What is a Property Broker?

Introduction

There is much confusion over what exactly are the legal definitions, authorities required, the type of operations that exists, and liability issues surrounding third party transportation providers. Questions often arise during discussions at professional meetings such as:

- What is the difference between a broker and a surface freight forwarder?
- What exactly is an IMC?

The purpose of this chapter is twofold. The first is to help the reader develop a better understanding of the legal definition and important role that property brokers play in the distribution channel. The second is to create a better understanding of the difference between some common third party transportation intermediaries such as brokers, freight forwarders, shipper's associations, and intermodal marketing companies.

The material in Chapter One, "What Is a Property Broker?" was excerpted, adapted and updated with the permission of the Transportation Intermediaries Association (TIA) from a text entitled Transportation Brokers: History, Regulations and Operations by Dr. Terence A. Brown.

What is the legal definition of a property broker?

A legal definition of property brokers is provided in the Code of Federal Regulation (CFR) at 49 CFR 371.2(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.*

There are several key points in this definition which should be noted. First, the definition applies only to brokers of property; it does not include or refer to brokers of passengers. The definition is based upon the statutory definition of "broker" in the Interstate Commerce Act, which states at 49 USC Section 13102(1): "The term "broker" means a person, other than a motor carrier or employee or agent of a motor carrier, that as a principal or agent sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation."

Second, this definition makes no distinction between brokers of general commodities and household goods brokers. This text will discuss general commodity brokers only. Thus, when the terms “broker” or “freight broker” are used in this text, they refer to general commodity property brokers.

Third, the definition clearly indicates the fundamental nature of the brokerage business - arranging transportation by authorized motor carrier. In other words, brokers bring together a shipper who needs goods transported with an authorized motor carrier who wants to provide the service. In marketing terms, brokers are intermediaries between shippers and carriers in the “marketing channel.”

Fourth, the “authorized motor carriers” utilized by brokers are registered motor carriers. The definition does not include transportation of exempt commodities. Finally, the definition excludes regulated motor carriers, carrier employees, and carrier agents. These individuals are not brokers when they are performing their normal motor carrier duties.

Can a broker ever be held liable for cargo loss or damage under this definition?

Since brokers arrange for freight and are not carriers themselves, they cannot hold themselves out to be a carrier. As a result, generally a broker is not liable for loss and damage. The motor carrier assumes this responsibility either under statutory or common law obligations or as a provision to a contract. However, there are two exceptions concerning cargo liability that a broker should be alerted to; negligence on the part of the broker and offering services other than that of a brokerage operation.

First, a broker operation may be liable if it selects a carrier which is incapable of providing the required service, such as temperature controlled. Another instance might be if a broker used a motor carrier (under contract) that had released valuation on a shipment and the broker did not notify a shipper of that fact.

Second, the broker may provide additional services to its customers such as physical consolidation of freight. This requires the broker to handle the freight and may, in the legal sense, make the broker appear to be a freight forwarder and expose it to liability for any loss or damage that occurs while it is responsible for the freight.

Professional brokers protect themselves against these liability by securing appropriate insurance. In fact, contingent cargo and errors and omissions insurance is available and may reduce the potential of loss.

Why do brokers exist?

Fundamentally brokers exist because they provide useful service to both motor carriers and shippers. Consider the case of a small motor carrier in New York with an occasional shipment to North Carolina, but with no return load. The carrier may approach a broker who can arrange such shipments for a reasonable fee. If the carrier's volume of business into North Carolina were heavy enough it could afford to set up its own sales force, but at present the broker is the most cost-effective, efficient alternative available. Even when a carrier has a sales force in an area, the firm may use a broker there if the brokerage can supply additional business at an attractive cost. In fact, it is often impractical, if not impossible, for carriers to market their service to all of the thousands of shippers located in a large city. Thus, carriers often use brokers to supplement their own sales forces.

Brokers also provide useful, efficient service to shippers by arranging reliable motor carrier service at a lower price or by providing other services. For example, shippers use brokers at times when it is hard to locate equipment or for those Friday afternoon emergency shipments. Some firms have gone as far as to allow a broker to become the "traffic" department for the company. It is as simple as just one call to a broker who can take care of all shipping needs.

