LAW OFFICES OF SEATON & HUSK, LP

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The Law Office of Seaton & Husk, L.P. is a commercial litigation firm specializing in the collection of freight charges, cargo loss and damage claims, bankruptcy and related litigation. The firm also maintains a concentration in the formation and review of logistics contracts. Attention is placed on serving the trucking industry in both federal and state licensing and regulatory compliance.

This newsletter is provided free of charge to our clients and patrons. It will contain topical articles of interest, including reprints of "Sound Law," a monthly column authored by Henry Seaton and appearing in *Commercial Carrier Journal* (previously *Trucking Co. Magazine).*

In this Issue:

RECENT DEVELOPMENTS IN FEDERAL REGULATIONS

I. FMCSA Proposes to End Broker and Freight Forwarder Regulations

The FMCSA has proposed the Congress eliminate the provision of the Act which requires the regulation of property brokers and freight forwarders. (See Article below entitled, "Keep It Clean.")

II. UNCITRAL

U.S. Proposes to Enter an International Treaty which will change intermodal transportation with respect to "COGSA." Now intermodal draymen handle ex water moves pursuant to surface transportation law and contracts they negotiate with the steamship lines. One Uncitral proposal would provide a "door-to-door regime." Motor carriers have been slow to give input to the State Department and there are some who have lobbied for revised ocean rules to apply to cargo loss or damage for the inland drayage. This could be disastrous if the effect were to limit draymens' ability to establish their own limits of liability. Those of you providing intermodal service need to be actively concerned.

III. FDA Bioterrorism Proposal

The Federal Food and Drug Administration proposes to require extensive new recordkeeping on movement of perishable foodstuffs, including accurate counts and the name, address and location of all consignors, consignees, truck companies and intermediaries involved in the food chain. The Agency has no real world experience with the transportation of food-stuffs, particular produce, and does not recognize the mischief such a regulation will cause.

IV. Hours of Service Rules

The FMCSA's new rules were published on April 28, 2003 and unless further modified become effective on April 4, 2004. The rules certainly could have been worse. The new rules will allow truckers to drive for 11 hours, 1 hour longer than currently allowed, within a 14 hour period (3 hours allowed for other on-duty time). Carriers will be required to take 10 consecutive hours off duty. Some flexibility exists, though, because off duty time can be split into two periods, neither one of which may be less than 2 hours in length. Drivers will still have cumulative on duty time of 60 hours in 7 days, and 70 hours in 8 days, but there is a restart provision which allows a driver to begin a new 7 or 8 day cycle after 34 consecutive hours off duty. Finally, some of the flexibility afforded by logging "off duty/not driving" will now be lost. Unless you are using your 2 split sleeper berth times, you will not be allowed to save additional driving or working time in your 14 hour on duty block, although off duty time will still be considered available hours on the cumulative work week cycle.

PROTECTING MOTOR CARRIER INTERESTS IN CONTRACTS

Randall Publishing Company, the publishers of *Commercial Carrier Journal* and Overdrive Magazine has just published the 2nd Edition of Henry Seaton's book, Protecting Motor Carrier Interests in Contracts. The book deals with four agreements:

(a) contracts between carriers on the one hand and shippers and brokers;
(b) owner-operator agreements subject to federal regulation;
(c) insurance contracts; and
(d) Factoring agreements.

In Part 1, the author deals with bills of lading, carrier service conditions or rules circulars, and written shipper-carrier and broker-carrier agreements. In this section, carriers are shown how to establish standard operating procedures through use of the bill of lading contract and published service conditions which are incorporated by reference into the carrier's sales literature, load confirmation sheets, agreements, etc. Examples of spot market agreements and broker-carrier agreements are attached as appendices for use by carriers in initiating contract carrier agreements. Objectionable provisions which frequently appear in shipper and broker drafted agreements (the "Dirty Dozen") are discussed in detail.

In Part 2, the requirements of the Federal Truth in Leasing regulations (49 C.F.R. §376) are discussed *ad seriatim* as well as workman's compensation and IRS classification issues.

Part 3 focuses on cargo insurance policies, highlighting the pitfalls and standard exclusions such as theft from an unguarded lot, moisture damage, etc., which can create nasty surprises for the unwary.

