with **Brent Wm. Primus, J.D.**

The Final Four Rules of Contracting

The two previous installments of PARCEL Counsel discuss the first two rules of contracting: (1) Know with Whom You Are Dealing and (2) Get It in Writing. In this issue, we will look at the four remaining rules. These four rules are, as with the first two, fairly obvious when one considers the steps and process involved in any business contracting.

However, the real challenge is not just to be aware of the rules, but rather to have in place the necessary corporate controls or to exercise the necessary self-discipline needed to diligently follow the rules — even when time is short with the pressure on to meet a deadline or even if there are no particular difficulties envisioned in the contractual relationship. To say what is obvious, and as Mr. Murphy has observed, "If something can go wrong, it will go wrong."

It must be kept in mind that one of the unique aspects of business dealings involving transportation is that there tend to be many, many transactions involving relatively small dollar amounts as opposed to one big transaction involving a very significant amount of money; for instance, the acquisition of a new building or a multi-year lease of an equipment fleet. In these situations, the need for an adequate review of the legal aspects of the transaction is obvious, while transactions in the supply chain tend to get overlooked. However, when things go wrong, all of the little transactions can add up to a very large problem involving thousands or even hundreds of thousands of dollars.

With that in mind, we will turn to the third rule: **Read It**. As tedious as it may be to read a multi-page document in fine print, a careful review of a contract prior to signing is part of your job description. Further, if the contract before you "incorporates by reference" some other document, such as a rules tariff or a set of rates, then one needs to also know exactly what is in those other documents.

The fourth rule is **Understand It**. Do not hesitate to ask questions if there is a term that you are not familiar with or if you are uncertain as to the effect of a certain provision. The transportation industry is laden with its own jargon, e.g., "Pro Number," "Free Astray," "NOI" — the list is endless. In addition to industry jargon, the document itself may have certain terms, e.g., "inside delivery" or "residential delivery," whose exact meaning will vary from carrier to carrier. Thus, when reviewing a transportation contract, one cannot assume that the way a term is used in the contract being reviewed is intended by your contracting partner to be used in the same way as in a previous contract with a different contracting partner.

For those new to the industry, please do not feel embarrassed to ask someone when encountering a new or unfamiliar term. Even the most experienced transportation professional or attorney had their own "first day on the job."

The fifth rule is **Agree to It**. While this may seem obvious, never be satisfied when your contract partner-to-be says, "Oh, we never enforce that provision." You can be assured that on the day the problem arises, the person who said that does not remember saying it or has long departed. Moreover, even if they

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did remember saying it or hadn't departed, there is a basic legal principle known as the "parole evidence rule," which precludes testimony as to statements made by a party during the negotiating process, which ultimately did not make it into the written version of the contract that was signed by the parties.

The sixth and final rule is **Keep a Copy**. As discussed in conjunction with the second rule, Get It in Writing, actual written documents are slowly becoming the exception to the rule in business dealings. However, whether a contract is memorialized in a traditional signed written agreement or posted on a website, the goal of this rule remains the same — both parties need to be able to identify in the future the exact agreement and terms comprising the contract.

All for now! ■

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