

Last Mile Transportation Myths Debunked – And A Path Forward

AUGUST 17, 2021

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One of the most important stories in the transportation space over the last few years has been the explosive growth of last mile residential delivery. The global pandemic has only further fueled demand for this localized and often tech-driven service. New ventures have flooded this space previously occupied by traditional couriers, parcel carriers, and household goods movers.

A challenge that often exists for the strategic growth of new and novel service offerings is the archaic transportation regulatory environment. The current system has as its foundation the commerce clause of the U.S. Constitution and a regulatory understanding that transportation is a utility and should be regulated as such, with a turn-of-the-last-century view on that proposition. Even after deregulation, the resulting regulatory landscape remains largely constructed for application to the over the road motor carrier space. Simply put, it is no shock to anyone that the speed of business and the speed of government are often out of step with one another.

The last mile space, and the business strategies developing to meet that market, are often driven by certain myths that - while logical - don't align with the legal reality. The practical question that emerges is then how we may go about navigating the maze of government requirements while still advancing our businesses. This challenge is as confusing for sales and operations leads as it often appears to be for regulators themselves.

Our team works every day to bring clarity to the dizzying array of regulatory obligations by asking just a few targeted questions: (1) What is the Nature of Commerce; (2) What is the Nature of Service; and (3) What are the Operating Characteristics? In our experience the answers to these questions cut through the noise of whether and what requirements apply. They yield the clarity required for confident strategic growth, risk management, and preparation for challenge.

Q1: What is the Nature of Commerce?

Arguably the single most misunderstood concept in the last mile space is the nature of commerce. The Federal Government holds exclusive jurisdiction over foreign and interstate commerce as granted by the Commerce Clause of the U.S. Constitution. State Governments hold jurisdiction over intrastate commerce (transactions between points in a single state). Even at the local level, municipalities will have a narrow zone of control over certain aspects of commercial activities within their boundaries.

Determining which level of government has a "say" in the performance of a service is the challenge - and it is particularly challenging for transportation and logistics due to the geographic nature of the business. In its simplest form we move things from one point to another or we provide service that

contribute to those movements. Those activities may amount to the entire through transportation from origin to destination or it may be a leg between nodes in a complex supply chain.

The key for this threshold inquiry is the nature of commerce itself. Courts look to the shipper intent at the point of origin to determine the nature of commerce and thereby which level of government has authority. If the shipper's intent was to achieve throughput from one state to deliver at final destination in another state then the movement is generally one in interstate commerce. This remains true even if multiple modes are deployed (such as air and motor carriage), if multiple carriers of the same mode are used (such as middle mile carriers between states and lightweight vehicle operations in the state of destination), if there is intervening storage that does not terminate transportation (such as short term storage at a distribution center), and on the right set of facts even if the ultimate destination is not yet known (such as for positioning based upon forecasted near-term sales).

To summarize, it can be the case that last mile delivery is merely furtherance of interstate commerce. This defies the conventional wisdom that a particular vehicle must cross state lines to trigger federal jurisdiction, which is not true. Crossing state lines is a strong indicator of interstate commerce but it is not necessary for that nature of commerce.

Q2: What is the Nature of Service?

Once we know what level of government applies we can then determine which agency, administration, commission, or similar body holds jurisdiction over the service. At the Federal level the dominant cast of characters are familiar to many in the business. The Federal Motor Carrier Safety Administration (FMCSA) has jurisdiction over motor carrier operations. The Transportation Security Administration (TSA) has jurisdiction over air carriage including indirect air carriage. The Federal Maritime Commission (FMC) has jurisdiction over international ocean carriage. The Surface Transportation Board (STB) has jurisdiction over water carriage in the non-contiguous domestic trades and other forms of motor carriage including household goods service. If the appropriate governmental body is known then the applicable set of laws, rules, regulations, and operating requirements can be swiftly determined.

Determining the State-level agencies with jurisdiction can be more of a challenge in the transportation and logistics space. One reason for complexity is that the States organize their governments in varying ways. For example, the State agency with authority over motor carrier transportation may be the Department of Transportation, or it could be the Public Utilities Commission, the Commerce Commission, or the Department of Motor Vehicles. Another reason for complexity is that not all States regulate the same services in the same way. For example, some States do not meaningfully regulate motor carriage by requiring intrastate operating authorities analogous to the FMCSA including Delaware, Louisiana, and Alaska. Other States require holding intrastate operating authorities with varying insurance requirements and other compliance burdens. Carrying this example forward it may be that an enterprise offers intrastate service in an array of States where some require licensure and others do not. Knowing which specific agency holds jurisdiction over each aspect of an operation, and whether or not that jurisdiction is exercised through regulation cuts to the heart of the complexity.

To summarize, it can be the case that last mile delivery is regulated by the FMCSA whose business is not merely focused on long haul carriers in commercial motor vehicles. If intrastate commerce is in

scope, then the applicable agency in the State of jurisdiction will control such as the Public Utilities Commission. For better or worse, not all States regulate operations equally particularly when it comes to the commodity carried or the type of vehicle used. In general despite this variance, the nature of the employment relationship between the carrier and driver (employee or independent contractor), or the relationship with the vehicle (such as using the driver's vehicle) is not relevant to the question of whether regulated activity is conducted - similar to analysis under Federal law.

Q3: What are the Operating Characteristics?

Finally, considering the operational characteristics can be determinative in understanding whether or not any governmental requirements are compulsory and their impact on operational performance as well as the cost of service delivery. A few common operational characteristics upon which operating requirements can turn are the types of commodities that are moved and the types of equipment that are used. Certain commodities are regulated differently than others due to particular safety and other public interest concerns of the Federal and State governments under which service is performed. Classic examples are household goods, alcohol products, and dairy products. These commodities may require special licenses, permits, and operating procedures among various and overlapping government agencies. Most last mile services do not trigger these categories but it is not without question.

Equipment types are the more common example of operating characteristics where there is often confusion when pioneering new services. For example, a great deal of attention is often paid to whether a commercial drivers license (CDL) is required to operate a vehicle. While this is certainly important, and key obligations attach, the fundamental question is often whether a commercial motor vehicle (CMV) is involved. CMVs may include seemingly light vehicles that break the 10,001 Gross Vehicle Weight Rating threshold such as heavy sprinter vans or pick-up trucks towing trailers. These vehicles trigger application of most Federal Motor Carrier Safety Regulations despite the absence of CDL requirements. Another area of frequent confusion involves passenger vehicles such as those used for last mile delivery operations. Even if a movement is in intrastate commerce, certain states such as Illinois and Pennsylvania take interest in regulating those for-hire services while others including Colorado and Georgia do not.

To summarize, the product delivered and the vehicle class are relevant to understanding the precise regulatory requirements including the applicability of certain permits. It is not the case that single deliveries of consumer products, or that all lightweight vehicle operations, let alone operations in personally owned vehicles, are always unregulated. The opposite is very often true.

Meeting the Market with Confidence

The complexity of operating in the last mile space can be effectively attached with a strong game plan, as outlined here. Understanding the nature of commerce narrows scope to the level of government with which we should be most concerned. Identifying the relevant agency narrows scope further to the applicable body of regulations and policies. Then, considering whether the unique operating characteristics are addressed in that applicable body of requirements yields an actionable approach - with confidence. Even if an agency were question compliance after launch of a new operation, the ability to clearly and concisely explain the answers to these questions assists in its persuasive or mitigating effect.

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