

## PART 371 — BROKERS OF PROPERTY

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AUTHORITY: 49 U.S.C. 13301, 13501, and 14122; 49 CFR 1.73.

### §371.1 Applicability.

This part applies, to the extent provided therein, to all brokers of transportation by motor vehicle as defined in §371.2.

[32 FR 20034, Dec. 20, 1967, as amended at 62 FR 15421, Apr. 1, 1997]

### §371.2 Definitions.

\* (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 pre-existing 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.

### §371.3 Records to be kept by brokers.

(a) A broker shall keep a record of each transaction. For purposes of this section, brokers may keep master lists of consignors and the address and registration number of the carrier, rather than repeating this information for each transaction. The record shall show:

- (1) The name and address of the consignor;
- (2) The name, address, and registration number of the originating motor carrier;
- (3) The bill of lading or freight bill number;
- (4) The amount of compensation received by the broker for the brokerage service performed and the name of the payer;
- (5) A description of any non-brokerage service performed in connection with each shipment or other activity, the amount of compensation received for the service, and the name of the payer; and

(6) The amount of any freight charges collected by the broker and the date of payment to the carrier.

(b) Brokers shall keep the records required by this section for a period of three years.

(c) Each party to a brokered transaction has the right to review the record of the transaction required to be kept by these rules.

[45 FR 68942, Oct. 17, 1980. Redesignated at 61 FR 54707, Oct. 21, 1996, as amended at 62 FR 15421, Apr. 1, 1997]

### §371.7 Misrepresentation.

(a) 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 sued.

(b) A broker shall not, directly or indirectly, represent its operations to be that of a carrier. Any advertising shall show the broker status of the operation.

[45 FR 68942, Oct. 17, 1980. Redesignated at 61 FR 54707, Oct. 21, 1996, as amended at 62 FR 15421, Apr. 1, 1997]

### §371.9 Rebating and compensation.

(a) A broker shall not charge or receive compensation from a motor carrier for brokerage service where:

(1) The broker owns or has a material beneficial interest in the shipment or

(2) The broker is able to exercise control over the shipment because the broker owns the shipper, the shipper owns the broker, or there is common ownership of the two.

(b) A broker shall not give or offer to give anything of value to any shipper, consignor or consignee (or their officers or employees) except inexpensive advertising items given for promotional purposes.

### §371.10 Duties and obligations of brokers.

Where the broker acts on behalf of a person bound by law or the FMCSA regulation as to the transmittal of bills or payments, the broker must also abide by the law or regulations which apply to that person.

[45 FR 68943, Oct. 17, 1980, as amended at 62 FR 15421, Apr. 1, 1997]

### §371.13 Accounting.

Each broker who engages in any other business shall maintain accounts so that the revenues and expenses relating to the brokerage portion of its business are segregated from its other activities. Expenses that are common shall be allocated on an equitable basis; however, the broker must be prepared to explain the basis for the allocation.

[45 FR 68943, Oct. 17, 1980]



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February 9, 2007

Mr. Barry "Spook" Stang  
Montana Motor Carrier Association  
501 N. Sanders #201  
Helena, MT 59601

RE: Property Broker Workers' Compensation Premiums

Dear Barry:

You recently requested that I comment on a trend you have observed in the Montana brokerage industry where certain workers' compensation auditors are wrongly concluding that brokers need to possess proof of insurance coverage for the motor carriers to whom they broker loads. Typically, auditors reach this conclusion based on their mistaken assumption that the broker is the principal contractor and that the motor carriers are thus subcontractors. As many states will hold the principal contractor liable for workers' compensation insurance coverage for the subcontractor's employees if the subcontractor fails to meet its insurance obligations, the auditors (although very few actually have taken this position over the years and I know of no such positions that have withstood legal challenge) are charging additional premiums to the brokers' policies to compensate for the perceived increased risk of exposure. As discussed more fully below, this argument rests upon a fundamental misunderstanding of the trucking industry and the role played by brokers in that industry.

Property brokers are not principal contractors, nor are for-hire motor carriers to which they tender freight subcontractors. Instead, property brokers contract with independent motor carriers to provide the actual movement of freight required by the brokers' customers. As such, the entities these auditors label "subcontractors" are in fact principal contractors with respect to the contractor drivers with whom they contract to physically haul the cargo. In other words, property brokers are not in that chain of liability as they occupy a wholly

different market niche and perform a wholly different and discrete function. Property brokers operate in tandem with motor carriers, either functioning as a seller of the motor carrier's service or as a representative of the shippers of goods, the buyers of transportation services.

An appropriate analogy can be found in the insurance industry. A property broker is akin to an insurance broker. As noted above, a property broker represents either motor carriers or the shippers of freight. In the same way, insurance brokers represent either providers of insurance or buyers of insurance. Further, a property broker is not the overall assembler of the service and it does not face ultimate liability on account of that service. Its liabilities are defined by contract and by law, which immunizes property brokers from liability associated with the movement of the freight (both with respect to damage or injury to persons or cargo). *See, e.g., Delta Research Corp. v. EMS, Inc.*, 2005 WL 2090890 (E.D. Mich. 2005) (brokers not liable for shipper for damage to cargo occurring during transit); *Toledo v. Van Waters & Rogers, Inc.*, 92 F. Supp. 2d 44 (D.R.I. 2000 (broker not liable to third party for negligence of motor carrier which caused traffic accident)).