Are brokers new to the trucking industry?

No! In fact, general commodity brokers have been in existence since the development of trucking in the United States.[i] However, with the beginning of broker regulation by the ICC in 1935, the industry suffered because very few new licenses were granted and regulations hampered the activities and growth potential of brokers. The administrative policies and rules adopted by the Commission to govern entry into the industry were so severe that they discouraged firms from even filing for new licenses. In fact, it has been estimated that as of 1970, there were less than a dozen active freight brokers in business. Since the late 1970s, federal transportation policy has changed dramatically; thousands of broker licenses have been granted and regulatory restrictions have been eased. Thus, to many it may seem as if the industry is new. In reality, the rapid growth of the past decade reflects the adjustment of the transportation industry to reduced regulation. The broker industry would have been much larger and more visible in the past had regulation allowed it to develop and grow as trucking grew. Now, the industry has attained the importance and visibility it would have enjoyed sooner if economic regulation had been less severe in the period of 1935-75.

Today, it is estimated there may be over 15,000 licenses (now registered) property brokers in the United States. It is difficult if not impossible to determine the exact number that are currently active.

What is the role of the broker in a marketing channel?

A marketing (supply) channel can be defined as all the firms or people who own or help transfer a good or service from the producer to the ultimate user. Marketing intermediaries are the firms or people, other than the producer and consumer, that compose the marketing channel. Marketing channels can be described graphically. Some common channel arrangements involving brokers are show in Figure 1. Channel A shows the traditional direct truck marketing channel without intermediaries. In Channel B, the trucking firm uses both direct marketing and a broker, while in Channel C, a broker is used exclusively. Finally, in Channel D, two brokers are used which is a situation described as co-brokering.

In fact, there are many other marketing channels and marketing intermediaries in transportation. Air passenger service is sold through a variety of channels including direct (airline customer), and through intermediaries such as travel agents. Some other examples of marketing channels in transportation include:

- Ocean shipping, whereby ocean transportation intermediaries, including ocean freight forwarders and non-vessel operating common carriers (NVOC) act as intermediaries between shipping lines and customers.
- Rail transport, in which shippers' associations, freight forwarders and brokers are quite active. In agricultural trucking, exempt brokers play an important and perhaps even dominant role in the marketing channel.
- Air transport, in which air freight forwarders and indirect air carriers arrange transportation for shippers using both passenger and all cargo aircraft.

From these examples it is clear that freight brokerage is not a new concept but an established business institution found throughout the transportation industry and other industries as well.

Traditionally, most people viewed competition as something that existed between two or more producers or two or more retailers. While it is certainly true that a producer can be in competition with another producer, or a retailer with another retailer, it has become clearer that competition must also be viewed as existing between entire channels. As depicted in Figure 2, producers (trucking companies in this case) and their marketing intermediaries (brokers) are now viewed as a whole, competing with other systems. This is easy to understand when it is remembered that the final user makes his choice on the basis of price and quality, yet both these factors are determined by the joint action of all members of the channel. Thus, if one channel member is inefficient, the whole channel suffers as the price and quality of the product suffers.

The Perception that competition exists between whole channels, rather than just between producers, encourages brokers to view the channel as a whole and work together with carriers and shippers for the benefit of all. Of course, this may be a difficult concept for some to accept, particularly those who see themselves as independent entrepreneurs, maximizing their own profit even at the expense of producers and users. Yet, such a view can be disastrous if it reduces overall channel efficiency and allows other channels to increase their market share. In sum, brokers should view others in the channel (i.e. carriers and shippers) in a cooperative way and work with them to the benefit of everyone in the channel.

