

## Pitfalls of the top five load boards every trucker should know

One of the great unintended consequences of the 1980 Motor Carrier Act was the definition of a Freight Broker in Section 371.1. The definition of a freight broker allows legal dual agency status with all its pitfalls. Section 371.1 had four subsections:

(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.

(b) *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 which provides for a continuing relationship, precluding the exercise of discretion on the part of the agent in allocating traffic between the carrier and others.

(c) *Brokerage or brokerage service* is the arranging of transportation or the physical movement of a motor vehicle or of property. It can be performed on behalf of a motor carrier, consignor, or consignee.

(d) *Non-brokerage service* is all other service performed by a broker on behalf of a motor carrier, consignor, or consignee.

Section (a) specifically excludes a broker as a person who for compensation arranges, or offers to arrange, the transportation of property by an authorized motor carrier. By federal law Section (a) eliminates a transport motor carrier from the definition of a Freight Broker.

Section (b) defines a bona fide agent as persons who are part of the normal organization of a motor carrier and perform duties under the carrier's direction pursuant to a preexisting agreement which provides for a continuing relationship, precluding the exercise of discretion on the part of the agent in allocating traffic between the carrier and others. This section defines an exclusive agent that acts on behalf of a federally licensed motor carrier. This is not a Freight Broker agent. It is an exclusive seller agent for a transport carrier that has obedience, loyalty, disclosure, accountability, confidentially ethical, and legal agency characteristics.

Section (c) defines *Brokerage* or *brokerage service* as an arrangement of transportation or the physical movement of a motor vehicle or of property. It can be performed *on behalf of a motor carrier, consignor, or consignee.* Section (d) defines *Non-brokerage services* as all other service that can be performed by a broker *on behalf of a motor carrier, consignor, or consignee.*

These two sections of the law permit freight brokers to be what is referred to in various state laws as dual agents. Dual agency is illegal in real estate transactions in Alaska, Colorado, Florida, Kansas, Maryland, Oklahoma, Texas, and Vermont. To more fully understand dual agency let us examine the definition of each type of agency. Let's use the real estate agent in a real estate property transaction as an example.

**Seller's agent --** A seller can engage the services of a real estate agent to act as a seller's agent in the sale of the owner's property. The agent represents the seller as a client. The agent owes the seller client undivided obedience to lawful instruction, loyalty, disclosure, accountability, confidentiality, and reasonable care to the seller. The agent must put the seller's interest first and attempt to negotiate terms acceptable to their seller client. The agent must put the seller's interest first and attempt to negotiate terms acceptable to their seller client.

**Buyer's agent --** A buyer can engage the services of a real estate agent to act as a buyer's agent in the purchase of a property. The agent represents the buyer as a client. The agent owes the buyer client undivided loyalty, reasonable care, disclosure, obedience to lawful instruction, confidentiality and accountability. The agent must put the buyer's interest first and attempt to negotiate terms acceptable to their buyer client.

**Dual agency --** No buyer or seller has any proper representation when a real estate agent can practice dual agency. It is a LOSE-LOSE situation for both parties. At any negotiated price the seller or buyer could be overpaying or underpaying for the ultimate settlement price. Nobody has any guidance. One or both parties could be making a big mistake. In dual agency the only person making out is the WIN-WIN real estate dual agent.

Freight Brokers are dual agents when they are involved in arranging for and negotiating a per mile price for a "contract for carriage." Generally, freight brokers conduct reverse auction procurements on behalf of a single shipper (consignor/consignee), Buyer and multiple Seller transport carriers having the exclusive legal right to transport the load or shipment under federal law. However, the Freight Broker can perform the *arrangement for the contract for carriage* on behalf of both the Buyer and the Seller in a dual agency arrangement. The Freight Broker owes neither the BUYER or SELLERS undivided loyalty, reasonable care, full disclosure, obedience to lawful instruction, confidentiality, and accountability. The winner is only the Freight Broker netting the difference between what the shipper pays the broker for the *arrangement* of the contract for carriage and the amount paid by the Broker to the transport carrier for the actual

performance of the contract for carriage. It is a LOSE-LOSE situation for both parties. It is a WIN-WIN for the Freight Broker.

