CONTRIBUTED CONTENT & PRESENTATIONS

Double Brokering and Hostage Load Action Plan: What to Do When You're Asked to Pay More or Pay Twice

OCTOBER 29, 2024

Authors: Jonathan R. Todd

You just received a demand that you must pay an unknown party to receive your cargo-NOW WHAT? Shippers and brokers too frequently receive payment demands for transportation services that far exceed contracted amounts or any reasonable variance. Those demands are increasingly coming from unknown third-party brokers or motor carriers. Demands can reach multiples of anticipated transportation spend. Sometimes even double payment is necessary to gain release of loads.

This article explains the legal background for freight payment disputes and what to do when you're asked to pay more or pay twice due to double brokering or hostage load scenarios.

Ground Rules for Who Can Demand Freight Charges

In a traditional brokering scenario the shipper with a load to move contracts with a broker or carrier to either arrange for carriage or accomplish that movement. If a broker is involved this means that the shipper will pay the broker who then pays the carrier. If the broker fails to pay the carrier then in most instances the carrier has a right to pursue the shipper for its freight charges. If the payment terms were collect-on-deliver then the carrier can withhold release of the load until those agreed-upon amounts are paid.

The flow of funds and services grows more complicated if double brokering is involved. This occurs where multiple brokers or even multiple carriers hand a load off to one another and receive a part of the proceeds. It is a myth that this practice is always illegal. Unlawful brokering is prohibited by statute but double brokering is not. Unlawful brokering refers to arranging for motor carriage, for compensation, without holding the necessary permit and bond to do so. This rule was signed into law on July 6, 2012, in a bill referred to as MAP-21. The codified statute at 49 USC § 14916 states that conducting regulated freight broker activities without a license is unlawful. The officer, directors, and principals of unlawful brokers can suffer personal liability to the United States and to aggrieved parties for harms due to violating this law.

However, no part of MAP-21 prohibited co-brokering. In the industry, co-brokering is the practice of one lawful broker offering a load to another lawful broker who then arranges the motor carriage. In other words, Broker A holds the customer relationship and engages Broker B who holds the motor carrier relationship. Doing so is often conducted under a Co-Broker Agreement between Broker A and Broker B. This practice is not presently unlawful although many Broker Shipper Agreements do contractually prohibit the activity.

Equipment interchange is sometimes also used to lawfully accomplish service through multiple motor carriers. Interchange occurs when a duly authorized motor carrier provides transportation as the originating carrier, physically transports the cargo at some point, retains liability for the cargo and pays other performing carriers, and interchanges equipment (the trailer) with another carrier. This practice is expressly permitted by 49 USC § 13902 without a broker permit. It is often conducted under an Interchange Agreement.

These operating scenarios mean that anyone buying services, whether shipper or broker, should have an idea who they will pay and the role the party they are paying is performing (this is specifically required by statute at 49 USC § 13901). Those expectations can be strengthened by prohibiting double-brokering, co-brokering, or interlining in the transportation agreement and requiring indemnity or other remedies when that occurs. The challenge is that those instances do occur from time to time.

What To Do When You Receive A Payment Demand

Are You a Shipper or Consignee? Check your paperwork! Does your company have a contract with the broker who brokered the shipment, or does your company have a contract with the motor carrier who was engaged to carry the load? If so, your contract with the broker or motor carrier will often outline who is responsible for freight charges and who may be contractually responsible if the transporting carrier does not get paid.

Review the Bill of Lading, if the shipment was being transported on a shipper bill of lading, check to see if the shipper included and invoked “Section 7: Non-recourse” language, letting the transporting carrier know that the shipper would not be liable for freight charges. The bill of lading should also indicate if the freight charges are “collect.”

Confirm with your company’s records to see whether your company has already paid someone for the transportation and determine how much was paid to whom. This will help you understand whether the payment being demanded is reasonable for the transportation that was conducted.

Review the demand you received and analyze who it came from, and the reasoning that company or person states it is entitled to be paid for the transportation. For example, if a collections company is demanding payment on behalf of the transporting motor carrier, but the transporting motor carrier is utilizing a factoring company, the transporting motor carrier may no longer have a legal right to try to collect the freight charges. In that case, a defense to payment may be that the collections company is not entitled to payment because the motor carrier has already promised those funds to someone else.

After your review of the paperwork and investigation of the circumstances surrounding the transportation, you may need to seek legal advice regarding whether you are legally liable for the demand or whether you have viable defenses. The facts regarding the transportation and relationships are important, and the same approach may not be reasonable for every demand.

Are You a Broker? Check your paperwork! Does your company have a contract with the shipper, consignee, or motor carrier your company engaged to transport the load? In most cases, this contract (or contracts) will outline who is responsible for freight charges. However, brokers are often in the unenviable position of choosing to preserve a relationship with a shipper or consignee by

paying the transporting carrier even when the broker has already paid the contracted carrier, or trying to enforce the contract terms that generally state that the shipper/consignee is responsible for all freight charges and souring the relationship with the shipper/consignee.

Often, a broker will choose to pay the transporting motor carrier to prevent the motor carrier from approaching the shipper/consignee. While this may make good business sense in many cases, as a broker, you should still conduct an investigation prior to paying any demand. Collections companies will often use aggressive and threatening language to get you to pay before allowing you to investigate, but agreeing to pay before conducting an investigation can be a costly mistake.

In your investigation, you should evaluate the paperwork and the motor carrier to ensure that it was the transporting carrier and that it has retained the legal right to the freight charges. As discussed above, the motor carrier may have assigned it legal rights to the freight charges to a factoring company. If your company pays the motor carrier, your company could face yet *another* demand from the factoring company if the factoring company does not receive a payment it is entitled to receive.

After review of your paperwork and investigation of the circumstances surrounding the transportation, you may need to seek legal advice regarding whether you are legally liable for the demand or whether you have viable defenses. The facts regarding the transportation and relationships are important, and the same approach may not be reasonable for every demand. Sometimes it will make business sense to pay the transporting motor carrier even when you are not legally obligated to do so; other times, the broker, shipper, and consignee may all have legal defenses to paying, and you, as the broker, may be the best position to advance those legal defenses.

Jonathan R. Todd is Vice Chair of the Transportation & Logistics Practice Group at Benesch. He is available at 216.363.4658 and jtodd@beneschlaw.com.

Kelly E. Mulrane is a partner in the Transportation & Logistics Practice Group. She is available at 614.223.9318 and kmulrane@beneschlaw.com.