TRANSPORTATION CONTRACTS FOR LEGAL COMPLIANCE & RISK MANAGEMENT

THEY AREN'T JUST FOR RATES ANYMORE!

Kenneth R. Hoffman Dysart Taylor Cotter McMonigle & Montemore, P.C.

As Samuel Goldwyn reportedly said, "A verbal contract isn't worth the paper it's written on." Every first-year law student learns all the standard reasons for advising clients to use written contracts: to document the deal (memories tend to get fuzzy, especially when a deal goes south and money is involved) as to price, payment terms, obligations of each party, etc. We also learned that some contracts, such as those involving an interest in real estate or ones that cannot be performed within one year, must be in writing in order to be enforceable. However, there are some transactions and agreements that must be in writing in order to be legal at all, not just enforceable, and in order to protect the parties and their officers, directors, and principals from the risk of serious liability. A number of transportation contracts fall into this category, and rates and charges are not the primary issues.

Because of the requirements of the recently enacted federal statute known as "MAP-21" (officially the "Moving Ahead for Progress in the 21st Century Act"), it is imperative that truckers (motor carriers), freight forwarders, freight brokers, and the shipper customers of each of those, use written contracts. The law states:

> "For each agreement to provide transportation service … the [trucker, broker, or forwarder] shall specify, <u>in writing</u>, the [Federal Motor Carrier Safety Administration] authority under which the person is providing such transportation service."[1] (Emphasis added)

The purpose of the law is to require each party to a transportation agreement to specify what hat they are wearing in the transaction.

This requirement is especially critical for transactions involving parties that might be authorized to wear more than one hat. For example, some companies have FMCSA authority to provide both trucking and freight broker services. That company and its shipper customers need to know (and must now specify in writing) if the company is acting as a motor carrier or a broker in each transportation transaction. The same is true for companies that hold any one, or a combination of motor carrier, freight forwarder, or freight broker authority.

A licensed motor carrier is not allowed to provide brokerage service unless it also holds broker authority, nor is a motor carrier allowed to provide freight forwarder service unless it has a freight forwarder registration.[2] Similarly, a freight forwarder and/or a freight broker cannot perform motor carrier service unless it also holds a separate FMCSA registration as a motor carrier.[3] Motor carriers are no longer allowed to broker shipments to other carriers under the guise of "convenience interlining." To constitute a legitimate interline operation, the originating motor carrier must physically transport the shipment for at least part of the trip and must retain liability for the cargo and for payment of the connecting carriers.[4]

There are numerous types of transportation agreements to which the written "hat-designation" provision applies, including:

- Carrier/Shipper
- Carrier/Broker
- Broker/Shipper
- Broker/Carrier
- Broker/Co-Broker
- Freight Forwarder/Shipper
- Freight Forwarder/Carrier
- Freight Forwarder/Broker

However, in any transaction in which freight brokerage service is involved (which includes all or most third-party logistics or 3PL service providers), not only must the broker be identified as such in writing for each transaction, it is also critically important for the parties to make sure the transportation service provider is actually authorized by the FMCSA to provide freight brokerage service.

MAP-21 includes some real teeth designed to deter violations and to compensate victims of those violations regarding unauthorized freight brokerage. One of the new statutory provisions specifies that "[a]ny person who knowingly authorizes, consents to, or permits, directly or indirectly, either alone or in conjunction with any other person," the provision of interstate freight brokerage service without registering as a broker and satisfying the $75,000 financial security (surety bond or trust fund) requirements applicable to brokers is liable to an "injured party for all valid claims incurred without regard to amount."[5] This private cause of action is in addition to the $10,000 civil penalty for each violation. The statute does not define what constitutes "a valid claim." Because the law is still relatively new, the courts have not had a chance to weigh in on the scope of that term; however, at least one case is pending.

The liability for civil penalties and private causes of action extends, jointly and severally, "to (1) any corporate entity or partnership involved; and (2) to the individual officers, directors, and principals of such entities."[6] In addition, an injured party may be entitled to recover attorney fees from the violators.[7] People rightfully tend to sit up and take notice when the law extends the risk of joint and several liability not only to their business or employer, but to them personally.