Following is a discussion of the top 10 pitfalls and unsavory business practices that have evolved since the passage of the 1980 Motor Carrier Act. They are the unintended consequences of dual agency allowing Freight Brokers to act on behalf of both a shipper consignor/consignee **BUYER** and a transport carrier **SELLER** of a contract for carriage.

**Pitfall #1 Loyalty:** In a dual agency arrangement, a Buyer of a contract for carriage and a Seller of a contract for carriage cannot think of any situation where it would be beneficial to have the same Freight Broker represent both the buyer and seller at the same time. How can the Freight Broker put the best interest of both parties to the transaction? A dual agent Freight Broker owes neither the buyer nor sellers undivided loyalty.

**Pitfall #2 Obedience to Instructions:** Once the bill of lading has been issued by a transport carrier the Freight Broker is substantially out of any obedience to either the buyer or seller of a contract for carriage. The Bill of Lading becomes the legal document and contract issued by a transport carrier that details the type, quantity, origin, and destination of the goods being carried. It is a document of title and a receipt of shipping goods with the terms and conditions between the transport carrier and a shipper.

The Bill of Lading controls the carriage. The Freight Broker's only obedience to the shipper is the legal arrangement of a transport carrier seller. The Freight Broker controls the transport carrier through the Broker/Carrier agreement signed before the load or shipment has been picked up from the buyer. Once a Freight Broker has legally arranged for a transport carrier, obtained a negotiated rate confirmation, and obtained a signed broker/carrier agreement from a Seller, the Freight Broker applies the compensation "markup" to the shipper's freight bill. A Freight Bill is then issued to the shipper after the Proof of Delivery (POD) has been received. Under terms of the Broker/Carrier agreement the transport carrier is paid. The difference is kept by the Freight Broker as compensation.

**Pitfall #3 Non-disclosure of material facts:** In the legal arrangement of a contract for carriage, a dual agent is not interested or may not be aware of material facts that might influence decisions the shipper and transport carrier might have regards a contract for carriage. Freight Brokers are primarily interested in soliciting a transport carrier, obtaining a rate confirmation, obtaining a signed broker/carrier agreement before the load or shipment is picked up. Once the title to the load or shipment has been transferred via the signed Bill of Lading, the freight broker is substantially out of any disclosure of material facts and will legally hide behind the bill of lading terms and conditions of carriage and the Broker/Carrier Agreement with the transport carrier.

**Pitfall #4 Non-disclosure of compensation:** A dual agent Freight Broker has an inherent conflict of interest in the legal arrangement of a contract for carriage. They earn commissions based upon the difference between what they bill the shipper consignor/consignee and what they pay the transport carrier under terms of the Broker/Carrier agreement. Compensation is the undisclosed difference between the freight broker's freight bill (Freight Revenue) to the shipper and what the transport carrier is paid for the contract for carriage (Purchased Transportation Costs). The difference is most often called **“Transport Margins.”**

By federal law the dual agency compensation disclosure is not required before, during, or after the contract for carriage is complete, unless the record is requested. The freight broker must only keep a record and subsequently, if asked, produce that record. Rarely is it disclosed upfront or subsequently asked for. Undisclosed freight brokerage transport margins are now running 15 to 20% nationally. It is a LOSE-LOSE situation for both the shipper (BUYER) and transport carrier (SELLERS) of the contract for carriage.

**Pitfall #5 Lack of Reasonable Care:** Arrangement of a contract for carriage legally means or implies an express trust between the Buyer and Seller in a freight transaction. Reasonable care protects both the shipper Buyer and transport carrier Seller and advances their best interest. In dual agency arrangements a lack of trust and reasonable care is prevalent. The Freight Broker owes neither the BUYER or SELLERS undivided loyalty, reasonable care, full disclosure, obedience to lawful instruction, confidentiality, and accountability

**Pitfall #6 Multiple Dual Agent Freight Brokers:**

With lack of trust prevalent, many shippers will give the freight order to multiple freight broker agents to solicit multiple quotes from multiple transport carrier sellers. They don't trust just one broker to look out for their best interest. They fear and know in a dual agency arrangement the freight broker will negotiate freight rates to maximize compensation.

As a result, multiple brokers will be negotiating one contract for carriage for the same freight order. Double brokering can occur. Not having available equipment, a solicited transport carrier may agree to transport freight for a broker under the guise it will be the one hauling the freight. The transport carrier through its affiliated brokerage company re-brokers the load to another transport carrier. The original broker is now in a compromising situation. The original brokerage firm does not know what party is hauling the freight, does not know if the actual carrier has the required authorities and permits, nor can the original freight broker perform due diligence on the actual transport carrier.

