

BROKERS v. FREIGHT FORWARDERS:
UNDERSTANDING THE DIFFERENCE IS IMPORTANT

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The most popular moniker for an intermediary in the transportation industry today is to identify itself as a "logistics company." The term "logistics" is often used to describe a multitude of services, including distribution, warehousing, physical transportation of property and even freight payment. In regulated transportation, there still remain just two types of legal independent intermediaries: the property broker and the freight forwarder.

The intent of this paper is to address the practical reality that the identity and the services provided by intermediaries in the marketplace today can sometimes become blurred. Understanding the difference between a property broker and a freight forwarder is vital for those who ship goods in interstate commerce, for those who carry goods in interstate commerce, and for the entities themselves. This paper sets forth the distinctions between freight forwarders and property brokers, the regulatory aspects, the obligations as it relates to freight charge payment, the obligations as it relates to claims and options if the regulated transportation intermediary fails to fulfill its statutory duties.

**What Are The Statutory
Distinctions Between The Two Entities?**

By statute, the term "broker" means a person other than a motor carrier, or an employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement or otherwise as selling, providing, or arranging for, transportation by a motor carrier for compensation.¹

Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers 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.² "Brokerage" or "brokerage service" is defined as the arranging of transportation or the physical movement of a motor vehicle or of property. It can be performed on behalf of a motor carrier, consignor, or consignee.³

Property brokers are required to keep a record of each transaction for a period of three years and these records must show the name and address of the consignor, the motor carrier, the bill of lading or freight bill number, the amount of the broker's compensation, a description of any non-brokerage services performed in connection with each shipment or other activity, the amount of any freight charges collected by the broker and the date the payment was made to the carrier.⁴ A property broker is required to maintain accounts so that the revenues and expenses relating to its brokerage portion of its business are segregated from its other activities.⁵

A freight forwarder, on the other hand, means a person holding itself out to the general public (other than as a pipeline, rail motor, or water carrier) to provide transportation of property for compensation in the ordinary course of its business:

- (a) assembles and consolidates, or provides for assembling and consolidating shipments and performs or provides for break bulk and distribution of the shipments;
- (b) assumes responsibility for the transportation from the place of receipt to the place of destination; and
- (c) uses for any part of the transportation of carrier subject to jurisdiction under this subtitle.

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¹See 49 U.S.C. §13102(2).

²See 49 C.F.R. §371.2(a).

³See 49 C.F.R. §371.2(c).

⁴See 49 C.F.R. 371.3.

⁵See 49 C.F.R. 371.13.

The term does not include a person using transportation of an air carrier subject to part A of subtitle VII.⁶

A freight forwarder acts like a carrier vis-a-vis its shipper and similarly, it acts as a shipper vis-a-vis the carrier it retains.

Under the ordinary course of its business, a freight forwarder must proffer assembly, consolidation, break bulk and distribution services for any and all traffic tendered or transportation services provided. The four service elements are basic to the definition of a freight forwarder. They are neither optional nor alternative. The service elements are required by the use of the conjunctive “and” in the statutory definition. Thus, in order to be a freight forwarder, a party must hold itself out to the public that it is prepared to provide the definitional services in all transactions. Moreover, if a party acting as an intermediary does not actually perform, but merely proffers such services, its activity is more akin to, and may be deemed to be, brokerage, for which a brokerage license is required. If the conduct evidences that the intermediary is merely arranging transportation rather than undertaking the transportation, such activity will likely not be considered freight forwarding.⁷

⁶See 49 U.S.C. 13102(8).

⁷See *Chemsource, Inc. v Hub Group, Inc.*, 106 F.3d 1358, 1361 (7th Cir. 1997); *Fireman’s Fund Insurance v. USA Truck, Inc.*, 1992 Fed. Carr. Cases ¶83,698; See also *Travelers Indemnity Company v. Alliance Shippers, Inc.*, 654 F. Supp. 840 (N.D.Cal. 1986).

The Regulatory Hoops

Although it has been almost four years since the enactment of the Interstate Commerce Commission Termination Act of 1995⁸ questions still remain as to the regulatory requirements for property brokers and freight forwarders.

A property broker must be registered with the Federal Highway Administration⁹ and post a property broker surety bond or trust fund in the amount of \$10,000.¹⁰

Evidence of a surety bond must be filed using Federal Highway Administration prescribed form BMC-84. Evidence of a trust fund with a financial institution must be filed using prescribed form BMC-85. The surety bond or the trust fund shall insure the financial responsibility of the broker by providing for payments to shippers or motor carriers if the broker fails to carry out its contracts, agreements or arrangements for the supplying of transportation by authorized motor carriers.¹¹

A property broker must designate agents for service of process for each state in which its offices are located or in which contracts will be written.¹² Designations must be made on Form BOC-3.¹³ A designation may be canceled or changed only by a new designation.¹⁴

Likewise, a freight forwarder must be registered with the Federal Highway Administration.¹⁵ The proper form for registration is an OP-1(FF). Under the present Federal Highway Administration rules, a freight forwarder is required to have both cargo and liability insurance.¹⁶ The minimum amounts for cargo and public liability and security are identical to those prescribed for motor carriers.¹⁷

A freight forwarder must designate agents for service of process for each state in which it is authorized to operate and for each state traversed during such operations.¹⁸ Designations must be made on Form BOC-3.¹⁹ If the freight forwarder does not have its own vehicles, it must designate an agent for each state in which it has offices or which it enters into contracts, much like a property broker.