A Rate & Load Confirmation document can satisfy the basic statutory requirement for a written specification of the role each party is playing in the transaction and the authority under which the service provider is operating. These documents have been common in the industry for years, but many companies still need to revise their forms to include their "hat designation" information. Moreover, most Confirmation forms are single page, bare-bones statements of rates and charges along with pick-up and delivery instructions. The better practice is to have a detailed master contract, and use a Confirmation document for each individual transaction. The Confirmation document should refer to the master contract as the governing agreement.

In addition to specifying each transportation service provider's role in the transaction to avoid the risk of liability for violating the freight broker registration provisions, all motor carrier, freight broker and freight forwarder transportation contracts should address a number of other issues that are keys to risk management, some of which have peculiarities for the transportation industry. Examples include responsibility for loss or damage of cargo; cargo legal liability insurance for truckers and freight forwarders (particularly considering that there is no longer any law or regulation requiring that coverage); contingent cargo liability insurance for freight brokers; cargo claims filing and processing; indemnification; compliance with California Air Resources Board rules; back-solicitation/non-circumvention; liability for payment of freight charges; availability of federal preemption of certain claims and suits based on state or local laws or regulations; and waiver of various statutory rights or obligations. Many of these issues are subject to default rules by statute or regulation, but those statutes and rules may be waived in contracts between shippers and carriers.

In fact, "contract carriage" is defined in federal law as "service provided under an agreement entered into under [49 U.S.C.] section 14101(b)."[8] That statute allows a motor carrier or freight forwarder to enter into a contract with a shipper (except for certain household goods shipments), if the shipper and carrier, expressly and in writing, waive any or all rights and remedies under the otherwise governing federal laws. The parties may not waive the provisions governing registration, insurance, or safety fitness.

The courts have tended to strictly construe the law regarding "express waiver." A specific reference to §14101(b) is highly recommended. On the other hand, both parties should carefully consider the implications of a blanket waiver of "any and all rights and remedies." It is often advisable to keep certain federal statutory provisions effective and applicable, and to do so by specifically excluding them from the waiver. Examples of key rights and remedies that should be considered for non-waiver include: cargo liability under the Carmack Amendment;[9] time limits for certain claims;[10] disclosure requirements for rates and charges[11] procedures and time limits for overcharge and undercharge claims;[12] and federal preemption of state laws related to rates, routes, or services.[13] By not waiving the provisions of these statutes the parties also preserve their opportunity to take their case to federal court in the event of a lawsuit. Even if federal law would govern a case brought in state court, the federal courts are likely to be more knowledgeable about these statutes and the extensive body of court decisions interpreting them.

Since economic deregulation of the trucking industry several decades ago, and the resulting demise of mandatory tariffs and the filed-rate doctrine, it has always been a good idea to have written transportation contracts to at least assure everyone knows what rates and charges apply. Now MAP-21 has made written disclosure of the precise role of the service provider a legal requirement applicable to every transportation transaction involving trucking, freight forwarding, or freight brokering. Because the parties to these transactions must have a written document, they should take the opportunity to protect themselves and their businesses by using a complete contract that addresses numerous other legal compliance and risk management issues inherent in surface transportation in the United States. If drafted well, that contract will be worth far more than the paper it's written on.

Ken is a Shareholder in the Kansas City firm of Dysart Taylor Cotter McMonigle & Montemore. He represents motor carriers, shippers, and transportation intermediaries regarding contracts, cargo claims litigation, and regulatory matters, both domestic and international. Ken is a Past President of the Transportation Lawyers Association. His e-mail is KHoffman@DysartTaylor.com.

1 49 U.S.C. § 13901(c)
2 49 U.S.C. § 13902(a)(6)
3 49 U.S.C. § 13903(d) & § 13904(d)
4 49 U.S.C. § 13902(i)
5 49 U.S.C. § 14916(c)
6 49 U.S.C. § 14916(d)
7 49 U.S.C. § 14704
8 49 U.S.C. § 13102(4)(B)
9 49 U.S.C. § 14706
10 49 U.S.C. § 14705
11 49 U.S.C. § 13708
12 49 U.S.C. § 13710
13 49 U.S.C. § 14501(b) & (c)