



## The *InterConnect* FLASH!

Practical Bursts of Information Regarding Critical Independent Contractor Relationships

### FLASH NO. 12

## ANOTHER “HYBRID” TO THE IC MODEL – PART II (The Transportation Agent Model)

Last month’s FLASH presented a Freight Forwarder Model which has been gaining some attention as a hybrid approach to the basic IC Model. It is a blend of two otherwise typical operating models: (1) a property broker, with respect to the shipper/transportation service provider relationship; and (2) a motor carrier using owner-operators to do the actual transport of the cargo. The starting point in considering the applicability of the Freight Forwarded Model was whether the shipper had a preference to operate through an intermediary or directly with an asset based motor carrier. If a shipper preferred (or did not object to) dealing with an intermediary, then the Freight Forwarder Model had potential applicability.

The opposite is true with respect to the Transportation Agent Model that we are discussing this month. It has potential applicability when a shipper prefers to operate directly with an asset based motor carrier. On the shipper’s side of the ledger the relationship is rather straight forward. The transportation contract is executed directly between the shipper and the motor carrier. The shipper retains all of the responsibilities to pay the motor carrier for the services rendered. The motor carrier retains all the legal responsibilities for matters attendant to the operation of a motor carrier, including compliance with FMCSA regulations; liability for cargo loss or damage; compliant CSA scores; public liability exposure; and service performance.

On the motor carrier’s side of the ledger, the Transportation Agent Model provides helpful features, particularly in the area of

worker classification (employee/independent contractor) related issues. It also positions the motor carrier to deal with an intermediary with respect to the owner-operator component of its driver workforce.

Figure 1 depicts the triangular relationships between and among the Transportation Agent, the motor carrier and the independent contractor with a power unit.

The first step, as described in Contract #1 in Figure 1, is the agreement between the Transportation Agent and the motor carrier. The relationship finds its legal basis

in the Federal Leasing Regs (specifically 49 CFR § 376.12(m)). This often overlooked provision applies to owners of commercial vehicles who are not agents but whose equipment is used by an agent of a motor carrier in providing transportation on behalf of that motor carrier. The motor carrier must ensure that the owner-operators receive all rights and benefits due to an owner under the Leasing Regs, such as compensation; payment period; freight bill copies; charge backs; products, equipment, or services; insurance; and escrow funds. Correspondingly, the Transportation Agent must be alert

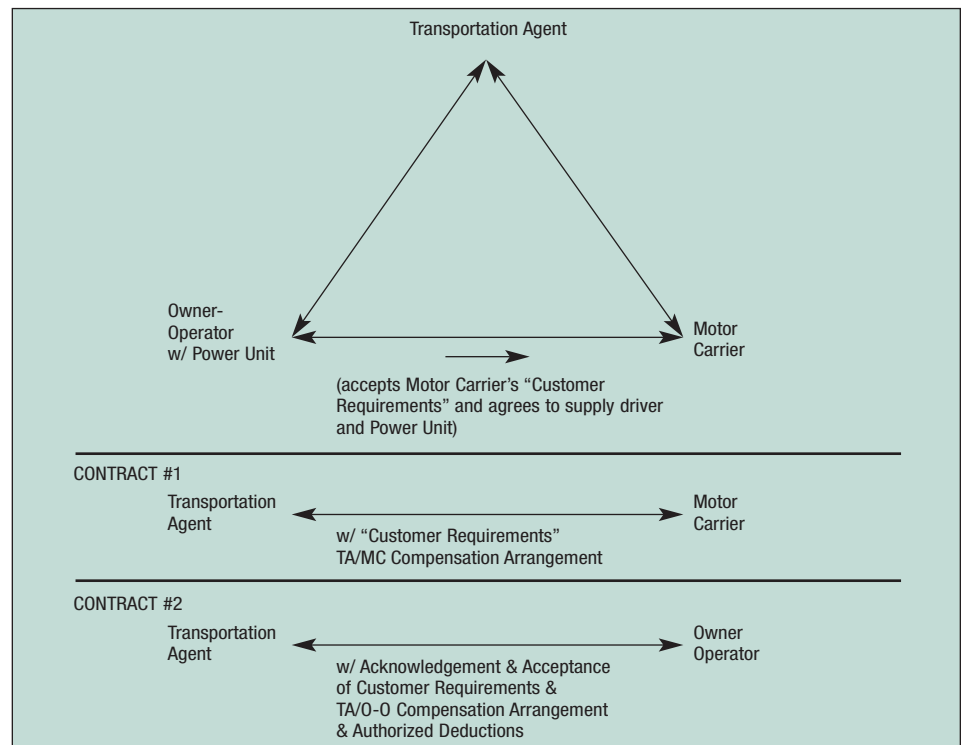


Figure 1

and attuned to compliance with the Federal Leasing Regs.

