CARRIER BROKER ENTITIES

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MOTOR CARRIER OR BROKER?

Is your insured a motor carrier or a broker — or both? Or does your insured arrange for other motor carriers to "cover" customer requests to haul loads but is not actually a broker?

The February Truck Stop addressed these considerations and is available on the transportationriskspecialist.com website. However, we received questions from a number of our members along with requests to provide a white paper to address not only the differences between a motor carrier and a broker but also MAP-21 considerations.

Let's begin with a common scenario: Your insured is a motor carrier and has authority to haul processed goods in interstate commerce. The insured gets a call from a customer to haul a load but does not have a truck available to haul it. Instead of telling the customer, "Sorry I cannot cover the load," the insured will likely protect their relationship with the customer by telling the customer, "I will take care of it," and then proceed to find another way to haul the load. The insured will then find another motor carrier with whom they have a friendly relationship and ask them if they can cover the load. When the other motor carrier agrees to haul the load, the bill of lading might be sent over not in the new motor carrier's name, but in the name of your insured. Thus, your insured, in order to protect its relationship with its customer, acts as a broker for this one transaction even though it normally would not consider itself a broker.

Before The Moving Ahead for Progress in the 21st Century Act, commonly known as MAP-21, was enacted in 2012, this common scenario was called "convenient interlining." MAP-21, however, was designed to address this and other concerns when there is not a "clear" definition of the service your insured is providing – transportation or brokerage?

The Federal Motor Carrier Safety Administration (FMCSA) defines a broker regulated by the USDOT as:[1]

> 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 motor carrier for compensation (49 U.S.C. § 13102(2)).

A broker is further defined in the Code of Federal Regulations as:

> a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier. Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within 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)).

The FMCSA publication goes on to give additional guidance by adding:

> As transportation broker, you will be connecting shippers who need to move their commodities with carriers that can transport them. Connecting the shippers and the carriers is arranging transportation. If you are compensated for the service, then you are brokering. If you arrange the interstate transportation, by a motor carrier, of a commodity for a shipper, then you are regulated by FMCSA and are required by Federal statute, 49 U.S.C. § 13904, to register with the USDOT. To be registered, FMCSA must grant you authority to operate as a broker. Registration also is referred to as "authority", "operating authority", or "being authorized." All brokers regulated by FMCSA are required to use the services of authorized motor carriers. An authorized motor carrier has been granted authority to operate interstate and is validly registered by FMCSA.

Federal law regulates two classifications of federal interstate brokers: property brokers and household goods brokers. Each classification requires a specific registration or authority. A property broker may arrange transportation for a variety of regulated commodities other than household goods, such as automobiles, electronics, or machinery. A household goods broker can arrange transportation for shipments of household goods only.[2]

Obviously, a broker cannot conduct business without other transportation operations. Motor carriers make brokering possible by providing transportation of the broker's customers' loads. Motor carriers are defined by regulation at 49 C.F.R. § 390.5:

> . . . a for hire motor carrier or a private motor carrier. The term includes a motor carrier's agents, officers, and representatives, as well as employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and employees concerned with the installation, inspection and maintenance of motor vehicle equipment and/or accessories. For purposes of subchapter B [of Title 49, CFR], this definition includes the terms employer and exempt motor carrier.

For hire motor carriers which operate in interstate or foreign commerce, between states, or between the United States and other countries, are subject to FMCSA safety and commercial regulations including the requirements to obtain operating authority, which includes proof of financial responsibility. However, several types of motor carriers are not regulated by FMCSA and include the following:

- **Intrastate motor carriers** operate only within the boundaries of a single state and usually do not fall within the jurisdiction of FMCSA unless they are hauling property in interstate commerce through a port or railroad.
- **Motor private carriers** (or private motor carriers) are trucking operations that are incidental to a business that uses, produces, sells or buys the cargo they are hauling. Private motor carriers are subject to FMCSA safety regulations but usually do not require operating authority (private carriers must register a USDOT number but do not need authority to haul others' non-owned, non-processed goods, therefore do not need a motor carrier number).

