

When Beset By Fraudsters, Will the Supply Chain be Unbroken?

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A. Introduction: *The Double Brokering Problem*

Double brokering is an unfortunate scenario, yet one that is all too common in the transportation industry. As we know, double brokering can arise in various modes of transportation. A transportation broker contracts with a shipper to provide the shipper's transportation services. Subsequently, the broker locates a carrier to perform that carriage service. Too often, a carrier will accept that shipment and then illegally re-broker it to another carrier, without the knowledge of the broker or the shipper, and in contravention of applicable law (as discussed below). The delivering carrier is then not paid for its services while the broker has already paid the original carrier. Double brokering is costing brokers and carriers millions of dollars while hurting legitimate businesses. This paper will give a historical perspective on the double brokering problem and on current regulatory activity affecting purported freight intermediaries.

B. Statutory Framework: *Governing Regulations*

Below is an outline of the relevant statutes governing brokers, freight forwarders, and carriers:

- 49 U.S.C. § 13902 – Registration of Motor Carriers
 - Section 13902 sets out requirements for registration for commercial motor carriers who wish to operate in interstate commerce. Among other things, the motor carrier must be “willing and able to comply with...”
 - any safety regulations imposed by the Secretary of Transportation; 49 U.S.C. § 13902(a)(1)(A)(ii)
 - the minimum financial responsibility requirements established by the Secretary under sections 13906, 31138, and 31139; 49 U.S.C. § 13902(a)(1)(A)(vi)
 - A motor carrier may not arrange transportation except as described in 49 U.S.C. § 13901(a)(1) unless “the motor carrier has obtained a separate

registration as a freight forwarder or broker for transportation under section 13903 or 13904, as applicable.” 49 U.S.C. § 13902(i)(2).

- 49 U.S.C. § 13903 – Registration of Freight Forwarders
 - Pursuant to Section 13903, the Secretary of Transportation shall register a freight forwarder if it is determined that person or entity:
 - has sufficient experience to qualify the person to act as a freight forwarder; and
 - is fit, willing, and able to provide the service and to comply with this part and applicable regulations of the Secretary. *See* 49 U.S.C. § 13903(a)(1)-(2).
 - 49 U.S.C. § 13903(d) – A freight forwarder may not provide transportation as a motor carrier unless the freight forwarder has registered separately under this chapter to provide transportation as a motor carrier.
- 49 U.S.C. § 13904 – Registration of Brokers
 - Section 13904(a)(1)-(2) requires that Secretary of Transportation register a broker for transportation of property if it is determined that person or entity:
 - has sufficient experience to qualify the person to act as a broker for transportation; and
 - is fit, willing, and able to be a broker for transportation and to comply with this part and applicable regulations of the Secretary.
 - Section 13904(d) prohibits a broker from providing transportation as a motor carrier unless the broker has registered separately under this chapter to provide transportation as a motor carrier.
- 49 U.S.C. § 13901 – Requirements for Registration
 - If the Secretary registers a person under this chapter to provide transportation or service, including as a motor carrier, freight forwarder, or broker, the Secretary shall issue a distinctive registration number to the person for each such authority to provide transportation or service for which the person is registered. *See* 49 U.S.C. § 13901(b)(1)
 - For each agreement to provide transportation or service for which registration is required under this chapter, the registrant shall specify, in writing, the authority under which the person is providing such transportation or service. *See* 49 U.S.C. § 13901(c) – Specification of Authority.

- 49 U.S.C. § 31134 – Requirement for registration and USDOT number
 - The Secretary shall register an employer or person under subsection (a) only if the Secretary determines that (i) that person is willing and able to comply with the requirements and regulations. *See* 49 U.S.C. § 31134(b)(1).

C. Enforcement by Law: *MAP-21*

- MAP-21, signed into law on July 6, 2012, as Public Law No. 112-141, contains several provisions intended to better regulate the transportation industry.
 - At its core, MAP-21 prohibits motor carriers from brokering freight which they possess.
 - MAP-21 separates motor carriage from brokering.
 - MAP-21 makes it unlawful to engage in brokerage activities without authority and without proper financial security.
 - Civil Penalties for Violating MAP-21
 - 49 U.S.C. § 14916(a) – Unlawful Brokerage Activities – provides that a person or entity may provide interstate brokerage services as a broker only if registered and licensed as a broker under 49 U.S.C. § 13904.
 - 49 U.S.C. § 14916(c) provides for civil penalties and a private cause of action, without regard to amount, against “[a]ny person who knowingly authorizes, consents to, or permits, directly or indirectly, either alone or in conjunction with any other person a violation of subsection (a). . .”.
 - 49 U.S.C. § 14916(d) defines liability as joint and several, and defines liable parties as any corporate entity or partnership involved and the individual officers, directors, and principals of those entities.
 - 49 U.S.C. § 14704(e) provides for the recovery of reasonable attorney’s fees due to the harm suffered as a result of unlawful brokerage activities.