Finally, in Part 4, objectionable provisions in factoring agreements are considered which can easily result in technical default, plus the assessment of draconian penalties.

To get your copy of "Protecting Motor Carrier Interests in Contracts," send your check for $30.00 made payable to "Henry E. Seaton" c/o Seaton & Husk, LP, 2240 Gallows Road, Vienna, VA 22182.

FALL CREDIT AND COLLECTION SEMINAR SCHEDULE ANNOUNCED!

In conjunction with CompuNet Credit Services, Seaton & Husk, L.P. and Transportation Revenue Management are pleased to announce the schedule for their Fall credit and collection seminars. The dates and cities are as follows:

September 23, 2003	Birmingham, AL*
October 7, 2003	Minneapolis, MN
October 8, 2003	Milwaukee, WI
October 21, 2003	Dallas, TX
October 22, 2003	Salt Lake City, UT

*In conjunction with McCloud Software seminar.

Further information on collection issues and the upcoming seminars can be found on the TRM web site at www.trmcollect.net.

ARTICLES

To follow are several recent articles by Henry Seaton appearing in Commercial Carrier Journal. Of particular interest is "Keeping It Clean" which deals with the increasingly significant issue of intermediary liability for bodily injury and personal property damage as well as cargo claims. Additional articles are available on our web site at www.transportationlaw.net

FEEDING ON THE VICTIMS

June 2003

Question:

We are a small carrier that extended extra credit to a home-town manufacturer during hard times. It paid us a chunk of its past-due freight bills right before it filed bankruptcy, and now its trustee wants us to give that money back. This does not seem fair. Is it the law?

Answer:

You are talking about a preference action brought by the trustee under Section 547 of the Bankruptcy Code. It''s an all-too-frequent occurrence. In theory, no unsecured creditors should get preferential treatment, so the trustee can demand that anyone who was paid within 90 days before the filing must return their payment so that the money, less administrative costs, can be redistributed more equitably under the bankruptcy guidelines. In practice, many trustees view preference actions as "easy money" and send demands out to every creditor for repayment.

Preference actions make good work for lawyers since some of our larger clients have been faced with six-figure demands. If you are the target of a preference action, you will receive a summons by ordinary mail requiring you to answer or appear in some distant bankruptcy court on short notice. If you ignore the summons, a judgment will be entered against you.

Defending against a preference action successfully will take some work and some legal talent because the burden of proof is on you. The two most frequent defenses are "ordinary course of business" and "new value."

The so-called ordinary course of business defense is a two-pronged test. A payment by the debtor within 90 days of bankruptcy is not a preference if it is (a) in the ordinary course of business and (b) in the ordinary course of your business transactions with the debtor. Since most payment of freight charges are ordinary course of business items, proving this defense usually boils down to an analysis of your payment terms and when the debtor paid its freight charges. Although there is no general rule, typically freight charges that are paid within less than 60 days are considered timely.

To satisfy the trustee, you will also have to show that during the 90-day preference period, the debtor paid you within the same time parameters as it did before the preference period. The analysis is fairly sophisticated, but in layman terms this means you must be able to show statistically that you did not, in fact, cut the debtor a break and extend more favorable terms to him when he fell on hard times. I know this is counter-intuitive and it seems like "no good deed goes unpunished," but this is how the bankruptcy law is applied.

The second defense is the new value defense that allows you to escape preference liability by giving up your claim for unpaid freight charges to the extent that those charges were incurred after you received the payment that the trustee claims is a preference. As a practical matter, motor carriers are most often generally unsecured creditors in bankruptcy proceedings, and giving up their claim, to the extent possible to avoid a preference action, is no loss. Small carriers in particular should recognize three things. First, if you haven''t yet been hit with a preference action, stay in business and you will get one. Second, when you get a demand or summons from a trustee demanding return of funds you worked long and hard to get, remember that you have defenses but that the unfairness of the Bankruptcy Code is not one of them. Third, you cannot afford to be a nice guy and let a shipper that has fallen on hard times slow its payments to you. The Bankruptcy Code forces you to demand continued on-time payments for fear that what you ultimately get you will not be able to keep.