Contract #1 includes a “spec sheet” from the motor carrier outlining the specific motor carrier’s requirements (the “Customer Requirements”). Basically, the motor carrier provides the Transportation Agent the criteria that it expects from an independent contractor who provides a power unit to the motor carrier. The content of the “spec sheet” contains many of the service-oriented provisions that typically appear in an Independent Contractor Operating Agreement which would otherwise exist between the motor carrier and an independent contractor, such as general performance requirements; operations requirements; communication equipment provisions; insurance requirements; and termination provisions.

Contract #1 also contains the compensation arrangement between the motor carrier and the Transportation Agent which generally includes the typical motor carrier-independent contractor components of compensation plus a per capita service fee retained by the Transportation Agent. There are other provisions related to the movement of funds from the motor carrier to the Transportation Agent, similar to the way in which funds move from a company that leases its employees from a typical employee leasing company.

The second piece of the puzzle is Contract #2 between the Transportation Agent and the independent contractor. As mentioned above, that Agreement addresses the compensation arrangement between the independent contractor and the Transportation Agent, coupled with full disclosure regarding related charge backs against compensation. It also contains an Acknowledgment and Acceptance by the independent contractor of the motor carrier’s Customer Requirements. Contract #2 will generally mirror the compensation arrangement between the motor carrier and the Transportation Agent, except for the retained service charge that the Transportation Agent may charge the motor carrier.

#### Why tinker with the basic IC Model?

The most attractive feature of the Transportation Agent Model from a motor carrier’s perspective is that it removes two nagging “control” issues from a motor

carrier operating with owner-operators: (1) if the owner-operators are an integral part of the business; and (2) if they have the ability to work for others. These two criteria are often the lynchpin to creating liability resulting from worker misclassification, such as withholding tax liability; workers compensation coverage; and employee benefits. Both of these “indicia of control,” along with other criteria necessary to create an independent contractor relationship, shift from the motor carrier to the Transportation Agent. The Transportation Agent, not being in the business of hauling freight, can overcome the hurdle of an integral part of its business which is an extremely difficult task for the motor carrier. If handled correctly, there is a legitimate basis upon which to demonstrate that the independent contractor does have the ability to work for others since, presumably, the Transportation Agent will have contracts with a portfolio of motor carriers. Thus, if done properly, the Transportation Agent can effectively create a legitimate, arms-length vendor/vendee relationship which will withstand legal scrutiny.

**Why would the Transportation Agent be interested in the business?** There are likely other reasons, but it appears that the entities who are offering the Transportation Agent function are also directly, or indirectly, engaged in the employee leasing business serving the trucking industry. Therefore, the Transportation Agents already have existing access to many potential customers which they either serve or are otherwise familiar with. Also, for the longest time, the employee leasing companies have not been able to really fill the gap with respect to satisfying a motor carrier in its relationships with independent contractors: the model which pays \$X to the truck and \$Y as W – 2 wages to the driver just has not gotten serious traction. Additionally, often the Transportation Agent will insist that the motor carrier forgo providing certain insurance coverages or similar items to its owner-operators, such as occupational accident insurance, and the Transportation Agent would assume that function for obvious related economic benefits.

**What about the owner-operator?** Based on our exposure to the Transportation

Agent Model, we have not been in a position to get a good sense of what the owner-operator really thinks of the arrangement, or if he or she really cares. From the owner-operator’s perspective, its nothing more than an assignment of the dispatch function from the contracting Transportation Agent to the motor carrier. The owner-operator ends up running the lanes and hauling the type of freight that he or she wants for reasonable compensation. So, from our perspective as lawyers, we don’t have a great handle on the last piece of the triangle.

The model may have merits as mentioned above, but at the same time it may have shortcomings. In the event you have any interest in this approach, we at Benesch can certainly assist in getting in right.

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