Figure 1

Brokers in the "Carrier" Marketing Channels

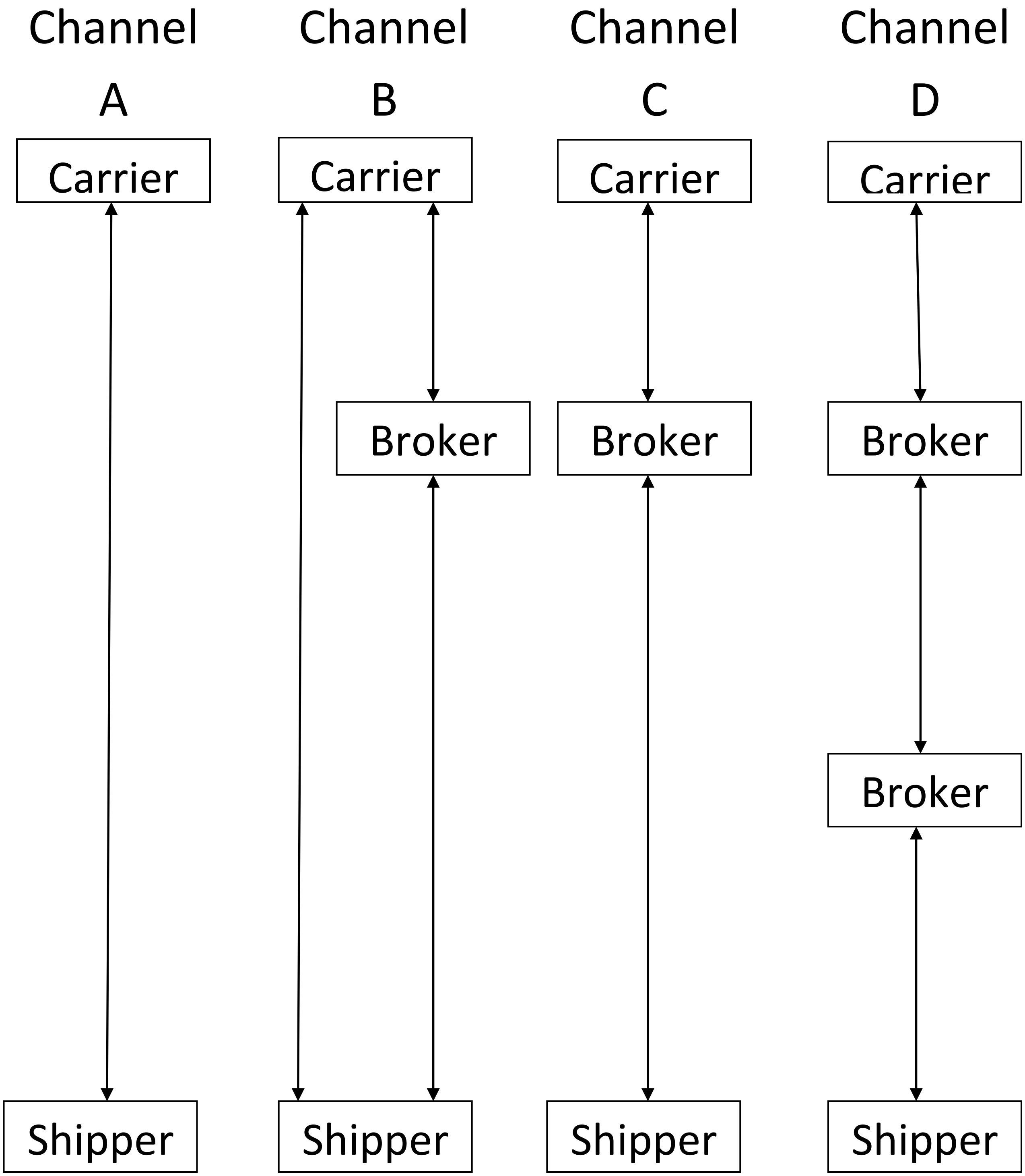
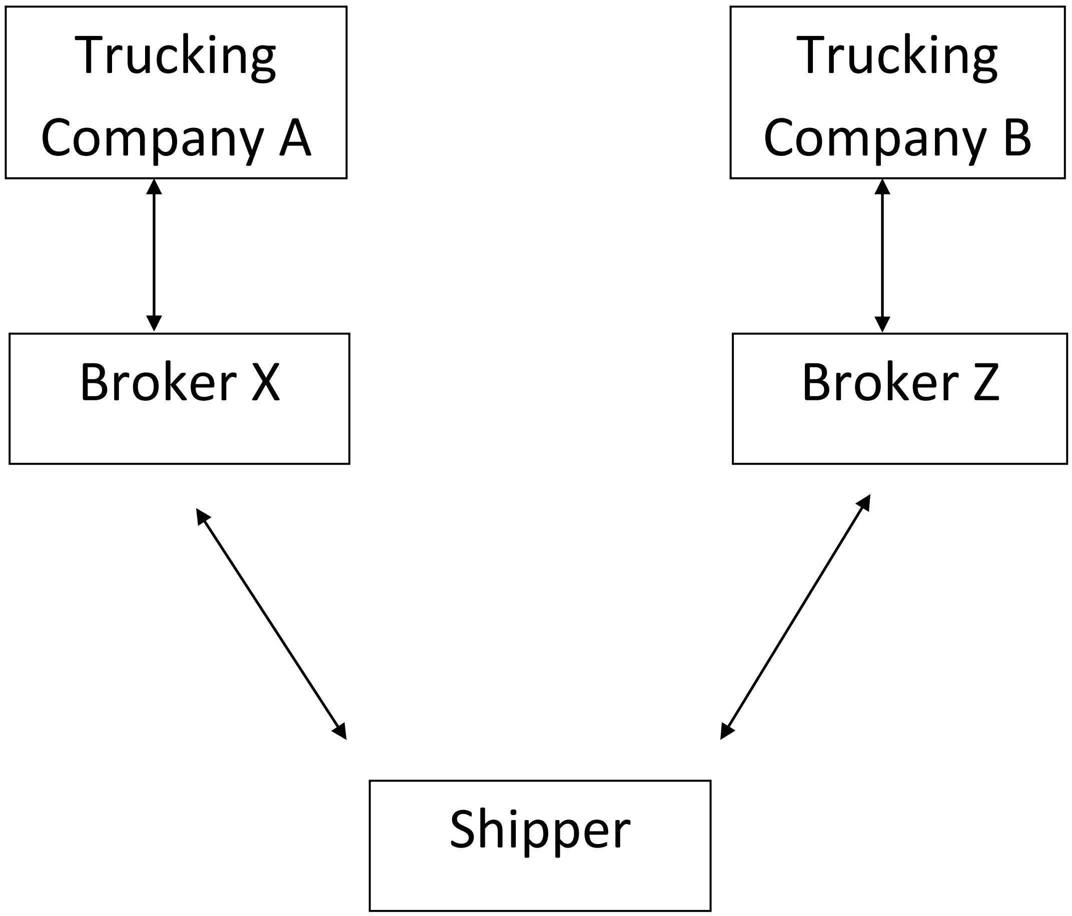


