IADC COMMITTEE NEWSLETTER

TRANSPORTATION

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IN THIS ISSUE

IADC Board Member, Heather Devine, gives her personal view and a legal update on a case regarding the enforceability of broker-carrier agreements.

Better Late Than Never Does NOT Apply to Carrier Confirmation Sheets: The Simple Rules of Contracting Must Be Followed

ABOUT THE AUTHOR

Heather C. Devine is one of Canada's leading transportation lawyers. From 2014-2020, she has been recognized as one of the *Best Lawyers*® in Canada for Transportation Law. Heather was admitted to the Ontario Bar in 1999 and the Nova Scotia Bar in 1998 and has a J.D. law degree from Queens University. Heather worked as a commercial litigator until learning to fly single engine planes in 2009, which led her to focus on transportation law. Since then, her focus has included combining technology, transportation, and intellectual property to advise clients such as brokers, freight forwarders, carriers, and other clients who move goods locally and internationally. Heather can be reached at hdevine@traffix.com.

ABOUT THE COMMITTEE

This IADC Committee was formed to combine practices of aviation, rail, maritime with trucking together to serve all members who are involved in the defense of transportation including aviation companies (including air carriers and aviation manufacturers), maritime companies (including offshore energy exploration and production), railroad litigation (including accidents and employee claims) and motor carriers and trucking insurance companies for personal injury claims, property damage claims and cargo claims. Learn more about the Committee at www.iadclaw.org.

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I am the Chief Legal Officer of TRAFFIX. After more than twenty years of working for clients in the transportation industry I moved in-house, so that I can focus all of my considerable energy on one client: TRAFFIX.

The benefit of being in-house is that I now better understand the pressures of our industry which create the evidence which forms the basis of court cases. The following is a legal update, not legal advice, and is my personal review of a current case with no connection to my favorite broker.

Carrier Confirmation Sheets are not Automatically Enforceable Broker-Carrier Agreements

Sometimes, the business records used commonly by brokers and carriers do not coincide with legal expectations. For example, the business practice of sending a Carrier Confirmation Sheet which contains terms of carriage meant to bind the carrier, may *not* be enforceable, particularly if it is sent *after* an agreement has already been made on the freight rate and other key service terms.

In *Conrad Refrigerated Trucking Inc. v. Etlas Freight* (2023 ONSC 5433) the Court considered a case where a Customer, Goodmark Poultry, tendered a load to a broker, Conrad Refrigerated Trucking, which in turn arranged a third party motor carrier, Etlas Freight, to transport the cargo. The cargo was damaged in transit.

If a Customer's cargo claim is compensated by the broker- can the broker recover from the carrier?

The broker paid the cargo claim to the customer, and then sought recovery from the carrier that had the load stolen while unattended. From the customer's perspective, the customer was made whole and its relationship with the broker was probably preserved.

However, be warned because here the broker failed to collect the monies it paid to its customer from the carrier.

Casual Industry Practices can Fail to Create Enforceable Contracts

In *Conrad*, the customer engaged a load broker to act as its agent to transport 40,000 pounds of frozen chicken into Canada from the U.S. The load broker then engaged a motor carrier to transport the cargo.

The contract between the customer and the load broker (shipper-broker agreement) did not dictate that the broker was liable for cargo loss or damage. Further, there was no assignment of rights by the customer to the broker in the contract.

The load broker retained a motor carrier to transport the freight but did not execute a broker-carrier agreement in writing. Instead, as happens in this industry, a match was made on Loadlink, and by telephone the terms of the freight transportation were

arranged. These terms did not include any discussion of penalties or liability regarding cargo loss, theft, or damage.

After the telephone call, the broker emailed a Carrier Confirmation Sheet to the carrier. It was only in the Carrier Confirmation that the carrier was advised that it was fully responsible for any claims regarding loss, damage or theft of the cargo. There were additional penalties included too, relevant to the load being frozen chicken.

Key Factors to Take Away

There are several key factors:

- The terms in the Carrier Confirmation were not discussed during the telephone call agreement.
- The broker's email to which the Carrier Confirmation was attached did not mention that there were additional terms in the Carrier Confirmation.
- The Carrier Confirmation had a signature line which required the carrier to sign its acceptance of the Carrier Confirmation and return the executed Sheet to the broker – but it was not signed by the carrier.

The cargo was stolen while the truck was unattended. The broker paid its customer for the loss of the cargo and related losses (quotas relevant to the importation of frozen chicken). The payment was made to "keep the customer happy" and no assignment of rights by the customer to the broker enabling the broker to sue the carrier were taken by the broker.

In Court, the usual arguments were made.

The broker argued that the carrier accepted the terms in the Carrier Confirmation Sheet because it picked up the load. The judge agreed that the carrier accepted the mandate to pick up and deliver the cargo – but that it had not accepted any of the terms in the Carrier Confirmation Sheet. The lack of signature by the carrier on the signature line was proof of non-acceptance.

The Broker was an Agent of the Shipper Without Standing to Sue the Carrier

The carrier argued that it should not pay the broker the amount it paid to the customer and that the payment was made voluntarily. The carrier argued that the broker was only an agent of the shipper and without a written contract, and without an assignment, the broker was not a party to the agreement between the customer and the carrier. The payment by the broker to its customer was only a payment *made by a volunteer*.

What was worse in the conduct of the litigation of the case, is that the broker, without an assignment from its customer, did not have 'standing' to bring a motion for summary judgment against the carrier to make it pay and the carrier was successful in getting the broker's case dismissed!

The only enforceable contract between the broker and the carrier was found in the

terms agreed to in the phone call between the broker and the carrier. In fact, the Court went further to find that sending a Carrier Confirmation Sheet after the terms were discussed and agreed to by telephone meant that the broker was not "clear and forthright" with the carrier "at the time the contract was formed".

Some Possible Solutions

Some possible solutions:

- Create an electronic Carrier Confirmation Sheet which requires the carrier to click accept to the terms therein and keep a record of the acceptance.
- Shipper-Broker agreements should be used and should include assignment rights.
- If the Shipper-Broker agreement does not contain assignment rights – obtain assignment rights before seeking to collect against a carrier, and before making payments to customers.

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