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Broker Liability and Leasing – Is Your Agreement Bulletproof?

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CONTROL OF MOTOR CARRIER

“Plaintiff’s transportation expert, Professor Carl Berkowitz, testified that Alliance and Dakota’s subcontracting restriction was different from the rest of the shipping industry at large. He also testified that carriers like Dakota were typically required to have insurance, but they usually were not required to indemnify other companies. Berkowitz based his opinion regarding the relationship between Dakota and Alliance on the contract requirements regarding insurance/indemnity provisions, the limitations on Dakota’s solicitation of Alliance’s customers and employees, the nondelegation of Dakota’s duties and obligations under the contract, and Alliance’s instructions regarding pickups and drops, seal integrity, rate changes, and accessorial charges. He opined that Alliance had “serious control, almost complete control [over Dakota], because [Alliance] laid out exactly what they want[ed] Dakota to do, and if Dakota didn’t do it, [Alliance] had the option of not using Dakota in the future.”

Cornejo v. Dakota Lines, Inc., 229 N.E.3d 546 (Ill. Ct. App. Sept. 27, 2023)

Background

Brokers are unique to the transportation industry. They do not operate trucks or employ drivers but play a role in the shipment of a variety of commodities. Brokers engaged in interstate commerce are regulated by FMCSA and are subject to several Federal statutes and regulations, in particular 49 CFR §371. Brokers are required to register with FMCSA, maintain process agents to accept legal service, and establish and maintain appropriate coverage for financial liability. Brokers also have administrative and financial recordkeeping requirements. Brokers are prohibited from misrepresenting themselves as motor carriers or as anything other than providers of brokerage services registered with FMCSA.

In response to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) and a petition by the American Moving and Storage Association (AMSA), the FMCSA amended §371 and other regulations. These amendments specify requirements for brokers of household goods, addressing consumer protection, financial liability coverage, and business practices. Additionally, in the future FMCSA will assign U.S. Department of Transportation (USDOT) numbers, in addition to Motor Carrier (MC) numbers, to all brokers to better identify them.

Small Entity Compliance Guide for Broker Operations, 49 CFR § 371 and Other Applicable Statutes (Jan. 31, 2012)

[small-entity-comp-guide-broker-operations-508.pdf](https://www.fhwa.dot.gov/ohrt/small-entity-comp-guide-broker-operations-508.pdf)

Overview of Broker Operations Regulated by FMCSA

A broker regulated by the USDOT is defined at 49 U.S.C. §13102(2):

BROKER - 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.

A broker is further defined in the Federal regulation at 49 CFR §371.2(a):

Broker – means 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 the 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.

As a 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, at 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.

There are two classifications of regulated brokers: property or freight brokers and household goods brokers. Each classification requires a specific registration or authority.

A property broker may arrange transportation of a variety of regulated commodities *other* than household goods. Property brokers may arrange transportation for commodities such as automobiles, electronics, or machinery.

Small Entity Compliance Guide for Broker Operations, 49 CFR § 371 and Other Applicable Statutes (Jan. 31, 2012)

[small-entity-comp-guide-broker-operations-508.pdf](#)

Interacting with Other Transportation Operations

When doing business as a broker, you will work with other transportation operations that may or may not be subject to FMCSA's regulations, such as motor carriers, *bona fide* agents, and freight forwarders.

Motor carriers make brokering possible and are defined by regulation at 49 CFR §390.5 as:

Motor Carrier means a for hire motor carrier or 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, C.F.R.), this definition includes the terms employer and exempt motor carrier.

There are several types of motor carriers; some are not regulated by FMCSA. With a few exceptions, intrastate motor carriers which operate only within the boundaries of a single state usually do not fall within the jurisdiction of FMCSA. Some hazardous materials motor carriers, depending on the hazardous materials transported, are subject to FMCSA regulations even if they only operate within the boundaries of one state. Private property motor carriers (or private motor carriers) with trucking operations that are incidental to other businesses, are subject to FMCSA safety regulations but usually do not require operating authority. A truck that is operated by a retailer to deliver its products to its consumers is an example of private property motor carriage.

Small Entity Compliance Guide for Broker Operations, 49 CFR § 371 and Other Applicable Statutes (Jan. 31, 2012)

[small-entity-comp-guide-broker-operations-508.pdf](#)

Understanding and Avoiding Misrepresentation, Compliance with Regulation, 49 CFR §371.7

When working as a broker, you may not do business, including advertise, in any name other than the name stated on your registration or operating authority. If you prefer to present yourself to potential shippers using a "doing business as" or "dba" name, then you must have your broker authority in that name. The name you register your brokerage with must be the name you present in your advertising.

You must be careful not to represent the operation of your business as that of a motor carrier. You must be clear that you provide services as a broker, not as a motor carrier. If you operate a Web site, then you must display on that Web site the name as stated on your broker registration, your MC docket number, and a statement that you are a broker.

For hire motor carriers that 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 requirement to obtain operating authority. There are exceptions, including, but not limited to, motor carriers that are agents for other motor carriers, and motor carriers that are leased to other motor carriers. Both agents and leased operations act under the authority of the motor carriers that employ them. As long as they are subordinate and are operating under the authority of other motor carriers, they are not required to have independent operating authority.

As a broker, you work with for hire property and/or household goods motor carriers, depending on your authority. As a broker, you are required to arrange transportation using *authorized* motor carriers. You may not arrange transportation with a motor carrier that does not have the appropriate operating authority granted by FMCSA. Remember, if you have authority as a property or freight broker, then you can only arrange transportation for motor carriers that have valid property motor carrier authority. If you have authority as a household goods broker, then you can only arrange transportation for motor carriers that have valid household goods motor carrier authority.

Bona fide agents appear similar to brokers and leased motor carriers in operation but are defined by regulation at 49 CFR §371.2(b) as:

Bona fide agents – are persons who are part of the normal organization of a motor carrier and perform duties under the carrier’s directions pursuant to a preexisting agreement that provides for a continuing relationship, precluding the exercise of discretion on the part of the agent in allocating traffic between the carrier and others.

A *bona fide* agent is an extension of the motor carrier. It has a preexisting written agreement with the motor carrier, and it is considered to act on behalf of that motor carrier. A *bona fide* agent works for its motor carrier and transports or otherwise handles shipments under its motor carrier’s operating authority.

The relationship between motor carriers and bona fide agents may appear similar to the relationship between motor carriers and brokers. Brokers, although they have business relationships with motor carriers consummated with written agreements, are independent of the motor carriers. There may come a time when you are arranging transportation for a motor carrier, but the shipment is transported by one of its *bona fide* agents. If shipments that you arrange as a broker are transported by *bona fide* agents, then the identity of the motor carrier for whom they are working must be clear, and the motor carrier must have valid authority.