A broker arranges loads but does not transport. A transportation company transports but cannot also arrange loads. While this seems clear enough, scenarios such as the one described at the beginning of this paper illustrate that further analysis is sometimes necessary. Motor carriers often need to cover excess loads, so they will ask another motor carrier to haul the load. But the shipper will not know the other motor carrier is hauling the load because the bill of lading will not be in the name of the motor carrier that actually hauls the load. The shipper will then pay the motor carrier that made the arrangement (not the carrier who hauled the load).

This type of load sharing was common before MAP-21. The two businesses adversely affected by this arrangement were the legitimate brokers whose purpose was only brokerage; and shippers/receivers whose loads were delivered damaged. If the load was damaged, whose cargo policy would pay? The shipper/receiver would obviously look to the motor carrier they asked to haul the load and whose proof of insurance coverage they were provided, but who, as it turns out, did not actually haul the load. The cargo coverage for the actual hauler of the load might not pay for a number of reasons (remember — the bill of lading was not even in that hauler's name); and the cargo coverage for the motor carrier that the shipper/receiver asked to haul the load might not pay because that carrier had not hauled the load. In the end, after a lot of finger pointing, cargo claims would not be addressed to the satisfaction of the shipper/receiver. And what if the shipper/receiver paid the motor carrier they asked to haul the load, but that motor carrier did not turn around and pay the motor carrier who actually hauled the load? In these situations, after seeking payment from the original motor carrier, eventually the hauler approached the shipper/receiver for payment, so the shipper/receiver ended up paying twice.

Before MAP-21, the motor carrier who had the relationship with the shipper would sometimes obtain brokerage authority, typically in the same name as the transportation company. The motor carrier would have to provide proof of financial responsibility as a transportation company and also meet the financial responsibility required for brokerage authority which is meant to assure the shipper that it would pay the motor carrier they arranged to actually haul the load but was brokered. The "payment bond" had a face aggregate limit of only $10,000 which did not provide enough protection.

While MAP-21 addresses many transportation issues, the section addressing motor carriers and brokerage is relatively small. When enacted in 2012, the Act provided strong reform legislation to ensure that shippers and receivers would know the services for which they were contracting and that motor carriers hauling loads would be paid. Congress' intent was to end the practice outlined in the above scenario — brokering loads without being registered as a broker. The Act also increased the $10,000 payment bond referenced in the above paragraph to $75,000.

MAP-21 includes stringent language in 49 U.S.C. 14916 to close loopholes which provided little accountability for motor carriers and brokers without clearly identifying the services being offered. Under that section, a person may now provide interstate brokerage services only if that person: (1) is registered as a broker and (2) has satisfied the financial security requirements found elsewhere in the Act (49 U.S.C. § 14916(a)). Accordingly, a business cannot arrange for a motor carrier to haul a load without having brokerage authority and without the $75,000 bond.

How does this affect transportation companies? MAP-21 prohibits a motor carrier from arranging, making possible, or receiving payment for having another motor carrier haul a load on behalf of the motor carrier's customer without the motor carrier providing some movement of the load in a unit that is operating within their authority, in other words, when a motor carrier is acting without brokerage authority. The unit hauling the load should have its own motor carrier's name and DOT# on its side. The bill of lading should be in the name of the motor carrier the shipper originally asked to haul the load. Two MC#'s are attached to the transaction: one for transportation and one for brokerage. The second relevant provision of this regulation applies when the business is actually authorized to provide both transportation and brokerage services. In that case, the business must make it clear which service they are offering to their customer and must register "distinctive registration numbers" with the Department of Transportation (49 U.S.C. § 13901(b)).

MAP-21 imposes civil penalties and allows private causes of action by any person/business damaged by:

> (c) Any person who knowingly authorizes, consents to or permits, directly or indirectly, either alone or in conjunction with any other person a violation [the Act] is liable
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> > (1) To the United States Government for a civil penalty in the amount not to exceed $10,000 for each violation [i.e., each load] and
> > (2) To the injured party for all valid claims incurred without regard to amount (49 USC § 14916(c)).

Valid claims may be not only damage to cargo but also bodily injury and property damage. The Act also requires that the transportation service clearly specifies in writing

the authority under which the carrier is providing such transportation service (49 U.S.C. 13901(c)). If it is not clear, then penalties and liabilities may be imposed. Under the Act, not only can the business conducting unauthorized brokering be held liable but also the individual officers, directors and principals of those businesses. So being a corporation or LLC in this case will not protect the individuals directing the activities of the corporation.

