Do it Right: Work with Other Delivery Companies

DO IT RIGHT: WORK WITH OTHER DELIVERY COMPANIES

You can call it brokering, forwarding, interlining, networking, agent hand-offs, or some term we haven't heard of yet. In fact, the federal government just released guidance on the difference between being a freight broker and a freight agent that is far from simple and clear. The transportation industry is full of companies doing this kind of work, from those who specialize in it to delivery companies that want to offer one-stop-shop service to customers and take on jobs that they have to farm out to others. Here's the thing: If you're not doing it right, then you are taking on much more risk than you might realize.

Tendering freight to another carrier without proper authority from the FMCSA (Federal Motor Carrier Safety Administration) is punishable by up to a $10,000 dollar fine PER shipment, and business owners may be personally liable for the fine while possibly facing a civil lawsuit for damages for the unauthorized activity. Compare that to your revenues from this work. And be advised, the government has set up a website and hotline where shippers (and competitors) can report alleged wrong doing.

If Risk Strategies is not aware of the full scope of what you are doing, your insurance may not cover you fully or at all. Even if coverage applies, if your operations take your underwriters by surprise you could find yourself denied insurance at renewal and having to pay more for substitute coverage.

Now for the good news; Doing things right is pretty straightforward if you have good sources of advice. Simply make a resolution to take care of the issues and you'll soon be back in the fast lane profiting from all these different services.

Let's Start with the Need for Proper Operating Authority from the FMCSA

If you're a pure freight broker/ forwarder or that's your primary business then you should know the score already. If you are primarily a motor carrier that delivers stuff, but you use other delivery companies to take care of customers outside of your normal territory, or to handle overflow, or special types of jobs, then you may be engaging in federally regulated logistics work and require another type of FMCSA authority besides Motor Carrier authority to avoid the penalties described above.

How can you tell if you're coming under the federal logistics regulations? We consulted with Greg Feary, partner at Scopelitis, Garvin, Light, Hanson, & Feary – a leading national Transportation law firm we turn to frequently for expert advice. The following is our layperson's understanding of the matter, so we urge you to consult with a qualified transportation attorney or consultant on your specifics. Risk Strategies can refer you to Feary and others at his firm, or other specialists depending on your needs and circumstances.

Under Whose Authority is the Shipment Moving?

If you are sub-contracting work to IC drivers who do not have their own authority or who are not using it, and who are instead leased to you and operating under the motor carrier authority you should possess for interstate commerce, then typically you would be acting as a motor carrier with no additional logistics authorization requirements. If, however, you are tendering shipments to another carrier who operates under their own authority, then you may be stepping outside the motor carrier role.

Are Shipments Technically "Interstate"?

Transportation is construed to be interstate in many situations beyond simply taking goods across state lines. If you agree to transport goods within your state, but the goods originated out of state, or are destined to be moved out of state after you complete your portion, then your move could be considered interstate transportation. Even moving cargo to or from a warehouse in your state, where earlier or later it moved across state lines, could involve you in interstate commerce and subject to the federal regulations.

Do Exceptions Apply, Like Interlining, Customs, or Free Trade Zones?

Work that would normally trigger federal regulation won't do so if certain exceptions apply. For example, interlining, where shipments are transferred among two or more carriers in the course of one movement, is exempt if both carriers actually physically move the cargo. Typically, if you transport the shipment part of the way yourself and then hand it off to another carrier, this would not require separate authority beyond that of a motor carrier. For more technical advice on the applicability of this and other exceptions, you should consult a qualified transportation attorney or consultant.

It does not matter how small or large a percentage of your business falls under federal regulation. Any federally regulated logistics work requires that you have special authority. Misrepresenting that you are providing motor carrier service when you are actually tendering shipments to another carrier is a violation of federal law (under the MAP-21 provisions). Federal law provides general penalties in this regard.

