

How to Effectively Contract for Excess Capacity and Reduce Risk

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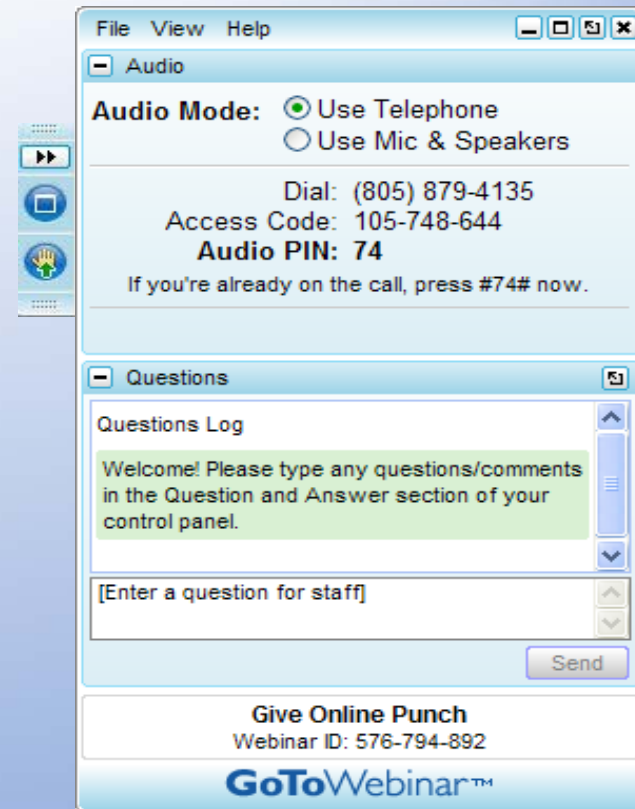


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Henry E. Seaton is a graduate of Duke University (A.B. '70) and Vanderbilt School of Law (J.D. '70). He has practiced law for 40 years in the Washington D.C. area representing motor carriers, brokers and forwarders. He is a member of the Vienna, Virginia based law firm of Seaton & Husk, L.P. The firm specializes in freight claims, freight charge collection, contracting issues, carrier representation before the FMCSA and bankruptcy issues.

Mr. Seaton serves on the Editorial Board for Overdrive Magazine; the Editorial Board for the Airforwarders Association Quarterly Magazine; and is a Contributing Columnist for Internet Truckstop Magazine. He is the author of Protecting Motor Carrier Interests in Contracts (Randall Publishing 2002) and authored a chapter entitled "Contracting, Negotiations and Legal Issues in Transportation" in The Business of Transportation (Praeger Publishers, 2013); From 1995 to 2011, Mr. Seaton was a Contributing Columnist for the Commercial Carrier Journal. He serves as Counsel for the National Association of Small Trucking Companies (NASTC), the Air & Expedited Motor Carriers Association (AEMCA), The Expedite Alliance of North America (TEANA) and the Auto Haulers Association of America (AHAA).

Mr. Seaton is a member of the Conference of Freight Counsel and is Vice President of Delta Nu Alpha. He also serves as Co-Chair of the Transportation Lawyers Association Federal Regulatory Practice Committee and is a frequent speaker and lecturer regarding cargo claims, freight charges, contracting and risk/insurance issues affecting carriers and brokers.

In 2014, Mr. Seaton was awarded the *Lifetime Achievement Award* from the Transportation Lawyers Association. For more information visit www.transportationlaw.net.

Winds Of Change Affecting Capacity



- Driver shortage.
- Hours of service hamstrings productivity.
- Cost of new equipment limits capacity and drives up cost.
- Yet, the demand for additional equipment is increasing.
- Shippers expect carriers to meet fluctuating seasonal demands, particularly for truckload shipments.

Regulatory and Legal Obstacles to Tendering Excess Capacity



- Owner-Operator model under attack.
- Independent contractors offer needed flexibility to asset based carriers.
- Provide motivated independent contractors who manage their own assets.

Owner-Operator model under attack at federal and state level:



- Independent contractor treatment for federal and state tax purposes is under great stress:
 - One size does not fit all
 - Subject to continued regulation – three recent California decisions
- Pro labor legislation pending in over 2 dozen states
- The control conundrum:
 - 20 part test
 - ABC test
 - Safe harbor
- An alternative hedge is needed



MAP-21

- No good deed goes unpunished – intended to treat double payment problem.
- Eliminates convenience interlining, restricting carrier flexibility to hire other carriers to provide all or part of contracted service.