Figure 2



How are brokers different from other transportation intermediaries?

In addition to brokers, there are a variety of other intermediaries in transportation. Many shippers have little knowledge of these firms and thus find it difficult to distinguish between them. The operations of some of these intermediaries can complement and enhance a brokerage operation. Thus, some firms may wish to consider entering these businesses to supplement normal brokerage activity. In contrast, other intermediaries may be competitors or potential competitors. In any case, knowledge of other successful firms' operations is useful because it may suggest new, profitable opportunities for brokers and because it provides insight into potential competitors in the marketplace. The various surface transportation intermediaries that will be discussed include:

- Agricultural Truck Brokers:
- Surface Freight Forwarders;
- Shipper's Association;
- Intermodal Marketing Companies (Shipper's Agents); and
- Carrier Agents.

Agricultural Truck Brokers

Unregulated agricultural brokers arrange motor carrier service for exempt agricultural products. They have been in existence for many years and now apparently arrange for most truck movements of agricultural goods. A review of two studies of agricultural brokers suggests the following conclusions about their operation.[ii]

1. The agricultural broker is essential because it is more efficient for the owner-operators of the trucks to spend their time driving rather than looking for loads.
2. Most agricultural brokers are small and operate in one area of the country. They do not generally arrange loads outside of their immediate vicinity.
3. Competition between agricultural brokers is keen both to attract loads and trucks. To be successful, agricultural brokers attempt to develop a reputation for honesty and reliability. Agricultural shippers look for brokers who can be relied on to have trucks available when needed. Brokers who have loads available regularly, are attractive to owner-operators. Of course, the price for a load is most important.
4. Agricultural brokers receive an average of 10 percent of the price the shipper pays for each load.
5. The agricultural shipper usually feels that he is doing business with the broker and is not concerned with the broker-trucker relationship.
6. When loss or damage of produce occurs during shipment, the shipper generally deducts the loss from the payment to the broker. The brokers normally deal with the trucker in regard to the claim. Most brokers will not use a trucker unless the carrier has proof of cargo insurance and, preferably, a history of settling claims reasonably.

Some agricultural brokers had received general commodity broker licenses from the ICC before its sunset in January 1996. In fact, these two markets are quite different. Among other things, agricultural truck brokers deal with individual truck drivers while freight brokers typically deal directly with the trucking company.

Surface Freight Forwarders

Surface freight forwarders are transportation intermediaries that utilize both rail (primarily piggyback) and motor carriage for distribution of a client's shipments. Freight forwarders are legally defined (49 USC Section 13102(8)) as "a person holding itself out to the general public (other than as a pipeline, rail, motor, or water carrier) to provide transportation of property for compensation and, in the ordinary course of its business:

- assembles and consolidates, or provides for assembling and consolidation, shipments and performs or provides for break-bulk and distribution operations of the shipments;
- assumes responsibility for the transportation from the place of receipt to the place of destination; and
- uses, for any part of the transportation, a carrier subject to the jurisdiction of the subtitle (DOT and Surface Transportation Board, where applicable).

Traditionally, many forwarders concentrated on small, less than truckload (LTL) shipments moving long distances between major cities. Thus, a forwarder in New York employed salespeople to solicit freight shipments destined to other major cities such as Los Angeles, Dallas or Chicago. The shipments are generally picked up in New York by a local cartage firm after the trailer was unloaded at the forwarder's terminal.

Surface freight forwarders were largely deregulated by the Surface Freight Forwarder Deregulation Act of 1986. They were still required to issue a bill of lading, take cargo loss and damage liability and, provide DOT with proof of appropriate liability insurance. Freight forwarders did not need to file rates or request permission to enter the industry after 1986. However, effective with the passage of the Interstate Commerce Commission Termination Act of 1995 (ICCTA), surface freight forwarders are required to be registered by the Department of Transportation. Even if a freight forwarder had authority prior to 1986, it is still required to become registered.

Shippers' Associations

Shipper's associations are exempt, nonprofit, cooperative organizations. Their members are shippers who have formed the association in order to reduce transport costs, primarily by pooling their shipments. Their operations are quite like surface freight forwarders. In fact, they are often referred to as the unregulated counterpart of forwarders. However, they differ in that shippers' association "customers" are their members, not the general shipping public.

Most shippers' associations are either primarily inbound or primarily outbound in their operations. Outbound associations normally collect shipments from a city or surrounding area and consolidate them for shipment (using piggyback or motor carrier) to a few or many distant cities. Such associations normally depend more heavily for membership on manufacturers than retailers. Inbound associations generally represent retailers or wholesalers in one city or area. The association will have a member's shipment from one or more important production centers or ports (such as New York or Chicago) consolidated into trailers and shipped via TOFC or motor carrier to the local area. Once in the destination city, the goods are delivered to the member or to the member's distribution center for eventual reshipment to another destination in the region. Local pickup and delivery, within the commercial zone, may be accomplished by the association in its own vehicles or by a local cartage firm. The physical consolidation, in the origin city, will often be performed for the association by a terminal operator.

For most associations, successful operations require a heavy volume of freight between two cities to allow them to quickly accumulate a truckload of freight. Associations which rely on piggyback for the line haul tend to serve distant points (seven hundred miles or more) since rates are most attractive at longer distances. Finally, saving money on transport costs, without sacrificing service quality, is the essential purpose of shippers' associations. One study which compared LTL rates with several shippers' associations found a savings of approximately 18 percent on the average, before deregulation.[iii]

Shippers' associations may offer brokers opportunities for profitable working relationships. For example, a broker may view an association as a shipper and be able to arrange economical motor carriage for the association. Conversely, some firms with broker's licenses have joined shippers' associations and use the association to consolidate their clients' LTL freight. This is but one way brokers can offer LTL service to shippers. However, shippers' associations have suffered a decline since trucking deregulation. Today, it is estimated that 50 or fewer domestic associations exist, down from over 100 twenty years ago.