The final regulatory aspect for a freight forwarder, and often the one most misunderstood, is the requirement of single state registration. Every freight forwarder who operates its own vehicles in interstate commerce under a certificate or permit issued by the Federal Highway Administration shall be required to register annually with a single registration state.²⁰ Only 38 states participate in single state registration.²¹

In order to register, a freight forwarder with vehicles of its own must select the state in which it maintains its principal place of business, if such state is a participating state. If the freight forwarder maintains its principal place of business outside one of the 38 participating states, it must select the state in which it will operate the largest number of motor vehicles during the next registration year.²² A freight forwarder may not change its registration state unless it changes its principal place of business or its registration state ceases to participate in the program.²³ A

⁸Pub. L. 104-88, Title I, Section 103, December 29, 1995, 109 Stat. 884.

⁹See 49 U.S.C. 13904.

¹⁰See 49 U.S.C. 13904(d) and 49 C.F.R. §387.307.

¹¹See 49 C.F.R. §387.307(b).

¹²See 49 C.F.R. §366.4(b).

¹³See 49 C.F.R. §366.2

¹⁴See 49 C.F.R. §366.6.

¹⁵See 49 U.S.C. 13903.

¹⁶See 49 C.F.R. §387.403(a), 49 U.S.C. 13906(c)(1); 49 U.S.C. 13906(c)(2); and §387.403(b).

¹⁷See 49 C.F.R. §387.405.

¹⁸See 49 C.F.R. §366.4(a)

¹⁹See 49 C.F.R. §366.2

²⁰See 49 C.F.R. §367.4(b).

²¹Alaska, Arizona, Hawaii, Delaware, District of Columbia, Florida, Maryland, Nevada, New Jersey, Oregon, Pennsylvania, Vermont, and Wyoming do not participate.

²²See 49 C.F.R. §367.3(a).

²³See 49 C.F.R. §367.3(b).

freight forwarder is required within 30 days after it has made its selection to give notice of its selection to the state commission of its selected registration state.²⁴

A freight forwarder must file its annual registration application between August 1 and November 30 of the year preceding the registration year. A freight forwarder must file or cause to be filed the following with its registration state:

- (1) A copy of its certificate and/or permits. It must supplement its filing by submitting copies of any new operating authorities as they are issued. Once a carrier has submitted copies of its authorities it may thereafter satisfy the filing requirement by certifying that the copies are on file;
- (1) The carrier must submit to its registration state a copy of its proof of public liability submitted to and accepted by the Federal Highway Administration; and

²⁴See 49 C.F.R. §367.3(c).

- (1) A copy of its designation of an agent or agents for service of process submitted to and accepted by the Federal Highway Administration.¹

Upon compliance, the registration state must issue the freight forwarder a receipt reflecting that it has filed the required proof of insurance and paid fees in accordance with the requirements. The registration state must issue a number of official copies of the receipt equal to the number of vehicles for which fees have been paid.² A freight forwarder must maintain in each one of its vehicles an official copy of its receipt indicating that it has filed the required proof of insurance and paid the appropriate fees for each state in which it operates.³

What Are the Freight Payment Obligations?

A broker is generally not liable, absent a contract, for freight charges which are the obligation of the consignor or consignee. A broker does not become liable for freight charges merely because it is shown as the "bill to party". Only when the broker acts on behalf of a person bound by law (i.e., the consignor or consignee) as to the transmittal of bills or payments does a broker become liable for the payment of freight charges.⁴ A broker should be a conduit for passing the consignor's or consignee's money on to the carrier it retains and the minimal surety bond or trust fund is in place in theory to insure they do so.⁵ Unless otherwise agreed, a broker has no right to offset freight charges due a motor carrier.

In contrast, a freight forwarder is both the receiving carrier and the delivering carrier and must assume responsibility for the transportation from the place of receipt to the place of destination.⁶ Since the freight forwarder wears two hats, as a carrier and a shipper, it is involved as a principal in both the payment and liability loop. Provisions which allow freight forwarders to set off freight charges against claims are typical in contracts with motor carriers and can deprive the unsuspecting small carrier of proper claims adjustment.

When Claims Arise, Who is Liable for What?

A freight forwarder has primary liability to the shipper for cargo loss and damage under the Carmack Amendment.⁷ This obligation flows from its carrier status, being both the receiving and destination carrier, and the assumption of responsibility for the transportation from point of receipt to place of destination.