Contractual Impediments to Outsourcing

- Shippers are frightened by SMS methodology and insist on carrier provided equipment.
- Shippers insist contracting party be “Transportation Service Provider” accepting liability for cargo loss or damage.
- If carrier gets its name on the bill of lading when outsourcing freight to others, it assumes increased risk of:
 - Vicarious liability - *Serna v. Pettey Leach Trucking, Inc.*
 - Theft
 - Direct cargo liability
- Note: MAP-21 requires the carrier to identify when acting as an intermediary.
- Yet clearly, carriers need access to outsourced equipment to meet their changing contractual obligations to shippers.

Two Types of Intermediaries are MAP-21 Bond Compliant and Could be Used to Outsource Additional Capacity

PROPERTY BROKERS Arrangers of Transportation	FREIGHT FORWARDERS Transportation Service Providers
Do not issue bills of lading	Issue freight forwarder bill of lading
Do not accept cargo liability	Accept, yet can limit cargo liability
Have constructive trust obligations for freight charges, but often guarantee payment	Same
\$75,000 bond requirement	Same
Typically do not adjust cargo claims but are subject to offset	Adjust cargo claims, have right of indemnity under statute
Frequently buy contingent cargo insurance	Purchase primary cargo insurance
Select and retain contracted motor carriers pursuant to contract	Select and retain licensed, authorized and insured carriers pursuant to contract/concurrence

Comparative Analysis of Obtaining Excess Capacity through Freight Forwarder Affiliate versus Property Broker Affiliate

- Shipper satisfaction / shippers want to contract with “Transportation Service Provider” not a mere “arranger.”
- Freight forwarder can sign a contract addendum to its affiliated carrier’s contract with shipper assuming responsibility for timely and intact delivery of cargo and adjustment of claims.
- Freight forwarder status eliminates shipper’s problem with unresolved cargo claims by broker’s retained subcontracted carrier.
- Freight forwarders can obtain primary cargo coverage and establish limits of liability by issuing bills of lading which easily apply downstream.
- Acting as freight forwarder, carrier affiliate can meet shipper’s requirements while avoiding the overreaching control issues which have established bad precedent for property brokers.

Advantage of Alternative Freight Forwarder Model

- Freight forwarder can retain subcontracted carriers on a load-by-load basis without assuming safety compliance responsibilities which accompany owner-operator model.
- Freight Forwarder hiring independently licensed and insured carrier can meet control test and ABC test without misclassification problems/can readily confirm subcontracted carrier is properly licensed, insured and certified to operate by FMCSA.
- Non-back solicitation provisions offer protection against poaching and issuance of freight forwarder bill of lading can clearly identify limits of liability for cargo and identity of pickup carrier, eliminating theft.



Voluntary cargo claims arbitration in Forwarder-Shipper and Forwarder-Carrier Agreements allows for a simplified resolution and results in binding decision which gives freight forwarders statutory indemnity plus fees against recalcitrant carriers and their insurers.



- Forwarder-Carrier Agreement can contemplate power only and semi-dedicated moves.
- Motor carrier with freight forwarder affiliate should have reasonably priced cargo, contingent auto and excess coverage options not available to non-asset based, stand-alone brokers.
- Contracting simplicity – less wordsmithing.



How to Implement Freight Forwarder Strategy to Outsource Freight

- Obtain freight forwarder authority in name of affiliated carrier and obtain bond while simplified application procedures are in place.
- Establish freight forwarder affiliate and description of freight forwarding service terms and conditions on website.
- Provide for inclusion of freight forwarder reference and issue of freight forwarder BOL on load confirmation sheet.

- Incorporate into standard shipper-carrier contract and shipper generated carrier contracts the following or similar language:

“For operating convenience and to fulfill shipper’s transportation needs with notice at time of booking, services may be rendered by _____ (Freight Forwarder), Docket No. FF-_____, carrier’s affiliate. Freight Forwarder warrants that it will be solely responsible for retaining and paying independent motor carriers which are properly licensed, authorized and insured to provide service. Freight Forwarder will issue its Bill of Lading identifying the origin carrier and shall be responsible for the handling and payment of all cargo claims in accordance with the contract terms set forth herein.”

- The above language is MAP-21 compliant and has been used by numerous motor carrier clients to establish partnerships with small carriers in search of dependable back hauls from credible logistics partners.



Question & Answer Session



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