees to be legally bound to deliver that load safely.

The party that hired the second carrier should be the party held responsible for the careful selection of that carrier. One exception may be when there is evidence that the broker knew and condoned the carrier's habitual substitution of another trucker without the broker having performed an investigation of the second trucker's safety record.

If an accident occurs and the evidence reveals that the second carrier had a poor safety record, a plaintiff's lawyer will argue that the broker was negligent in hiring that carrier, because the broker knew that unsafe truckers could be hired under this arrangement.

Suppose the broker used a contract that prohibited substitution of carriers and double brokering without the broker's written

permission. Will that provide a complete defense to the broker? Probably not if the broker did nothing to ensure that the carrier lived up to that stipulation. The problem is that most brokers do not follow up on the terms of their contracts. Worse yet, a greater number have no contract at all!

Another problem is presented when the broker deals with a carrier that also holds a broker's license under the same name. Typically, the carrier does not disclose whether it is accepting a load as a carrier or a broker.

The FMCSA's regulations, however, require that a broker that engages in any other business (motor carrier business, for instance) must segregate its brokerage business from its other activities. 49 C.F.R. § 371.13.

Another section states that "Each party to a brokered transaction has the right to review the record of the transaction required to be kept by these rules." 49 C.F.R. § 371.3 (c).

Therefore, brokers should insist that carriers accept loads only under their motor carrier authority, and that their records be made available to prove it. Once the carrier agrees to deal with the broker as the carrier, it may not avoid being held liable for its selection of the truckers and drivers used to conduct the over-the-road operations of the broker's loads.

The same reasoning would also apply to the carrier's collection of the freight charges. If the carrier extended credit to the broker rather than to the shipper, it would have no legal right to seek payment from the shipper if the shipper paid the broker.

The carrier's written agreement to designate the broker as its agent for the collection of the freight charges must also be included in the broker-carrier contract. Another essential clause relates to indemnification of the broker. Brokers that operate without a carefully drawn contract today, in light of these concerns, particularly the Maryland District court's decision in [Schramm v. Foster](#), are inviting financial disaster.