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Transportation Brokering, Double Brokering, Co-Brokering, Interchange, and Interlining - Legal Rules in the Era of Fraud

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Double brokering has emerged as a hot topic in this era of supply chain fraud, hostage loads, and cargo theft. The term “double brokerage” is used sweepingly as a reference to a wide range of operational practices where the acting motor carrier is a different company than the party originally intended to haul. It is increasingly derided and often referred to as illegal. This article breaks down the true story of these practices when viewed from their legal foundations.

FALSE: MAP-21 Strictly Prohibited Double Brokering.

President Obama signed into law the Moving Ahead for Progress in the 21st Century Act (P.L. 112-141) on July 6, 2012. This legislation, referred to as MAP-21, is the statutory basis for today’s industry concerns around double brokering - twelve years down the road.

Two provisions found in MAP-21 are key. First, conducting regulated freight broker activities without a license was made clearly unlawful by 49 USC § 14916. 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. Second, every transportation agreement with shippers must “specify, in writing, the authority under which the persons is providing such transportation or service.” This law is found at 49 USC § 13901 is intended to require clarity on whether the contracting provider is offering motor carriage, brokerage, or another regulated service such as freight forward. Doing so eliminates the opportunity to falsely characterize a service.

Together these provisions require broker permits for regulated broker activity and prohibit misleading others in flow of transportation about the actual service that will be performed. They are particularly helpful tools for both commercial users of transportation services and the industry. They do not, however, prohibit double brokering but rather unlawful brokering or fraudulently representing services.

TRUE: Regulated Brokerage Activities Require License.

It is clear that broker activities require a FMCSA broker permit. What exactly constitutes a regulated broker activity is often less clear to both the industry and to press. In practice the key to understanding regulated brokerage tends to be the broad “arrangement” term within the statutory definition at 49 USC § 13102. Classic broker activities involve the arrangement of motor carriage for compensation. In simple terms, there is no regulated brokerage activity without arrangement, motor carrier services, and compensation.

All lawful brokers must register with the U.S. DOT's Federal Motor Carrier Safety Administration ("FMCSA") and must also hold a $75,000 surety bond or trust fund, described as financial responsibility, to protect those with whom the broker deals from harms arising during its activities. 49 USC § 14916. A minority of states also regulate broker activities in intrastate commerce. These are relatively simple obligations but they provide for DOT oversight, recourse in the event of bad behavior, and publicly verifiable records.

FALSE: Co-Brokering and Interchange Are Unlawful.

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.

Another lawful and often overlooked transportation operations activity is equipment interchange. 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.

TRUE: Convenience Interlining is Unlawful, but Interlining is Not.

One of the other more common misconceptions is that MAP-21 prohibited all interlining. This is the practice of one motor carrier delivering service in part through the performance of another motor carrier. The *de facto* prohibition under MAP-21 is a restriction against "convenience interlining" where one carrier simply offers a load to another carrier, without holding a broker permit, and without performing any service. Convenience interlining is clearly unlawful since it amounts to brokerage. However, the FMCSA has been clear in its guidance that traditional interlining where one originating motor carrier issues a bill of lading for the entire through movement and works with another motor carrier for a leg of that movement can do so without a broker permit. This often involves an interchange relationship although that is not required. In some scenarios implementing an Interline Agreement can also be appropriate to manage those lawful interline relationships.

Time for Clarity and Lawfulness

We can all agree that every unlawful actor and any disreputable behavior is a blight on law abiding actors in the industry and the efficient workings of our domestic supply chain. Unlawful brokering must end. Fraud must end. Those who are harmed should exercise the best possible courses of action with practical maneuvers for recovering stolen or hostage loads and legal remedies for financial exposure including, oftentimes, double payment to resolve the issue. Still, we will all benefit from awareness of precisely what are and are not prohibited transportation broker or carrier operations.

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