Again, by analogy, the liability of insurance brokers is similarly limited. While insurance brokers may be liable for errors and omissions associated with selling insurance, they are *not* generally liable for the problems associated with the insurer's policy language, wrongful coverage denials, or claims handling errors. In fact, both property brokers and insurance brokers typically purchase E&O policies to cover their principal business liabilities, which are distinct from those facing that actual provider of the transportation service or the insurance product.

If these auditors were to apply their position that motor carriers are subcontractors of property brokers to the insurance industry, it would produce an absurd result. Under this view, an insurance broker would be liable for the workers' compensation premium when an insurer with which it transacted business failed to secure workers' compensation coverage for the insurer's employees. This approach would dramatically change the way the insurance industry conducts business, and the economics and administrative burdens affecting these distinct industry segments would be profoundly altered. For example, imagine the economic upheaval that would result if Marsh USA were held responsible for the workers' compensation premiums of the insurers with which it conducted business (not to mention the concomitant upheaval experienced by Marsh's workers' compensation insurer which, upon asserting such a position, would thus assume a coverage obligation for the employees of Marsh's vast list of insurers). Similarly, the position that a property broker is a principal contractor to a motor carrier and thus liable for the motor carrier's

employees imposes an impossible burden on the property broker, which might tender freight to many hundreds of motor carriers in a single policy period.

In addition, the position advanced by these auditors is impractical. While it might seem simple to require the broker to obtain certificates from each motor carrier, the speed at which brokerage operations transpire would make such a requirement unduly burdensome with respect to both brokers and shippers. This is because shippers often place property brokers in urgent scenarios. For example, a shipper's primary motor carrier might fail to arrive for a pick-up. The property broker might then be called upon on short notice to find a motor carrier to pick up the freight and deliver it to a destination in a matter of hours. Burdening such transactions with an insurance certificate verification process would have the effect of grinding interstate commerce to a halt in many instances.

Moreover, the coverage issues evoked by the auditors' stated position would prove impractical for insurers. Each auditor would have to assemble a list of every motor carrier that hauled freight tendered through the property broker insured by the insurance company (in some cases thousands of motor carriers) and examine each motor carrier's workers' compensation declaration page of any insurance policy that covered the policy period of the insured broker's policy. It would then have to obtain a payroll list of every motor carrier, make proper state payroll assignments, and recalculate the broker's premium. Following the logic of this position to its practical result, insurance companies would be the insurer to literally thousands of transportation workers. Under these circumstances, it is almost certain that the insurance companies' denial of claims from such workers based on a lack of coverage would constitute de facto improper claims handling. It is difficult to believe that these auditors intend to trigger such sweeping coverage obligations under the policies issued to property brokers or to precipitate such an immense administrative burden for the insurers' auditors.

More to the point, the position that for-hire motor carriers are subcontractors of property brokers fails because the employees of the motor carrier would not be considered statutory employees of the property brokers under workers' compensation law. This is because there is no principal contractor/subcontractor relationship between the broker and the motor carrier. Further, the indicia of employment between the broker and the employees of the motor carrier are lacking since the type of detailed control that would need to be exercised by the broker over the employees of the motor carrier to prove common law employment would result in the broker usurping the motor carrier's regulated duty to carry out the actual transportation of the freight. See 49 U.S.C. § 13102(12) (brokers expressly prohibited from providing

transportation of freight). In effect, assuming the property broker's exercise of such control over the motor carrier's employees necessarily implies that the property broker is violating federal motor carrier law. This assumption, which would have to be asserted by insurance companies on a case-by-case basis, is legally improper.

Since property brokers are not principal contractors with respect to the motor carriers that haul loads for the brokers' customers, they does not face the specter of statutory liability for workers' compensation coverage. In sum, workers' compensation insurers face no increase in their liability exposure owing to their insured's brokerage operations. Accordingly, there is no basis for charging the additional premium being levied by some novice auditors.

If you have any questions regarding this letter, please do not hesitate to contact me.

Very truly yours,

Gregory M. Feary

GMF/wd

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Mike Anderson Trucking LL (307) 548-7415

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ATTN:  
Heath  
\*SPOOK\*

DEPARTMENT OF EMPLOYMENT  
EMPLOYMENT TAX DIVISION

1510 East Pershing Blvd  
Cheyenne WY 82002  
307-777-6763

RECEIVED

FEB 20 2007

February 4, 2005

MONTANA MOTOR CARRIERS  
ASSOCIATION, INC.

INDEPENDENT CONTRACTORS  
SOLE PROPRIETORS  
PARTNERS

MIKE ANDERSON TRUCKING LLC  
28 EAST 7<sup>TH</sup> ST  
LOVELL WY 82431

Dear Employer:

The Wyoming Workers' Compensation Act excludes coverage for sole proprietors, partners, and independent contractors, under Wyoming Statute 27-14-102(vii)(B), and (D). Since you state you have no employees, we are unable to provide coverage through the Wyoming Employment Tax Division, and are unable to issue a Wyoming Workers' Compensation Certificate of Good Standing.

Please be advised that, should you hire employees that are based in Wyoming and regularly work at or from the Wyoming base of operations, you must notify the Division immediately to verify whether Wyoming Workers' Compensation coverage is required for your business' industrial classification.

This letter **may be copied** for parties requesting a Wyoming Workers' Compensation Certificate. Should you have questions regarding this letter, please contact me at (307) 777-6763.

Sincerely,

*Brandy Schaneman*

Brandy Schaneman  
Administrative Specialist III