As is often the case with federal regulations, MAP-21 may trap the unwary. For example, a motor carrier accepting a load from an unauthorized motor carrier without broker authority could be liable under the Act, so the hauling company should always verify the brokerage authority of a referring business. Additionally, the Act may impose liability on businesses who may not think they are brokers, but arrange loads they do not own to be hauled. This could happen if a merchant agrees to ship to a retailer and was paid to arrange the transportation by motor carrier or if a warehouse arranged transportation by motor carrier to distribute shipments.

In order to avoid liability under MAP-21 for unauthorized brokering, businesses must be crystal clear in specifying which role they are fulfilling when arranging for the transportation of loads, and they must also obtain a DOT# for both roles. The best practice for a motor carrier who also acts and has broker authority will be to set up each role as separate legal entities.

SEPARATE LEGAL ENTITIES

It has been my advice as well as attorneys that provide information for members of the Foundation that the best practice when an operation provides transportation and brokerage is to have the different operations in separate legal entities. The operations should be separated as much as possible; paperwork, promotional material, websites, and bank accounts. When you suggest this to your insureds as well as what is lined out, use my rule to always blame the government.

Let’s go beyond government penalties and fines – Protection of assets. If the operations are in the same legal entity and either operation is involved in an auto accident that causes a lot of damage to the public; both operations‘ assets are exposed. If there were two legal entities and the operations were separate operations in separate legal entities and a claim happens, in most cases, the legal entity that was not involved in the claim would be protected.

An agent providing this information would need to have the business contact an attorney to set up the different legal entities and operations to protect each entity’s assets if a claim happens.

How about insurance? If one legal entity has both brokerage and transportation authority and performs both operations, then that entity would be the “named insured“ on the Auto Liability and General Liability policy. When either operation has a claim, then the policy(ies) would address the claim no matter which operation’s actions caused the damage that lead to the claim. If the operation is a large one, then an insurance provider might be willing to assume both operations of an insured if they can underwrite each operation if they are both safe operations with good claim history and the insurance carrier can collect the premium they need.

Insurance carriers could attempt to take steps to remove the operations they do not like by adding endorsements and use of symbols, but the insurance carrier will always question if the steps to remove coverage for exposures of a legal entity will be effective. If one entity has both operations there will be a shared limit as well as a problem finding an insurance provider that would be willing to insure both operations on one AL and one GL policy. There could be insurance providers that would be willing to provide coverage to one of the operations of the legal entity but not both and will attempt to exclude the undesirable operation. They would still have a concern that the exclusions would hold up in case of legal action.

If there are two legal entities; one for the brokerage and one for the transportation operation, then there would be more insurance carriers that would be willing to provide coverage for the separate entities. The transportation operation is typically better understood and more insurance markets available. The coverage for the brokerage entity is not as easy to place as there are not as many insurance providers that are willing to provide coverage to brokers as there are for providing coverage to motor carriers. Insuring a property broker is a subject for another day.

Let’s look at insuring a motor carrier that only has transportation authority but there is another business that is a separate entity but common ownership that has brokerage authority. For the sake of this discussion, the business has taken the steps to have two legal entities and separated the operations. The coverage we are looking at providing is for the transportation entity.

Some insurance carriers have a concern when the insured is a motor carrier and has a “sister” company that is a separate legal entity that is a property brokerage operation. This concern was a real concern before MAP-21 and when using the Truckers Coverage Form without the favorable CCIC vs. Yates court ruling in 2007. Why? Transportation companies would “arrange” loads for other motor carriers without brokerage authority or even if they had brokerage authority it was not clear as to the services being provided to their customers. The MAP-21 Act attempts to stop these businesses that did not separate their operations. Today, there are more and better set-ups for these different operations.