Tracing the freight is not possible, leaving the original broker with incorrect tracing information to its shipper. The original broker also runs a liability risk where the original broker pays the contracted transport

carrier and that transport carrier does not pay the actual carrier. The original broker (or its consignor/consignee) may be held accountable to pay a second time for the same freight movement. This type of unsavory business practice has been aided and abetted by load board postings and has given Freight Brokers very questionable reputation for unsavory business practices.

**Pitfall #7 Non-brokerage services:** Federal law allows all other kinds of non-brokerage services to be performed on behalf of a consignor, a consignee, or a motor carrier. Freight brokers are free to create their own unique “value added proposition” to and for both the shipper consignor/consignee Buyer or transport carrier Sellers. They are free to determine by whatever means or methods of business practice to arrange for freight transport transactions without upfront compensation disclosures. Let the buyer and seller beware of their “value added propositions” and their fair market value pricing!

**Pitfall #8 Freight Broker Misrepresentations:** Federal regulations require that a broker shall not perform or offer to perform any brokerage service, including advertising, in any name other than that in which its registration is issued. Further a broker shall not, directly or indirectly, represent its operations to be that of a motor carrier. Any advertising shall show the broker status of the operation. Misrepresentations as a motor carrier are now so frequent that even the courts have been unable to clearly distinguish the Freight Broker from a transport carrier. Many now use the words “logistics,” “transportation,” or “services” or some other 3<sup>rd</sup> party logistics names. For example, the judge in the 2004 court case of Schramm vs. Foster and C.H. Robinson Worldwide, Inc. found it difficult to determine the types of services C.H. Robinson performed as a freight broker. The judge used the following description:

C.H. Robinson Worldwide, Inc., together with its subsidiaries and affiliates referred to themselves as a third-party logistics "3PL" company that specialized in brokering the shipment of goods via truck, rail, ocean and air. C.H. Robinson stated they did not own transportation equipment (trucks, trains, ships or aircraft), as it is prohibited by Title 49 law from doing so, but instead match shippers together with carriers that did own and operate transport equipment so that commercial goods could be moved efficiently from origin to destination.

C.H. Robinson and its affiliates operate over 150 branch offices in the United States and abroad brokering millions of shipments each year. To move the freight C.H. Robinson has brokerage contracts with thousands of licensed motor carriers, whereby the carriers agree to haul loads for shippers through C.H. Robinson. At the same time, C.H. Robinson markets itself to businesses and manufacturers with transportation needs. With a simple phone call, e-mail, or fax to C.H. Robinson, shippers with transportation needs have ready access to available carriers to haul their loads, and

carriers with available trucks can find shippers with goods requiring transportation.

Today the majority of freight brokerage company's business model is similar:

1. Locate a sales office or sales offices in one or more major freight clustered areas.
2. Hire sales, marketing, and logistics people.
3. Solicit arrangement of shipper consignors/consignees by making hundreds of telemarketing or sales calls.
4. Obtain loads and shipments for transport by oral or written contracts
4. Using Load Boards or stable of transport carriers solicit transport carrier sellers for transport service.
5. Negotiate a "contract for carriage" to transport the consignor/consignee freight.
6. Markup the contract for carriage and freight bill the shipper consignor/consignee.
7. Keep the difference between the freight bill (Revenue) to the shipper and the Broker's payment to the transport carrier under terms of the Broker/Carrier agreement for carriage (Purchased Transportation). The net difference is the compensation. (Transport Margins).

Broker/Carrier contracts for carriage have now become so tightly written that some courts have concluded that freight brokers have effectively created an employer/employee relationship with a federally licensed transport carrier having 48 state authorities and cargo insurance.

**Pitfall #9 Contracts for Carriage a Commodity:** Contracts for carriage are now a commodity, bought and sold by freight brokers at the lowest per-mile prices. The primary broker's selling pitch is now fair market pricing based upon the supply and demand of trucks in an area. Along with other various value-added propositions. Lower prices are often quoted to the shipper consignor/consignee. Upon obtaining the shipper freight orders for carriage the broker must now find a way to negotiate a contract for carriage with a transport carrier at an even lower price in order to yield net compensation. They have now established multiple spot market Load Boards. Spot market Load boards are online classified media networks that reach out to selling transport carriers. The Freight broker then becomes the buyer and offers the freight orders at an even lower price in order to yield the compensation margins. Load Boards become a "freight order auction pit" for unsavory dual agency business practices. Let the Freight Order Buyer and Sellers beware of the Load Boards and the spot market freight orders on them!