D. The Courts: *Defining Double Brokering*

- *Millam v. N. Freight, LLC*, 2023 WL 423114, at *3 (S.D. Ill. Jan. 26, 2023)
 - “Double brokering involves the practice of a broker receiving a shipment from a shipper and subsequently tendering the shipment to another broker for movement by a motor carrier. It is frequently done without the

shipper's knowledge or the motor carrier's knowledge. No written or even oral contracts exist between the shipper and the second broker or between the motor carrier ultimately used and the initial broker.”

- “Double brokering is often considered illegal in light of the wording of federal regulations” (citation omitted).
 - It should be noted that this Court stated that it “offers no opinion or finding as to the legality or illegality of double brokering” because that exact issue was not before it, but the definitions offered are helpful.
- *Crouch v. Taylor Logistics Co., LLC*, 563 F. Supp. 3d 868, 880 (S.D. Ill. 2021)
 - In this case, certain individuals died because of a motor vehicle accident in 2017 in Illinois. Their vehicles were struck by a tractor-trailer. Representatives of the decedents’ estates filed suit asserting negligence and wrongful death against certain defendants, and claims for vicarious liability and negligent hiring against the defendant-broker.
 - The Court determined the shipment had been double-brokered by the accepting carrier without the broker’s knowledge.
 - The court granted the defendant-broker’s motion for summary judgment on all claims against it because there was no agency or hiring relationship between the driver who caused the injury and the broker, and the broker did not exert any control over the driver.
 - The court stated that if a broker discovered a carrier it hired was double brokering, it could withhold payment from that carrier and pay the carrier that transported the shipment.

E. FMCSA Broker Regulation: *Update*

- The FMCSA acknowledges that “MAP-21 mandates for regulations on broker and forwarder responsibility have been incomplete for over a decade”
- FMCSA proposes changes in broker and forwarder requirements: Notice of Proposed Rulemaking (“NPRM”) for Five (5) Areas
 - Assets Readily Available
 - The NPRM proposes allowing brokers or freight forwarders to meet the MAP-21 requirement to have “assets readily available” by maintaining trusts that meet certain criteria, including that the assets can be liquidated within seven calendar days of the event that triggers a payment from the trust, and that do not contain certain specified assets.

- Immediate suspension of broker/freight forwarder operating authority
 - Available financial security below \$75,000
 - Suspension of operating authority if a broker/freight forwarder does not replenish funds within seven (7) business days after notice by the FMCSA.
- Surety or trust responsibilities in cases of broker/freight forwarder financial failure or insolvency
 - FMCSA proposes to define “financial failure or insolvency” as bankruptcy filing or state insolvency filing. The NPRM also would require the surety/trustee to notify FMCSA and initiate cancellation of financial responsibility if it is notified of any insolvency of the broker or freight forwarder. The agency also proposes to publish immediately a notice of failure in the FMCSA Register immediately.
- Enforcement Authority
 - FMCSA proposes that to implement MAP-21's requirement for suspension of a surety provider's authority, the agency would first provide notice of the suspension to the surety/trust fund provider, followed by 30 calendar days for the surety or trust fund provider to respond before a final agency decision is issued. The agency also proposes to add penalties in 49 CFR part 386, appendix B, for violations of the new requirements.
- Entities eligible to provide trust funds for BMC-85 filings
 - FMCSA proposes to remove the rule allowing loan and finance companies to serve as BMC-85 trustees.

F. FMCSA Broker/Carrier Vetting Procedures: *Is It Enough?*

- FMCSA requires that all carriers designate their principal place of business in addition to having a registered agent's address for service of process.
- FMCSA requires that a motor carrier may designate as its principal place of business only locations that contain offices of the motor carrier's senior-most management executives, management officials or employees responsible for the administration, management and oversight of safety operations and compliance with the FMCSRs and Hazardous Materials Regulations.
- A motor carrier may not designate the office of a consultant, service agent, or attorney as the motor carrier's principal place of business if the motor carrier is not engaged in operations related to the transportation of persons or property at that location.