Under Carmack, a carrier (freight forwarder) may establish rates for transportation of property (other than household goods) under which the liability of the carrier (freight forwarder) for such property is limited to a value established by written or electronic declaration of the shipper or by written agreement between the freight forwarder and shipper if that value would be reasonable under the circumstances surrounding the transportation.⁸

The freight forwarder's right to limit its liability is subject to the requirement that it provide to the shipper, upon request, "A written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier is based."⁹

A broker is generally not liable to the shipper for cargo loss and damage.¹⁰ Brokers can limit their liability by contract. Neither the regulatory framework set forth in the Carmack Amendment nor common law restrict a broker's ability to freely contract with shippers, freight forwarders and others.¹¹ A broker is free to establish by

¹See 49 C.F.R. §367.4(c)(1)(2)(3).

²See 49 C.F.R. §367.5(a)(1).

³See 49 C.F.R. §367.5(e).

⁴See 49 C.F.R. 371.10.

⁵*Milan Express Co. v. Western Surety Co.*, 792 F. Supp. 571 (M.D. Tenn. 1992).

⁶See 49 U.S.C. 14706 and 49 U.S.C. 13102(8).

⁷See 49 U.S.C. 14706(a)(1).

⁸See 49 U.S.C. 14706(c)(1)(A).

⁹See 49 U.S.C. 14706(c)(1)(B).

¹⁰See *Golden Triad Carriers v. Paco American Corporation*, 1990 Fed. Carr. Cases, ¶83,515.

¹¹See *Service Master Co., LP v. FTR Transport, Inc.*, 868 F. Supp. 90, 95 (E.D.Pa. 1994).

contract, the rates, services and terms and conditions of liability assumed.¹² In terms of liability, a crucial issue for property brokers is whether they hold themselves out to the public generally as the actual transporter of the goods.¹³ If there is no evidence that a property broker held itself out as the actual transporter of goods it should not be found liable for cargo loss and damage, absent negligence on its part. Often, property brokers maintain contingent cargo insurance to protect their own business as well as the shipping public but acquiring same does not increase the broker's basic legal obligations in terms of liability for the goods transported.

Recourse When the Intermediary Fails to Pay

A topic that always stirs controversy among the members of the transportation bar is the situation when the intermediary fails to pay the freight bill and subsequently closes down its business, files bankruptcy, or otherwise is insolvent. The question for those who represent motor carriers is what recourse is there to obtain payment from the shipper?

Those who represent freight forwarders steadfastly maintain that their classification as a carrier precludes recourse to the shipper in the event of nonpayment to the actual motor carriers they retain.¹⁴ Those who represent motor carriers hold that such a position does not comport to economic reality and that unless the shipper can demonstrate that the underlying carrier released it, the shipper should remain liable for the payment of freight charges. The motor carrier's position is that while it may extend credit to the forwarder, there is no economically rational motive for the carrier to release the shipper from freight charge liability.¹⁵

In situations where the underlying freight forwarder files for bankruptcy protection and either has collected or still has outstanding receivables due from its shipper or consignee principal, there is case law to suggest that a constructive interline trust theory can be asserted.¹⁶

When a property broker has received payment and has failed to pass along the freight charges to the underlying carrier, the carrier has a number of options. First, the carrier has recourse to the property broker bond and/or the surety trust fund. Second, the carrier may have recourse to the shipper on prepaid or collect shipments provided Section 7 of the bill of lading contract has not been executed.¹⁷

Likewise, in situations involving a bankrupt property broker, a constructive trust argument can be made based on the applicable regulations regarding the transmittal of payments¹⁸ and accounting.¹⁹

Conclusion

The federally licensed intermediary plays an important role in the transportation industry. Understanding the differences can make a big difference to shippers, receivers, motor carriers, and the intermediaries themselves.

¹²See *General Electric Co. v. Harper Robinson & Co.*, 818 F. Supp. 31 (E.D.NY 1993).

¹³See *Florida Power & Light Co. v. Federal Energy Regulatory Commission*, 660 F.2d 668 (5th Cir. 1981), cert. denied, 459 U.S. 1156 (1983).

¹⁴See *Compania Sud Americana de Vapores v. Atlantic Caribbean Shipping Co.*, 587 F. Supp. 410 (S.D.Fla. 1984); See also *Koninklijke NedLloyd BV v. Uniroyal, Inc.*, 433 F. Supp. 121 (S.D.NY 1997).

¹⁵See *National Shipping Company of Saudi Arabia v. Omni Lines, Inc.*, 106 F.3d 1544 (11th Cir. 1997); *Strachan Shipping Co. v. Dresser Industries, Inc.*, 701 F.2d 483 (5th Cir. 1983); *Sea-Land Services, Inc. v. Amstar Corp.*, 690 F. Supp. 246 (S.D.NY 1988).

¹⁶See *Parker Motor Freight, Inc. v. Fifth Third Bank*, 116 F.3d 137 (6th Cir. 1997).

¹⁷*Ranger Transportation v. Walmart Stores*, 903 F.2d 1185 (8th Cir. 1990); *Southern Pacific Transportation Co. v. Commercial Metals*, 456 U.S. 336 (1982); *Bestway Systems, Inc. v. Gulf Forge Co., et al*, 100 F.3d 31 (5th Cir. 1996).

¹⁸See 49 C.F.R. §371.10.

¹⁹See 49 C.F.R. §371.13.