Obtaining the Proper Federal Authority

The whole process may take 30 days or more and involves:

- **Submitting an application and proof of logistics expertise (and a fee) to the FMCSA**

  This can be done online on the agency's website, and many of our clients have accomplished this themselves. Also there are private services that can assist.

  A fee, and of course, qualified attorneys can assist as well with greater assurance of proper advice. Note that when applications are submitted online, your new authority typically will be issued using your existing MC and USDOT numbers, though FMCSA may issue separate numbers for different authorities.

- **Obtaining a $75,000 surety bond**

  Risk Strategies can usually quote this for you in one to two days, typically right before or while you apply for your authority. The bond generally applies when you fail to pay a motor carrier that does work for you. The cost of the bond is often under $2,000 per year and normally no collateral is required, though you should expect to give personal guarantees.

  The tricky question really is which type(s) of over the road logistics authority to obtain, because there are two sorts: Broker and Freight Forwarder. The website where you apply for authority contains the legal definition for each, but the definitions given are not necessarily clear enough to make it wise to decide on your own.

  Qualified legal counsel is recommended, but here are some key factors to consider:

  - **Liability**

    An entity doing business under a freight forwarder authority is responsible for loss or damage to its shipments by default in the same manner as a motor carrier. It can contractually limit (reduce) its liability. An entity doing business as a broker has no liability for freight by default, though it could contractually agree to assume additional liability. While brokering may sound better (less liability), consider the customers who entrust their deliveries to you. Will they be satisfied when something goes wrong and you simply point them in the direction of another carrier they barely realized was involved?

  - **Visibility**

    Freight forwarders typically utilize their own bill of lading for the entire shipment so customers don't necessarily see documentation identifying the other carriers involved. They also bill the shipper, then pay the carriers so again the forwarder is the visible vendor. Brokers utilize bills of lading from the carriers they selected to handle the shipment and often those carriers bill the shipper directly. Generally, when brokering, all parties providing services may be visible to the customer.

Obtaining the Proper Federal Authority (continued)

- **Scope of Services**

  Traditionally, freight forwarders offer services beyond transportation, including consolidation and deconsolidation of freight at their own (and others') facilities, assembly of product, etc., while brokers focus on transportation of shipments from here to there. While this may not be a requirement for forwarder authority, customers may have expectations that should be considered when dealing with an authorized forwarder.

  Regardless of which authority you choose – or if you obtain both – you will need to familiarize yourself with some additional rules and regulations. For example, you need to properly communicate to customers which authority you are using to handle their business, and you should run logistics and motor carrier operations separately. This may mean separate business entities or just separate divisions, with each approach having its own pros and cons. Again, the advice of a qualified attorney or consultant is highly advisable, and Risk Strategies can help connect with the Scopelitis team or an alternate source of counsel.

Consider the Business Insurance Risks of Tendering Transportation Work to Other Carriers

Many customers will want to see evidence of coverage, but a mere certificate of insurance will not shed much light on whether your policies actually protect you and your customers in situations where you are not acting as a motor carrier. If your insurance comes up short after a loss, no one is going to be happy.

What Kinds of Insurance Do You Need?

You can always get dragged into lawsuits relating to an auto accident or other type of loss because you are part of the chain of parties involved. Auto liability and general liability insurances can handle such claims smoothly provided that you've been up-front with your underwriters about what you do and the policies have been issued to cover your needs.

Obviously, another chief concern would be the value of the cargo should something happen to it in transit. Cargo insurance, supplemented as necessary by warehouse insurance, can take care of this. As with liability insurance, full disclosure of your operations to the underwriter is critical.

You may also face allegations that you were negligent in selecting/hiring/entrusting another carrier with the property or that your failure to adequately arrange for delivery led to financial losses beyond simply the value of the cargo. Errors and omissions liability insurance (also called professional liability insurance) would be the type to respond to these kinds of claims, both to pay for your legal defense and any damages above and beyond the value of the cargo. Be careful to review the policy's description of covered services before you buy to make sure it adequately covers all that you do.