THE SCOURGE OF DOUBLE BROKERING?
May 2003

Question:
I know a company that double brokers most of its loads and then when people find out, simply changes its name and address. Is this legal?

Answer:
Clearly, it is not "legal" for a company to commit fraud. It is larceny by fraud for one to take freight charges under the pretext that it provided the services and then to abscond with the proceeds, leaving the unwitting carrier, the shipper and the lead broker to sort out who will bear the risk of loss.

Moreover, the broker regulations and a prior opinion from the interpretations branch of the ICC suggest that double brokering, per se, is not contemplated by the regulations. A broker is one who arranges for transportation "by an authorized motor carrier." Brokerage services can be performed "on behalf of a motor carrier, a consignor or consignee" not on behalf of another broker. See 49 C.F.R. Sec. 371.2. A broker is required to keep records, showing the amount of freight charges it collected and "the date of payment to the carrier." See 49 C.F.R. Sec. 371.3.

The regulations, therefore, contemplate that a broker, when acting on behalf of the consignor or consignee, should retain and pay the actual carrier that provides the service. Most brokers require carriers they retain to warrant that (1) they are carriers and (2) service will be provided in equipment owned or leased to them. Any company that brokers a load in violation of such an expressed warranty has committed misrepresentation and a technical violation of the regulations that provide "a broker shall not directly or indirectly represent its operations to be that of a carrier." See 49 C.F.R. Sec. 371.7.

Unfortunately, in the real world, what is legal or proper often does not make much difference. Other than the cleansing light of public exposure, there is little to keep unscrupulous middlemen from setting up a succession of phony "carriers/brokers" and repeating the scam you describe with impunity.

Criminal prosecution is rare, if not unheard of. As a civil matter, the victims of the fraud -- the shippers, the lead brokers and the carriers -- themselves. Generally, no single party suffers enough to justify the legally arduous task of proving the fraud, piercing the corporate veil and finding enough of the ill-gotten gains to make a suit feasible.

But double brokering is far more than a nuisance. When shipments are unknowingly double brokered, both the proper payment of freight charges and the settlement of cargo claims are compromised.

When the alleged "carrier/broker" does not discharge its payment responsibility to the actual carrier who handled the shipment, that delivering carrier likely will demand payment of its freight charges from the consignor if bill-of-lading recourse permits. The lead broker, who may have paid the middleman in good faith, now must indemnify its customer and explain away what appears to be negligent entrustment.

An even worse situation occurs if the cargo is stolen or damaged in transit. Even if the lead broker got a valid certificate of insurance from the company with which it contracted, if the shipment was actually hauled by someone else, chances are that certificate of cargo coverage will be worthless. The customer surely will ask the lead broker a hard question: "Who hauled this shipment anyway, and is there any cargo insurance to pay my claim?"

How can legitimate carriers and brokers avoid the surprises of unapproved double brokering? Brokers should direct shippers to:

- Execute Section 7 showing a third-party billing.
- Clearly indicate that the carrier should send the freight bill to the lead broker (without recourse).
- Call the broker at once if the pickup unit does not bear the logo of the carrier with whom you contract.
- Make sure the bill of lading contract clearly identifies the actual carrier who took physical possession and control of the goods.

Carriers are just as interested as brokers in proper completion of the bill of lading and should instruct their drivers to look carefully at the bill of lading at time of pickup. If the shipment is tendered without recourse to the consignor, or if there are third-party billing instructions to an intermediary with whom the carrier has no contract, a driver should immediately notify his dispatcher. Instruct drivers to sign the bill of lading on behalf of the carrier for whom he works. Finally, when transmitting the proof of delivery, if there is any ambiguity, the actual carrier should use a "P.O.D. Certification" to make clear to the shipper and anyone else in the payment loop -- lead broker, factor, etc. -- that it was the party that actually provided the service under the bill of lading contract.

If carriers and brokers follow these procedures, the ugly surprises of double brokering could be avoided. If a given transaction requires convenience interlining or the use of multiple intermediaries, at least the parties can be properly identified and contractually protected from the outset.

NOTHING BUT THE ORIGINAL?