- But while the FMCSA has these regulations, in practice, they are hard to enforce given the lack of staff at FMCSA charged with overseeing millions of entities.
- There are many instances where a carrier's listed physical address is a vacant lot, an office park, or some other location that may reveal they are not a bona fide operator.

G. Enforcement and Monitoring Techniques: *Stopping Fraud*

- Brokers and freight forwarders should verify carriers' physical addresses before engaging them.
- Check the carrier's experience. A carrier with several years in the business indicates stability and reliability.
- Ask for and review on-time performance. Quality/reliable carriers will usually provide this information upon request.
- Check references of the carrier.
- Review the FMCSA's CSA (compliance, safety, and accountability) program. The CSA program ranks carriers based on seven criteria:
 - Crashes
 - Unsafe driving,
 - Hours of service compliance
 - Maintenance
 - Alcohol/drug use
 - Hazmat compliance
 - Driver fitness
- Check carrier insurance certificates
- Check the carrier's authority
 - A carrier with broker authority may be a red flag
- Utilize third party resources such as watch dog reports or other monitoring systems that can provide real time information on carriers in an efficient manner

- Establish and maintain open lines of communication with your carriers. Relationships with those carriers are crucial.
- (Note that these fraud prevention techniques should be juxtaposed against any carrier qualification vetting processes that may be used, or not used, for vetting motor carriers safety and fitness to operate on the public highways.)

H. Current Regulatory Activity: *What Else is Being Done to Combat Fraud in the Supply Chain?*

- Reputable insurance firms have estimated that the plague of double brokering is costing the transportation industry, at a minimum, over \$100M annually.
- Online freight marketplace Truckstop.com said complaints about fraud, including double brokering, jumped 400% in the fourth quarter of 2022 into Q1 2023 from the same period the year before to the highest level since the company began tracking reports in 2004. *Wall Street Journal*, Growing Freight Fraud is Peeling Millions from the U.S. Shipping Market, April 26, 2023

1. FMCSA Fraud Reporting System

- There have been about 80,000 complaints logged with the FMCSA national consumer database since 2010.
 - It is estimated that the FMCSA has only investigated hundreds of these complaints due to constrained resources and lack of manpower.
- Protect your DOT PIN. Check SAFER frequently (bi-weekly at a minimum) to ensure critical information has not changed. Unauthorized changes can signal fraud or stolen identity.
- Report double-brokering issues and file complaints directly to the USDOT's Office of the Inspector ("OIG") General Hotline or online.
 - This is an option, but it is reported that while there were roughly 3,500 (if not many more) supply chain schemes conducted last year, the OIG conducted only 13 investigations involving double brokering with two convictions over the last few years.
- There is no evidence that the FBI or any other governmental agency is a viable alternative given that out of the nine areas of investigation on the FBI's website, transportation or fraud in the transportation system is not among them.

2. Vetting of Brokers and Carriers?

- CFR Part 385 – FMCSA’s procedures to determine the safety fitness of motor carriers.
 - CFR Part 371 – FMCSA’s regulations involving brokers of transportation by motor vehicle.
 - The general requirements that brokers must comply with can be summed up as an obligation to keep records of transactions, avoid misrepresentation, not charge carriers in specific instances, and correctly account for their revenues and expenses.
 - Given the sheer number of carriers and brokers, FMCSA oversight of broker or carrier record compliance is minimal.
 - This reinforces the recommendation that diligence needs to be completed at the business level.
3. Electronic Registration/Electronic Safety Inspection
- USDOT Volpe Center//CVSA Electronic Registration Proposal
 - The U.S. DOT Volpe Center is supporting FMCSA in developing and implementing the Level VIII Inspection Program Operational Test, which will apply new technologies to improve the efficiency and effectiveness of roadside enforcement while mitigating the current process’s climate impacts and minimizing supply chain disruptions.
 - Among Level VIII inspection’s potential benefits are a tenfold increase in the total number of vehicle inspection data collected annually, while enabling better decisions about which carriers to prioritize for inspection.
 - This type of system could alleviate the problem of bad actors by increasing inspections that would not overly burden reputable motor carriers of any size. This type of “net” could intercept carriers authorizing without requisite authority or paperwork and cut down on the number of fraudsters. However, this is not a viable solution right now because this is a multi-year effort that will continue through at least May 2024.

I. Conclusion

- Ultimately, until mass electronic surveillance and/or mass enforcement effort of FMCSA regulations and federal law is undertaken by the federal government, the best defense against

double-brokering is detailed and diligent employees and constant evaluation of internal processes to utilize reputable carriers.