Finally, there are insurances that make sense for virtually any type of business, including workers compensation, employment practices liability insurance, and property coverage (including sufficient coverage to pay for extra expenses you'd incur to avoid interruption of your business if a calamity struck and took out your offices).

There are Two Basic Approaches to Getting Your Broker/Forwarder Operations Properly Insured

The first is using specialized policies with names like “contingent cargo” or “broker liability.” These non-standard types of policies tend to contain many more restrictions and conditions that could leave you without protection against a claim. Happily, such policies are often not necessary. Odds are we can obtain broader insurance coverage for you using a much simpler approach.

You see, the best quality standard forms of cargo and liability insurance do protect you for various kinds of transportation services, including motor carrier, brokering, and forwarding.

Because many businesses wind up doing multiple kinds of work, these broad, standard policy forms are the way to go. The trick is:

- Underwriting: Making insurance companies comfortable quoting these policy forms to you.
- Pricing: Getting your rates to match the mix of services you provide.

Application Information

Picture yourself wanting to bet on a sports game, only the names of the teams and players are missing so many letters that it’s difficult to know who you’d be betting on and which players would be starting vs injured. How much money would you be willing to put up, or would you simply take a pass? That’s the position you’re putting underwriters in with a sketchy application. Even if you are just expanding into or dabbling with forwarding/brokering, underwriters will want a complete roster of your partners, procedures, and practices.

The level of detail on your application will also impact your cost. Say the rate for logistics work is lower than for motor carrier work. Underwriters will assume there’s more of the higher-rated motor carrier work unless you clearly show how much of each you do. You should back that up with enough operational information to create confidence in the accuracy of your numbers.

Carrier Selection

If you choose your carriers with care, you can use them to increase the comfort level of your underwriters and save. After all, when it comes to logistics services, the only control you have is when you decide whom to entrust your customers.

- Check references and don't be shy about asking for detailed information about a carrier's practices, like their own driver hiring standards.
- You may have them complete a questionnaire like the relevant sections of our insurance application.
- Obtain certificates of insurance showing your carriers cover all the bases you are looking to insure. Let Risk Strategies be your double-check on the adequacy of these certs.
- Be sure to request and review the USDOT Safety Measurement System (SMS) rating of your carriers, including any BASIC alerts or open investigations
- You have to know that your underwriters will do this. You should be prepared to justify your choice of carriers if there are issues.
- While you're at it, check out your own SMS profile since this is accessible both to underwriters and your own customers.

Contract Quality

It should go without saying that when operating as a forwarder or broker, a proper contract between you and the carrier(s) you utilize is important. Otherwise, who will be responsible for what?

Risk Strategies can share some sample language and specimen forms, but we strongly advise you to use documents that have been drafted with your needs and jurisdiction(s) in mind by a qualified transportation attorney. Your customer agreements also deserve careful consideration as they can affect how much liability you take on. Of course, insurance underwriters value quality contracts highly since they will likely have to pay to sort out the mess if things are not set up well.

Because of the new higher -- and personal -- penalties for conducting unauthorized logistics services (forwarding/brokering cargo), companies cannot afford to do this kind of work on the side without taking the necessary steps to operate legally. For most, this will involve a call to a Risk Strategies representative to obtain a bond. At the same time, you would be wise to have us check that your insurance is set up to protect you for this kind of work, and that your insurance rates fairly reflect your mix of work so you're not over-charged. Undoubtedly, some who do very little beyond straight motor carrier work will choose to step aside and refer their occasional opportunities to others and Risk Strategies can help you find a quality partner for this and introduce you to other specialists who can help you in their areas of expertise. For sure there is work to be done, but this is not rocket science. Many of our clients, large and small, have succeeded in doing this right, and you can, too.

About the Authors

This article originally appeared in *Courier Magazine*.

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