BY HENRY SEATON

UNINTENDED CONSEQUENCES

Fighting Fraud in Transportation Legislation

After deregulation, every motor carrier was granted nationwide interstate authority. In order to provide service to their customer, carriers large or small, need to be able to put wheels on the ground on 24 hours notice at any origin in the U.S. and to provide truckload service to any other point regardless of established back haul.

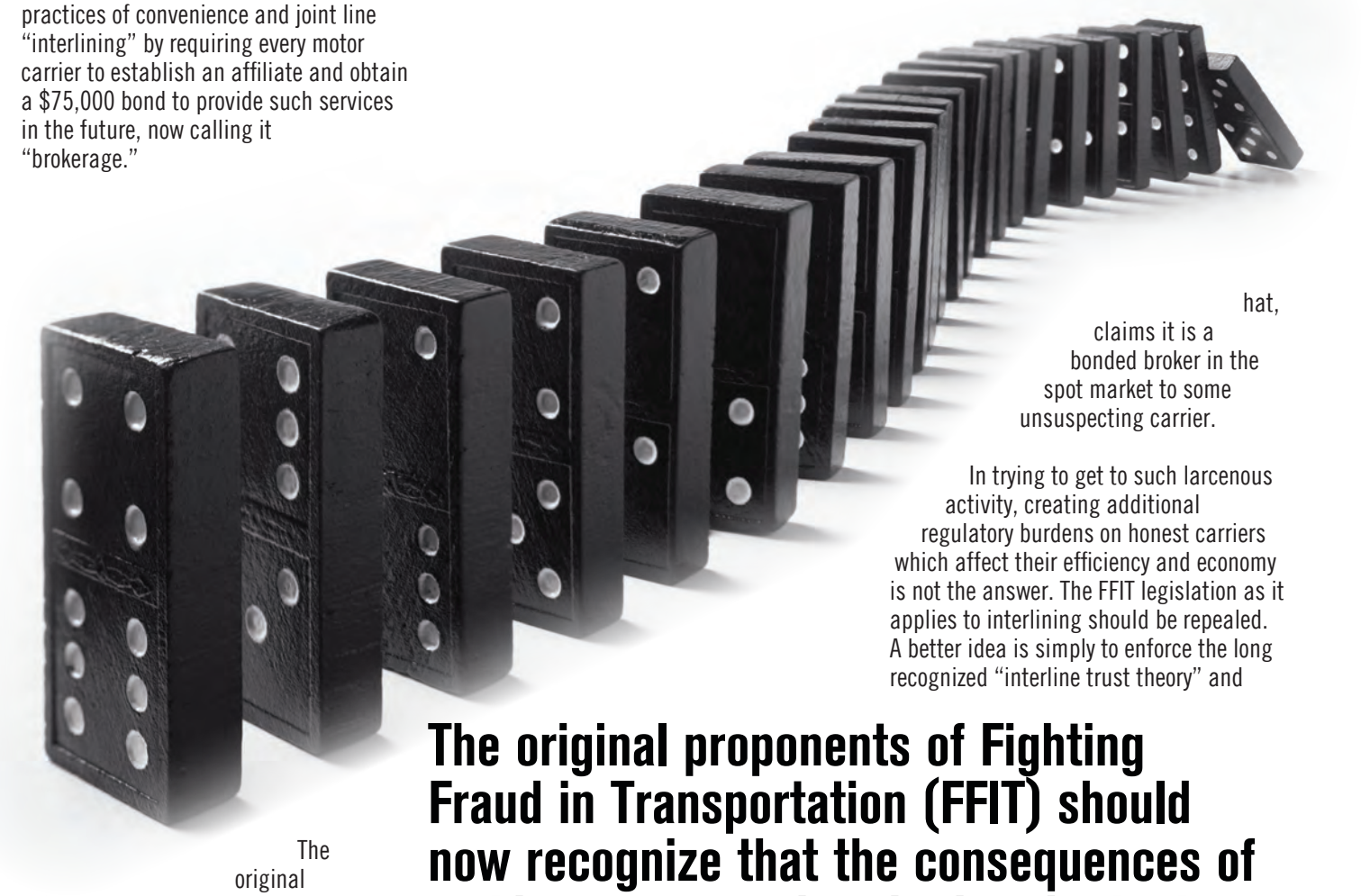
To do this economically and efficiently, all carriers, and small carriers in particular, must augment their fleets by obtaining excess capacity from other licensed, authorized and insured carriers in order to provide all or part of the service the originating carrier has agreed to provide. Since the passage of the Motor Carrier Act in 1938, carriers have been able to provide such subcontracted service (called convenience and joint line interlining) as part of the definition of motor carrier service by contract or by executing a bill of lading as the origin carrier and accepting cargo liability for the through service. The definition of brokerage service in 49 U.S.C. 203(a)(1) of the original Act as interpreted by the ICC in Practices of Property Brokers, Ex Parte MC 39, 53 MCC 633 (1951), expressly confirmed that without obtaining a broker's license an authorized carrier could retain another carrier to actually provide service for it either in whole or in part.

