Load matching Applications

The mission statement of the OOIDA Foundation is to fight for the rights of truckers, which it does by performing research and education specifically from the driver's perspective. In recent months, a number of companies have introduced load-matching apps that are touted to "level the playing field" for the owner-operators and small fleets. The focus of these apps seem to offer the single truck and small carrier access to loads in real time from a smart device. The idea is that because it is real time and readily accessible, the owner-operator can make real time decisions on the next load, or loads, based on their present location and time. There are a myriad of reasons why a small carrier or owner-operator may book a load in advance, but find that they cannot make the schedule for that load. Access to a real time load, through an app, would help that carrier to reschedule or get another load thus avoiding a lot of deadhead runs. The Foundations surveys show that an average of 10-15% of all miles driven are unpaid deadhead miles.

The use of these apps would indeed appear to be a potential problem solver and a chance to increase income for the owner-operator and small fleets. The Foundation decided to take a closer look at a couple of the bigger players in this market to see if indeed it could be a technology to enhance the profitability of OOIDA members. We concentrated initially on the bigger companies as they are more likely to have the financial backing to succeed or at least invest and stay solvent.

The first thing for a carrier to understand in these load-matching apps is that the app provider is acting as a broker. So all the things that you need to watch for are the things that you should be looking at whenever you work through a broker. The Foundation obtained the Broker-Carrier agreement for two of these providers and while these apps have tremendous potential, their agreements include clauses that are both problematic and common among many broker carrier agreements.

As a carrier, you are aware that you must have a Bill of Lading (BOL) that acts as your receipt for goods delivered and can act as a contract of carriage. Most carriers use a standard Uniform Bill of Lading that establishes the terms and conditions between the parties involved. However, after deregulation a number of other BOLs sprang up with complicated and confusing conditions. This practice has intensified

with the proliferation of more brokers and third-party logistics companies (3PLs). These newer contracts and all other contracts of carriage, more than likely supersede the provisions within a uniform BOL.

The load-matching apps and broker-carrier agreements we examined have some of the more egregious concerns that owner-operators and small fleets need watch for before signing. Owner-Operators and small fleets do not have the bevy of attorneys to read and advise them of the potential pitfalls that is inherent in many broker-carrier agreements. New companies becoming brokers look to shippers for their business to grow, and often those shippers will want provisions within the contract of carriage that maximizes their rights and minimizes their responsibilities. In order to get their business, many brokers write their contracts to protect the shipper, often at the expense of the owner-operator and small carrier.

One of the most problematic conditions that many brokers and 3PLs demand is that carriers must agree to the right of "setoff". This allows brokers and shippers to refuse to pay freight charges when there is a claim against the carrier and to deduct the amount of any disputed claim. There are federal claims regulations which are fair and protect both the carrier and the shipper. These claim regulations are found in Title 49 of the C.F.R. Part 370. By signing any contract containing "offset" language you are giving up your rights to a fair claims review. Brokers and 3PLs often use the offset language to attract shippers as they offer them protection at the expense of the carrier. This is clearly seen in one of the load matching carrier agreements we looked at:

> *"Carrier further agrees that Broker has the discretionary right to offset any payments owed to Carrier under this Agreement against liability incurred by carrier, including but not limited to claims for freight, loss damage, or delay."*

Further shipper protection is provided at carrier's expense in:

> *"CARRIER agrees to waive any and all claims CARRIER may have against the shipper, consignor, consignee, the CUSTOMER, or third party payor related to payment of CARRIER freight charges;"*

Be mindful that Part 370 establishes the Principles and Practices for the investigation and voluntary disposition of loss and damage claims and processing salvage. However, in this agreement:

> *"CARRIER shall have the right to salvage goods a right to claim an offset for the value of salvage with BROKER"S prior written consent, which shall not be withheld if SHIPPER allows salvage of goods or an offset for salvage value."*

In other words, the agreement does not protect salvage as given in Part 370, but only with the Shippers permission and prior written consent. However, how likely is that to happen?

This contract states that after the CARRIER receives a claim for freight loss, damage, or delay, that the CARRIER will pay, decline, or make a firm compromise of settlement within 60 days after receipt of a claim. Part 49 CFR 370 states a CARRIER has 120 days.

An **Indemnity** clause within the contract basically states that you, the carrier, will not hold the Broker, or shipper responsible for just about anything, including personal injury (including death). In fact, as strange as it may sound, if you sign the contract, the broker or shipper could use your liability coverage to cover any expenses for loss, damage, personal injury etc.

> *"CARRIER shall be liable for all for the full invoice value of the cargo lost, damaged, delayed, or destroyed, but shall not be liable for such related costs or fees including consequential, or incidental damages unless shipper requires CARRIER to be liable for such related costs or fees."*

While the first half of this sentence is fine under the CARMACK Amendment, the second half is not. Incidental costs may be that the delay in delivery not only has a cost, but the shipper can charge the carrier for loss of revenue that they determine may have occurred due to the delay. "Incidental fees" is an excessively broad and vague term. It could include all kinds of charges that the carrier has no control over.

(In fairness, the other broker carrier agreement we looked at did have an indemnity clause for the shipper and the carrier in certain instances.)

Another provision in the second broker-carrier agreement we examined, required that any disputes be handled through arbitration. While this always sounds fair, after all who does not want to avoid costly litigation? It just seems right that a third party listens and arbitrates for the case. Though it might sound fair, it can be quite costly as the parties must pay the arbitrator and most contracts require that only certain arbitrators can be used. The shipper will undoubtedly have an attorney present their side and we all know that a person who represents him/herself in legal proceedings has a fool for a client. In addition, arbitration requires that you attend arbitration and you agree with any findings. Arbitration can be a long drawn out process and during this time you are not getting the pay you feel you deserve.

It will be interesting to see if the broker-carrier agreement is changed in light of recent court findings where the Arbitration Act does not apply to transportation workers.

The Foundation believes that Freight matching technologies offer tremendous opportunities for cutting down on deadhead miles and finding loads that are in real time. However, these apps carry the same concerns that are present within broker-carrier agreements. The Foundation also still believes that the successful owner-operator or small fleet owner is better off establishing their own network of shippers and using brokers on occasion. Paying broker fees and hauling for a shipper through a broker while signing an agreement that you will not solicit that shipper in the future, is not a good business policy.

For more advice on broker-carrier agreements and education on becoming a successful owner-operator, go to www.ooidaonlineeducation.com. The Foundation has published over 40 free online education classes. It will also host a 3-day seminar, Truck to Success, in September 2019.

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