**Pitfall #10 Unsavory and unethical business practices on Spot Market Load Boards:** Prior to 1980 rate-making deregulation a freight spot market did not exist. Freight brokers were not in high demand. With the rapid growth of freight brokers, the freight spot market began to grow rapidly.

With dual agency allowed by federal law, unsavory business practices have evolved in the matching of a Freight Order with transport carrier SELLERS in a contract for carriage transaction. These systems and business practices have been designed, some intended, others not, to yield broker compensation that can now add transport markups to contract for carriage of 15 to 25%.

### **Electronic Load Matching Boards**

Dial-a-Truck (or DAT) was one of the first electronic load board in North America. Established in 1978, before rate deregulation. It was the first system of its kind. Before internet and electronic media, truck drivers seeking loads to transport left handwritten notes on a bulletin board at the Jubitz Truck Stop in Portland, Oregon. Jubitz quickly realized that shippers and freight broker agents seeking independent transport carrier services could post their truckload origin and destination points on a monitor at the truck stop and a transport carrier would pay a fee to “peek” at the shipper or broker’s phone number.

Soon after deregulation, hundreds of DAT monitors could be found in truck stops around the country, with thousands of brokers posting loads and transport carrier drivers or dispatchers paying to “peek” at the telephone number, whether the load was still there or not. By 2001, there were 1200 load monitors in the United States. Now powered by DAT Solutions, subscribers now access the DAT Load Matching Board over the Internet with telephone numbers tightly controlled and classified by DAT as a shipper consignor/consignee, freight broker, or transport carrier.

Some transport carriers call it the “pay to peek” load board. The electronic load board works like a classified newspaper advertisement with a telephone number that matches broker loads and shipments with transport carriers. A transport carrier pays a monthly subscription fee to enter the site. Then the transport carrier “pays to peek” with an additional transaction fee charged to “peek” at the number and details of the freight order. The transport carrier takes a \$2 chance to peek at the load details. It may or may not be still there.

One transport carrier sampled the number of \$2 peeks the dispatcher had to pay to view a load that was still there. Thirty-five “peek” fees were charged to find and locate one good paying load that was still there. Variations of this load board system remains, costing millions of dollars for transport carriers trying to find and bid on loads and shipments for transport.

This service was acquired by TransCore, a transportation service company and unit of Roper Industries. DAT is now known by the names of its subscription services, which include 360 Freight Match, 360 Express, TruckersEdge, DAT Connect and DAT Partners. Established in 1978, DAT is the trucking industry’s largest load board where 256 million online transactions took place in 2018 to match empty truckload capacity and freight. DAT also collects \$60 billion of actual freight bill data annually through direct system integrations with over 800 manufacturers, distributors, freight brokers and trucking

companies. Freight brokers are now responsible for arranging over 82% of the nation's truckload spot market freight and contribute pricing information to DAT RateView, the underlying data source for the settlement indices for the newly marketed Trucking Freight Futures.

Truckstop.com Truckstop Pro, Truckstop Advance, 123 Load Board, DAT Members Edge (OOIDA) and Direct Freight are all similar and competing Load Matching Board features. Collectively these Load matching boards are referred to as the "Freight Spot Market" where freight orders are bought and sold at the lowest price.

### **Phantom load board postings**

Freight Brokers need trucks! Therefore, another unsavory business practice is to post "phantom good paying loads" on Load Boards to develop a stable or "Rolldex" of transport carriers for future load matching and contracts for carriage. Phantom load postings cannot be controlled by the Load Boards. They are transport carrier lead generators. When the dispatcher or driver calls about the phantom load, they are advised that it is "gone" or "booked. "But we have future loads!" How often are you in the area? What is your per mile price out of this area? Would you like us to call you in the future? Would you like to get on our private load board? Great! We will call you when the next load or shipment come in, or words to that effect.