April 2003

Question:

As a carrier, we signed an agreement with a broker which required submission of an original proof of delivery (P.O.D.) in order to get paid. The original P.O.D. that we sent was apparently lost in the mail and now the broker refuses to pay us. Is this proper?

Answer:

I have seen a number of broker agreements that require the submission of an original proof of delivery as a prerequisite for payment. Some say this is because of a shipper requirement. Others say that the carrier cannot be trusted to provide an otherwise unaltered copy. Neither of these arguments is persuasive to me.

With EDI, imaging and electronic payment of freight charges, the digitizing of shipping documents is becoming the norm. Many shippers do not want original proofs of delivery. Increasingly, the large carriers are providing P.O.D.s only upon special request and for a charge.

The federal statutes governing motor carriers do not require the submission of an original proof of delivery as a prerequisite for payment. In fact, the regulations governing the payment of freight charges expressly contemplate "billing by the use of electronic media." See 49 C.F.R. Sec. 377.207. Carriers must preserve for one year their records regarding the movement of freight, including copies of bills of lading and other documents furnished to the carrier. But even these records can be preserved "by any technology that is immune to alteration, modification or erasure of the underlying data" and that can be reproduced on "an accurate and unadulterated paper copy." See 49 C.F.R. Sec.379.

Consistent with the intent of these regulations is the business record rule, which is an established evidentiary principle. It holds that in the absence of evidence to the contrary, a record kept in the ordinary course of one''s business will be admitted into evidence and given probative weight.Thus, even the most demanding shipper or broker should be reasonable and accept a faxed or imaged copy of a proof of delivery as adequate support for a carrier''s freight invoice. I advise carrier clients to use a P.O.D. stamp to provide a written certification on the face of any copy attesting to its authenticity. Certainly, this should be enough to satisfy the shipper or broker. Moreover, if the invoice or P.O.D. can be sent electronically or by fax, the carrier achieves two additional benefits. First, it has confirmation that the billing was actually received. Second, any delay in the billing process caused by slow mail is eliminated.

One final thought relates to the issue of whether a broker can arbitrarily deny payment because an original P.O.D. is not provided. I do not think so. If the broker has collected the freight charges for the shipment in question from its shipper, it has an obligation to discharge the shipper''s payment obligation by transmitting the proceeds to the carrier. It would violate the spirit and intent of the broker regulations to permit a broker to keep the carrier''s money and receive a windfall at the carrier''s expense when there was no issue about the services provided.

If, on the other hand, the shipper refuses to pay based upon a certified P.O.D., it should be up to the shipper to prove that the consignee never received the shipment and has accordingly refused to pay for the goods.

HIJACK OR LIEN?
March 2003

Question:
We are a property broker that booked a load with a small carrier from Atlanta to Florida. The carrier''s truck broke down and missed a job site delivery appointment. To make matters worse, the carrier then asserted his possessory lien and refused to deliver the shipment unless he got paid. The carrier insisted that money be wired to him before delivery, but by then we did not trust him with the money and the load. What should we have done in this situation?

Answer:
The situation you describe occurs all too frequently. Because of late-discovered credit problems or fear of contested setoffs, small carriers are increasingly asserting their possessory lien right to demand payment upon delivery.

Although broader liens may be available to the carrier by contract or under state lien laws, under the Bill of Lading Act and the Uniform Commercial Code (Section 7-307) the carrier has the lien on goods covered by a bill of lading for freight charges. The usual language in the accepted bills of lading confirms the carrier''s lien rights with language noting that "nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges."

A carrier has the right to demand payment of freight charges, or at least a guarantee of payment prior to delivery. But it loses its lien on goods that it unjustifiably refuses to deliver and can even become liable for the resulting harm it causes.

The actions of a carrier in asserting its lien may appear to the shipper or broker to be "holding freight hostage." But in the eyes of the carrier, the specter of nonpayment or unjustified setoff often appears to be "freight charges held hostage." Unless cool heads prevail, the resulting standoff can quickly turn a bad situation into one that''s much worse.
If the carrier has lawful possession of the shipment under a bill of lading and asserts its lien rights, the carrier''s retention of the goods is a civil -- not criminal -- matter.

