Getting Your Money's Worth

Tips and cautionary tales from the trenches of contract negotiation

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The devil is in the details, as the saying goes — and that's nowhere more true than in contract negotiation.

It can be tempting for motor carriers and brokers to breeze past the fine print in the contracts they sign with shippers, but it isn't smart. In a presentation to the Arkansas Trucking Association's annual conference in May, transportation and logistics attorney Eric Zalud outlined some of the common mistakes carriers and brokers make in contract negotiations and the most important protections they should push for.

"We've been deregulated since 1985, and as a consequence transportation contracts are much more prevalent than they used to be and are much more important to the industry," said Zalud, a partner with Benesch Friedlander Coplan & Aronoff in Cleveland, Ohio, and a past president of the Transportation Lawyers Association.

"Contracts really are assets," Zalud said. "This industry more so than many others is very relationship-based. It's important in the industry to treat all those contracts as assets — to maintain them and carefully negotiate them, to carefully draft them."

Like other industries, transportation is influenced by macroeconomic cycles, Zalud said. These cycles mean that power shifts gradually but regularly from shippers to carriers. When cycles favor shippers — generally in less prosperous economic times — they may use that leverage to negotiate contract terms that favor them.

"They can be 800-pound gorillas," Zalud said. "And a lot of motor carriers will say 'I want the business, so what the heck, I'll sign it,' and they can be haunted by what they undertake in these contracts."

Carriers might not feel comfortable arguing with a shipper about the details of a contract, but if a carrier pushes back on 10 or 15 points in the contract, the shipper will probably meet the carrier halfway on seven or eight of them, Zalud said.

"That's better than just accepting everything without any comment or negotiations," he said.

In today's economic climate, power is returning to carriers simply because of the driver shortage. "Carriers have trucks but no one to drive them. If there's less capacity that's really not good for anyone, but it gives carriers the option to choose. And they will pick shippers they have better arrangements with, that are more profitable for them, and that didn't turn the screws when they had the upper hand."

CONTRACT LENGTH AND TERMINATION

One of the most important issues for carriers to consider is the length of a contract and what kind of exit clauses to include. Longer contracts may seem more desirable, but they can wind up locking carriers into arrangements that aren't profitable — such as requiring a carrier to commit a certain number of trucks to a shipper's business even when the shipper's volume doesn't justify it. Carriers should negotiate for volume

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guarantees if possible, Zalud said.

In some situations, carriers should negotiate for a long-term contract with a shipper, he said. For instance, if the carrier commits to large capital expenditures for additional equipment to provide the services in the contract. In that case, carriers need enough time to recover their startup costs and should include provisions in the contract for cost recovery if the contract is terminated early.

CLARITY

Contracts need to be very detailed and clear about each aspect of the carrier/shipper relationship, Zalud said. Some questions to ask include:

- Does the contract govern all relationships between the two parties?
- Is there a geographical limitation?
- Is the contract for both domestic and international transportation?
- Does it include warehousing, freight bill audit and payment, and customs services?
- Are the needs and expectations of both parties clearly described, including services to be provided, the volume and metrics?
- How will compliance be measured?

The scope of the contract can be included in the body or put in a separate appendix.

PRICE AND COST

Carriers need to make sure they know exactly what their costs will be — how much they'll have to pay for the labor, equipment, fuel and other items needed to provide the promised services. The prices set in the contract have to reflect those costs accurately to allow the carrier to make a reasonable profit, Zalud said.

The contract should also spell out how the charges will be determined. Will it be based on a rate per mile, accessorial charges, other means of pricing, or a combination of methods? Will there be a fuel surcharge? Gain sharing? This section is also a good place for carriers to incorporate their Rules Tariff.

TO CARMACK OR NOT TO CARMACK?

One of the unavoidable issues of the transportation business is determining who is responsible when something goes wrong.

The Carmack Amendment to the Interstate Commerce Act put into federal law a number of provisions governing liability. Some provisions benefit carriers and others benefit the shipper, Zalud said. Shippers will sometimes try to include waivers to some parts of the Carmack Amendment in their contracts. Carriers should be very careful in this area, he said.

▲ Zalud

For example, carriers may not be aware that signing a Carmack waiver means giving up the defense that federal law trumps any state laws in the event of cargo loss or damage litigation. This so-called "preemption defense" protects the carrier from all state law claims, including breach of contract, misrepresentation and unfair and deceptive trade practices claims.

"If the Carmack Amendment is not waived, then it's very easy to eliminate any of those crazy claims," Zalud said. "This is America, so claims lawyers think of a lot of creative ways to get into court."

Other federal law provisions that carriers should try to avoid waiving address the time limits for filing claims or lawsuits against the carrier. The federal provisions are generally much shorter than state statutes of limitations, which would apply if the carrier agrees to waive the federal provisions.