The Truckers Coverage Form (TCF) in the Who Is An Insured provision and the Other Insurance provision cause concern for the insurance carrier. The customer calls the motor carrier they typically use to provide transportation services for them. The motor carrier cannot or does not want to cover the load with units operating under their authority. They arrange for another motor carrier to “cover” the load. However, the motor carrier that the customer called did not tell the customer that another motor carrier was picking up the load, the bill of lading was in the name of the motor carrier the customer called and payment was to be made to that motor carrier and not the motor carrier that hauls the load. A crash happens, the motor carrier who was hauling the load and caused the crash turns the claim into its insurance carrier that provided coverage using the TCF. That insurance carrier learns the load was provided by another motor carrier during investigation of the claim and the bill of lading was in the other motor carrier’s name. The insurance carrier for the hauler of the load that is handling the claim puts the motor carrier that arranged for the load on notice. Why? The TCF makes an insured any one operating under the “authority” of their insured and makes coverage primary. The bill of lading is in the name of the arranger of the load, the customer “thinks” the motor carrier they called hauled the load and they check to make sure the motor carrier they called had authority to haul the load and had insurance. So the arrangement from the customer of their load was hauled under the authority of the motor carried that the customer called and who arranged the hauling not who hauled the load. The insurance coverage on the unit that hauled the load was also written with the TCF and its Other Insurance provision stated: “This coverage form’s liability coverage is excess over any other collectible insurance for any covered auto while hired or borrowed from you by another trucker.” Therefore, the insurance carrier that provided coverage to the motor carrier that the customer called now has been put on notice that their policy has primary responsibility for the claim even though their insured did not provide transportation and the coverage on the unit that hauled the load was excess.

This changed with the Motor Carrier Coverage Form (MCCF). Now the hauler of the load would not be an insured under the MCCF provided to the arranger of the load because there was no written agreement, and if there was a written agreement the broker-carrier agreement would have the motor carrier hauling the load holding the arranger of the load (broker) harmless. The coverage on the hauler of the load, no matter whose name the bill of lading is in, would address the claim if they were insured with a MCCF or BACF and if the auto that caused the crash was a covered auto (for more details concerning the subject, refer to Blogs on the transportationriskspecialist.com website – Symbols 8/68 and 9/71 and their impact on coverage). This way the insurance policy provided to the hauler of the load would address the claim, no matter whose name the bill of lading is in, whose authority the load was hauled under on a primary basis as well as protects any other entity that would be held vicariously liable for their actions, therefore, the motor carrier/broker that provided the load as well as the shipper would be protected on a primary basis as an additional insured on the policy of the hauler of the load. Even without an endorsement,

the Who Is An Insured provision of the ISO MCCF and BACF build the coverage into the form. If the claim is settled within the limits of the coverage, then all who qualify as insured would have to be included in the release – the motor carrier transporting the load, the driver, the company providing the load as well as the broker or shipper – if the coverage on unit hauling the load is at least the amount required by FMCSA ($750,000 for non-hazardous), the BMC91X and MCS90 obligation of the motor carrier that arranged for the load to be hauled is met by the coverage on the policy of the motor carrier that hauled the load under the CCIC vs. Yates decision. MAP-21, the MCCF and CCIC vs. Yates have reduced and in most cases removed the primary exposure for the insured letting another motor carrier haul a load with or without brokerage authority no matter if separate legal entities and separate addresses.

A lot of words to say that if a motor carrier arranges a load for another motor carrier, they must have brokerage authority. Best practice, the authority should be in separate legal entities. If the motor carrier that hauls the load and coverage is written on a MCCF or BACF and using a covered auto that policy would address the claim and provide defense and coverage for any entity named in the suit because of the actions of the motor carrier hauling the load – Broker or shipper without endorsements.

If the limit is at least the amount required by the FMCSA ($750,000 for non-hazardous) the BMC91X or MCS90 obligation of the motor carrier/broker that arranged the load is met by the payment of the policy on the unit hauling the load no matter if many other BMC91X/MCS90's are involved. The arranger of the load, another motor carrier, broker or shipper would get primary coverage under the coverage on the unit hauling the load. They could possibly have exposure in excess of the coverage on the unit hauling the load if that limit does not settle the claim.

- **^** <="">This definition is from FMCSA's publication "Small Entity Compliance Guide for Broker Operations 49 C.F.R. § 371 and Other Regulations and Statutes." If you require additional information to share with your insureds, you can obtain it by going to the FMCSA's home page and search for the publication.<="">
- <="">**^** <="">Household goods regulated by FMCSA are defined at 49 C.F.R. § 375.103. Household goods brokers are not discussed in this paper.