Intermodal Marketing Companies (Shippers' Agents)

Intermodal marketing companies (IMC) also knows as Shippers' Agents are unregulated intermediaries who help shippers by arranging rail piggyback service. In using Rail Trailer in Flat Car (TOFC) service, a shipper may face a variety of questions, including the following:

1. What firm will bring the trailer to the shippers' dock and take it, once it is loaded, to the rail terminal?
2. Which rail routing will be least expensive?
3. Which rail routing will provide the fastest service?
4. Who will provide drayage service at destination and between connecting railroads en route?
5. What can be done if the railroad does not accept single trailers yet the shipper only ships in single trailer lots?

6. How can the shipper take advantage of empty trailers and containers that need to be repositioned from one area of the country to another?

To complicate matters more, over time, market conditions and the weather can change to such an extent that the best arrangement and routing at one point in time may not be the best at a later date. Thus, IMCs develop expertise and current market information that is far better than that of most shippers who use TOFC on a sporadic basis. It should be noted unlike freight forwarders IMCs do not take liability for lost or damaged goods. IMCs provide service to their clients, including the following:

1. Make all transport arrangements, including all rail and motor carriage and trailer leasing.
2. Provide the shipper with one bill for the entire move instead of several bills from several carriers.
3. Accomplish the move with expertise and knowledge of current market conditions.

One reason IMCs have attracted increased interest lately is because of the rapid growth of piggyback. With improved service through stack trains and more attractive prices, TOFC has become a strong growth market which offers profitable opportunities for transportation firms that can provide useful services to shippers.[iv] In addition, piggyback service is generally long haul in nature and tends to complement rather than compete with most brokerage shipments. It is not uncommon for a brokerage to offer both services to shippers. Some of the reasons behind the growth include improved ramp operations from new piggyback terminals, lower relative prices and better ride quality provided by “double stack” technology.

It is noteworthy that the number of IMCs grew rapidly for a time and helped promote TOFC use, however, now the industry appears to be declining in numbers as the larger agents grow and the smaller ones withdraw.

Carrier Agents

Carrier agents are marketing and sales people who represent and work for a specific carrier or several noncompeting carriers. Such agents do not have the authority to allocate traffic to any trucking company they choose. Brokers, on the other hand, can and often do, arrange loads for competing motor carriers. Carrier agents do not take liability for good nor do they publish rates.

Editor’s Note

An article in the Summer 1995 Transportation Journal entitled, “Licensed Transportation Brokers: Their Joys and Frustration,” provides some interesting insights into, “What is it Like

Being a Broker?" The survey of 228 brokers found that a vast majority of the brokers were happy with their chosen profession. Over eighty percent (80%) of the respondents when asked, "Would you do it again if you could start your career over?" answered yes! The article also highlighted some reasons why it is such a rewarding job as well as why it is also frustrating. The top two aspects of the job the brokers enjoyed most was the creativity in the problems solving for customers (48.7%) and the fast paced work environment (16.2). The worst part of the job was the lack of trucks (21.2%) and the fact that brokers are not respected as professionals (19.7%).

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[i] For a discussion of the early development of freight and passenger brokers, see *Copes Broker Application*, 27 MCC 153 (1940).

[ii] Other published studies on agricultural brokers include: D. Daryle Wyckoff and David H. Maister, *The Owner-Operator: Independent Trucker* (Lexington,: Lexington Books 1975).

[iii] Terence A. Brown, "Shippers' Associations: Operations, Trends and Comparative Prices," *Transportation Journal*, 21.1 Fall (1981) 54-66.

[iv] For a further discussion of shippers' agents, see Terence A. Brown, "Shippers' Agents and the Marketing of Rail Intermodal Service," *Transportation Journal*, 23.3 Spring (1983): 44-52.