Assertions of "hijack" are inflammatory and unrewarding. The carrier often does not trust the shipper or broker enough to deliver the load without insisting upon payment. And the shipper or broker does not trust the trucking company enough to wire it money and then hope delivery is made.

To keep situations of this sort from mushrooming into cargo claims for the full value of shipments, the shipper or broker should offer -- and the carrier should accept-- a reasonable guarantee of payment. Simultaneous exchange of freight charges for freight at point of delivery should be acceptable to both parties. Likewise, a simple escrow where an attorney or trusted third party holds the shipper or broker''s payment that it is authorized to release once delivery is complete, can be easily arranged.

If you are a carrier asserting your possessory lien, demand in writing payment at time of delivery or through a simple escrow. If you are a shipper or carrier on the receiving end of a carrier''s demands, offer in writing to satisfy the lien in one of these two ways.

Unfortunately, one side or the other -- and possibly both -- often will not listen to reason. The flow of commerce is interrupted. The carrier is left with a shipment it cannot easily salvage. And the broker is left with a cargo claim and a dispute that results in a lawsuit.

Remember, a carrier may have a lien for payment of freight charges, but it cannot require a waiver of the right to file a claim as a precondition of delivery. Documentary proof that the shipper or broker offered to satisfy the lien by escrow or payment upon delivery should be sufficient to hold the carrier liable for wrongful refusal to make delivery.

KEEP IT CLEAN
February 2003

Question:
What is a broker''s liability for the negligent acts or omissions of the carrier it retains?

Answer:
I have addressed this issue before, but the topic needs to be addressed again in light of two current cases. In my opinion, logistics firms are best served by acting in a simple broker capacity -- i.e., arranging for transportation for compensation and steering clear of accepting carrier duties and responsibilities.

The regulations prohibit property brokers from representing themselves as carriers in any way. When a property broker ignores these regulations by placing its name on the bill of lading as a carrier of record, or otherwise undertaking carrier duties, it opens the door to be named in lawsuits for third-party accidents and cargo claims.

Clearly, there are cases that go both ways, and how a logistics company structures its transaction can have huge consequences. For example, in Chubb v. H.A. Trans. Systems, the shipper''s assignee sued a property broker when the carrier it hired failed to have proper cargo insurance.

The Court held that H.A., which operated as a pure property broker, was not liable under federal transportation law for the cargo claim and had no duty to determine that the authorized carrier was fully or properly insured. If the broker had made written warranties in its shipper-broker contract, obviously the case would have gone the other way.

A more frightening recent decision was entered in a wrongful death lawsuit brought against C.H. Robinson in Madison County, Illinois. The plaintiff seized on the fact that Robinson allowed its name to be used on the bill of lading and otherwise represented itself on its website and elsewhere to be in a logistics "partnership" with the carriers it retained.

This blurring of the distinction between the role of the property broker and the role of the underlying carrier was sufficient to tag Robinson with joint and several liability. Robinson reportedly contributed $4.25 million to settle this suit.

Obviously, the case law is not well settled, and no one can predict with accuracy how a court will rule in any specific case. But plaintiffs'' lawyers clearly will attempt to sue every deep pocket involved in the chain of commerce when a horrific accident occurs.

In view of these two cases, an intermediary arranging for transportation for compensation should conduct operations as a property broker and carefully avoid any sales literature, contract language or bill of lading notation that could be used to argue that it was a de facto carrier or was in a joint venture with the carrier it retained.

RULES CIRCULARS

For help in constructing a truckload rules tariff, owner-operator contract, or long term logistics agreements, please contact us at 703-573-0700 or heseaton@aol.com.

FOR MORE INFORMATION...

Fill out the following form and fax, email to HESeaton@aol.com or mail to:

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Tel: 703-573-0700
Fax: 703-573-9786

Name: __________

Company Name: __________

Mailing Address: __________

Email: __________

Fax: __________

Please send me the following:

9 "Protecting Motor Carrier Interests in Contracts" ($30.00 including shipping/handling)

9 Information on rules circulars or service conditions

9 Collection services referral information

9 Information about specific topics, namely:

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Comments/Questions:

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Thank you!