This precedent was affirmed 30 years later by the Fifth Circuit in Global Van Lines, Inc. v. Interstate Commerce Com., 691 F.2d 773 (5th Cir. 1982). Both the statutory and regulatory definition of brokers handed down until MAP-21 expressly defined a broker as any party "other than a carrier or carrier agent" who arranges for transportation Moreover, the Carmack Amendment governing cargo claims expressly provides for originating carriers to utilize other carriers, accept cargo liability, pay claims and seek indemnity from the carrier in actual possession of the goods at the time of the loss. See 49 U.S.C. 14706(b).

Thus, the services carriers can render traditionally have been dependent upon their ability not only to provide service and equipment which they own and operate, but also the unfettered ability to work with other authorized carriers to provide

services in whole or in part which they have contractually obligated themselves to provide.

MAP-21 makes hash of the well accepted practices of convenience and joint line "interlining" by requiring every motor carrier to establish an affiliate and obtain a $75,000 bond to provide such services in the future, now calling it "brokerage."



The original proponents of Fighting Fraud in Transportation (FFIT) should now recognize that the consequences of making every carrier obtain a broker's license and bond outweighs any benefit.

In attempting to solve the problem of crooked intermediaries who fail to pay the actual carrier for the services provided, the authors of the FFIT legislation created a bigger problem for industry than they solved. When FFIT becomes effective, many carriers will have to discontinue flexibility of augmenting their fleets to serve carriers' immediate needs or be involved in excessive expense and red tape in setting up a brokerage affiliate to merely do what they have done for more than 65 years. There may be as many as 50,000 new applications to be filed, representing a bonding burden of as much as $3.7 billion on industry, as well as an unfunded mandate on federal regulators to process in a short timeframe new regulations, fitness standards and applications for brokers, periodic re-evaluation of fitness and re-regulation unheard of in 35 years.

In this respect, MAP-21 and Section 32915, in particular, redefining a large part of motor carrier service as brokerage is a bad idea which needs to be reversed. More than 30 state trucking associations, at least two councils of ATA as well as NASTC, AEMCA, TEANA and AHAA now recognize the impact of MAP-21 and are collectively seeking congressional reconsideration. Clearly, one carrier can fail to pay another carrier for services it contracts to provide, but the source of the misfeasance which caused the FFIT legislation is "double brokerage" i.e., when an entity represents itself as a carrier to a shipper in the spot market then, wearing another hat, claims it is a bonded broker in the spot market to some unsuspecting carrier.

In trying to get to such larcenous activity, creating additional regulatory burdens on honest carriers which affect their efficiency and economy is not the answer. The FFIT legislation as it applies to interlining should be repealed. A better idea is simply to enforce the long recognized "interline trust theory" and require any carrier who hires another carrier to receive freight charges in trust and pay the freight charges to the performing carrier upon receipt, without comingling or diversion. Now, that's an idea which could be adopted into law and used by industry to fight fraud under the self-help provisions of 49 U.S.C. 14704, without any regulatory burden.

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