"You could have claims lingering around for a decade," Zalud said. "There are a lot of good reasons to be very careful about how many of those [provisions] you waive."

LIABILITY FOR CARGO LOSS/DAMAGE

On the other hand, the Carmack Amendment also states that the carrier is liable for the actual value of any goods that are lost or damaged. This is one of the main provisions that carriers should modify by contract in order to limit their liability, Zalud said.

The contract or the bill of lading should state that the carrier is responsible for a specific released value rather than the actual value. This can be an amount per pound with a maximum liability amount per shipment. National freight classifications set limits for particular types of cargo, Zalud said.

The amount of liability limitation is typically negotiated along with the carrier's rates, Zalud said, so that the carrier offers the shipper the opportunity to choose different levels of coverage.

"If they pay less, they often will get a liability limitation, Zalud said. "If they pay more, they can declare a value on the shipment."

Under federal law, the shipper must be informed that there is a liability limitation and that the shipper can pay a higher rate and have the limitation removed. As long as the shipper is notified of the limitation and option to pay for more coverage, the liability limitation will be effective, Zalud said.

Brokers, in theory, have no liability

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—ERIC ZALUD, PARTNER,
BENESCH FREIDLANDER COPLAN & ARNOFF

for cargo loss or damage unless it results from the broker's negligence. It's good to make that clear in a contract anyway, Zalud said.

Another aspect of spelling out the details of liability is specifying when the carrier's role as carrier ends — particularly in the event of a refused shipment. It's beneficial for a carrier to contractually transition to a warehouseman role if it is unable to deliver the cargo immediately after it reaches the destination. The standards of liability are higher for warehousemen than for carriers, Zalud said.

"You want the contract to say that carrier liability ends when the goods are not in transit anymore," he said. "You want that status changed after the goods have arrived at their destination."

OFFSETS

Shippers and brokers may sometimes use offsets in an attempt to more quickly recover losses if they've filed a claim for lost or damaged cargo. An offset occurs when a shipper deducts the amount of the claim from what it owes the carrier for other unrelated shipments, or when the broker pays the claim but in turn deducts it from what the broker owes the carrier.

Offsets usually come into play when carriers or their insurers don't settle claims or because the carrier's insurance contains loopholes that allow denial of coverage.

Offsets are harmful to carriers because cargo claims are not adjusted in accordance with federal law, insurers will not pay the carrier, and the carrier is deprived of revenue it needs to operate.

INDEMNITY

Indemnity is "one of the more onerous things" carriers have to deal with in contract negotiations, Zalud said.

A lot of contracts contain indemnity clauses, which might try to shift all liability that results from the contract to the carrier — even liability for the shipper's negligence or the negligence of third parties like brokers, subcontractors and owner-operators.

"This really comes into play with personal injury lawsuits where high dollars are involved," Zalud said. "If a carrier is locked into an indemnity clause that forces it to indemnify the shipper for everyone's negligence, those costs can mount tremendously."

And once a carrier signs a contract with an indemnity clause they're typically bound by that, Zalud said.

"I've been on both sides of these, and it's hard to get out from under them," he said.

Indemnity is less of a problem than it used to be because 41 states, including Arkansas, have passed laws limiting indemnity clauses.

"The best indemnity clause is each party is responsible for its own negligence," Zalud said. "That's the easiest way to handle it."

DRIVER RESPONSIBILITIES

Shippers will sometimes want to include contract provisions that make the driver responsible for counting every package during loading, and state that if the driver does not count the packages, then the shipper's package count as shown on the bill of lading or shipping document is binding on the carrier.

This type of provision puts an improper burden on the driver to do the shipper's counting, Zalud said.

"Sometimes the drivers are not even allowed on the loading dock," he said. "Carriers should be careful about responsibilities being shifted to the drivers."

CONTRACT ALTERATIONS

A good contract should specify that any changes must be signed by an authorized representative of both parties. This prevents a driver or dock worker from changing the terms and conditions inadvertently by signing a bill of lading or other document that has different terms and conditions.

It also guards against any promises a sales representative might make that are contrary to what's in the contract, Zalud said.

"One of the things contracts help do is let you think through the whole relationship," Zalud said. "But you can't control what happens at the loading dock. What the driver signs at the bill of lading — 'Sure, we'll take this' — the commitments drivers make on the loading docks sometimes create liability for the motor carrier."

If a contract is well drafted, Zalud said, it will spell out that it supersedes any promises made by employees before the contract was signed, and that any modifications have to be in writing and signed by both parties.

"That eliminates claims that some representative made after the contract that's in conflict with it," Zalud said. "It helps prevent a lot of that extraneous potential liability."