The Second Rule of Contracting: Get It in Writing

In the last installment of *PARCEL Counsel*, the focus was on the first rule of contracting: Know with Whom You Are Dealing. In this issue, we will consider the second rule of contracting: Get it in Writing. There are many reasons why a business agreement should be reduced to writing, especially when significant amounts of money are involved. The fundamental reason is that "a short pencil is better than a long memory."

Additionally, most states have a set of laws, historically referred to as a Statute of Frauds, requiring that certain contracts be in writing in order to be enforceable. Examples of this are real estate leases, contracts extending for more than a year or contracts for more than a certain dollar amount.

With respect to transportation contracts and, in particular, contracts with motor carriers involved in regulated interstate commerce, the applicable statute states "a carrier providing transportation or service… may enter into a contract with a shipper… to provide specified services under specified rates and conditions. If the shipper and carrier, in writing, expressly waive any or all rights and remedies under this part… for the transportation covered by the contract, the transportation provided under the contract shall not be subject to the waived rights and remedies…" (Source: 49 USC Section 14101).

In analyzing this statute, it should be noted that the statute does not require a transportation contract with a motor carrier to be in writing. Thus, verbal contracts are allowed and are enforceable (assuming one could remember what was said)! However, if the shipper and carrier wish to depart from the statutory framework, then the contract must be in writing.

It should also be noted that even though this statute does not require a contract between a shipper and a motor carrier to be in writing, the most critical sentence of the current Uniform Straight Bill of Lading reads as follows:

- "RECEIVED, subject to individually determined rates or contracts that have been agreed upon in writing between the carrier and shipper, if applicable, otherwise to the rates, classifications and rules that have been established by the carrier and are available to the shipper, on request."

While the Uniform Straight Bill of Lading is not as widely used as it once was, it certainly is used by many carriers for many shipments. The quoted language underscores the need for written contracts in transportation matters.

At one time, "get it in writing" meant simply that, i.e., typing an agreement up on a piece of paper that representatives of each party signed with each party retaining a fully signed copy. This leads to the question as to what "in writing" means in this day and age of e-commerce. While most people continue the practice of having a printed, signed document for the main body of the contract, one of the most critical portions — the actual rates — are sometimes incorporated by reference to a set of rates not actually included in the contract. Another practice is to have the rates on a CD-ROM of which both parties retain a copy. As an aside, it should be noted that a chain of emails is far from being the best way to document an agreement.

Thus, verbal contracts are allowed and are enforceable (assuming one could remember what was said)!

If there are terms or rates which are incorporated from an independent source or tariff publication, it is very important to identify the outside source with specificity. It is also very important for a shipper to "freeze" the reference to the outside source as of a particular date so as to avoid incorporating into the contract subsequent changes in the outside source over which a shipper would have no control or even knowledge.

Whatever method is used, the critical task is to ensure that both parties are able to identify clearly and unequivocally, and without dispute, the exact contract language and terms agreed upon between the parties — even though the individuals involved in the original negotiation are no longer available.

All for now! ■

BRENT WM. PRIMUS, J.D., currently serves as the General Counsel for the Freight Transportation Consultants Association and is the CEO of transportlawtexts, inc. and Primus Law Office, P.A. Your questions are welcome at brent@transportlawtexts.com.