With a large stable of transport carriers, Freight Brokers then have marketing pitches that include value-added propositions such as: "We have one point of transport service for shippers," "We have a large stable of qualified transport carriers who can pick up your load or shipment at a moment's notice."

### **AN ALTERNATIVE SOLUTION:**

As Einstein years ago so eloquently stated, "We cannot solve a problem the same way we created it." The 1980 Motor Carrier Act created Freight Broker dual agency status with all its pitfalls. Freight Brokers dual agents have created many unethical and unsavory business practices. Freight Broker dual agents have created the demand for spot market load boards where truckload contracts for carriage are solicited and purchased at per-mile costs substantially **below or above** the current and future total truckload transport costs creating so much pricing volatility and risk that a Freight Futures market has been created in 2019 to help mitigate that risk.

To eliminate the pitfalls of freight broker dual agency and the volatility and risks of spot market pricing for shippers and beneficial cargo owners, the Transport Carrier Network has now developed a **FREIGHT ORDER REVERSE AUCTION MARKETPLACE** called **FORAM**.

**FORAM** is a truckload freight order procurement marketplace where the auction parties are reversed. A single **BUYER** or **GROUP OF BUYERS** can solicit a **CONTRACT FOR CARRIAGE** at current or an inflation adjusted future truckload transport costs per-mile price *directly* from TCN pre-qualified and preferred transport carrier **SELLERS** or **GROUP of SELLERS**. Auction **CONTRACTS FOR CARRIAGE** transactions are billed, collected, and settled by an independent financial clearing house with fully disclosed auction and clearing fees paid by the transport carrier **SELLER**.

A **FREIGHT ORDER** issued by the **BUYER** is required to conduct a reverse auction. Freight Brokers are not legal or beneficial cargo owners of a freight order and cannot conduct or participate in a freight order reverse auction. Auction **PER-MILE PRICES, STOPS, DROPS, ANY ACCESSORIAL CHARGES** or other terms and conditions of transport are negotiated directly between the **BUYER** and **SELLER**. When a **BOOKING** is completed, the auction ends. The **BOOKING** serves as the **CONFIRMATION** and basis for the bill of lading as the final **CONTRACT for CARRIAGE**, between buyer and seller. No Broker confirmation, or Broker/Carrier agreements are involved.

Generally, in a freight order auction, but not always, the **BUYER** wants to procure a contract for carriage that is evaluated on both per mile prices and other shipping factors. **BUYERS** most often want stable, transparent, fair and reasonable freight rates and do not want to be subjected to the volatility and risks of the spot market. Conversely transport carrier **SELLERS** want **RESERVED** per mile prices **at or near** their current or inflation adjusted future transport costs that includes a fair and reasonable profit and return on their invested capital.

The clearing house provides weekly current and future inflation adjusted per-mile pricing information for auction participants. Current and future inflation adjusted per mile costs are based upon the Petroleum Administration for Defense Districts (**PADDs**) publications of weekly diesel fuel costs for the 8 regions of the United States. A remaining basket of current truckload cost per mile are added to the 8 regions. This information provides the **BUYERS** with stable, transparent, fair and reasonable per mile freight rates and does not subject buyers to the volatility and risks of spot market rates.

Some shippers and beneficial cargo owners may reject all solicited offers and want to procure at spot market rates using the **TCN SPOT MARKET LOAD BOARD** by soliciting both TCN and Out-of-Network licensed transport carriers. A **FREIGHT ORDER AUCTIONEER** will conduct the procurement auction at the TCN spot market load board and prepare a **BOOKING** for the freight owner. **TCN SPOT MARKET LOAD BOARD AUCTIONS** are billed, collected, and settled by the independent financial clearing house in the same manner as a direct **FREIGHT ORDER REVERSE AUCTION**.

A **FREIGHT ORDER REVERSE AUCTION** can start at any time and run for 1 to 10 days. Auctions are conducted by the shipper or beneficial freight owner at the [www.transportcarriernet.com](http://www.transportcarriernet.com) website. A shipper or transport carrier account and a username and password is required to conduct an auction.

When Proof of Delivery (POD) documents are received from the SELLER, the Contract for Carriage is assigned to Carriernet Group Financial clearing house for billing, collecting from the BUYER and payments to the SELLER. All fully disclosed auction and clearing fees are paid for by the SELLER.

The financial clearing house makes available credit check information to the auction parties. Final credit approval is the responsibility of the individual auction participants.