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A Half-Century Game Changer That Rocked the Transportation World: *Dixie Midwest Express, Inc., Extension – General Commodities (Greensboro, AL)*, 132 M.C.C. 794 (1982)

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***Dixie Midwest Express, Inc., Extension – General Commodities (Greensboro, AL),* 132 M.C.C. 794 (1982)**

1. Background and Historical Context.

The transportation industry, especially motor carriage, and the practice of transportation law have changed so dramatically over the last 50 years that it is difficult to recognize today's business and law practice as their lineal descendants. From the beginning of motor carrier regulation with the Motor Carrier Act of 1935 through 1980, when Congress and the late Interstate Commerce Commission began to relax regulatory constraints on the industry, motor carriers and their lawyers were steeped in administrative (some would say draconian) practices of operating rights applications, protests, purchase, sale and merger applications and tariff filings. The industry and its lawyers were steeped in an elaborate administrative process that strictly controlled and restricted entry into the industry, restricted the scope of operating rights and routes, distinguished common and contract carriage operations, strictly limited shipper-carrier contracts, required common carriers to file and strictly comply with tariffs and a constellation of administrative rulings and practices promulgated by the late Interstate Commerce Commission—all intended to control competition for interstate traffic, protect the fledgling motor carrier industry and the shipping public and prevent rate and practice discrimination. Transportation brokers, though technically they existed, were barely a blip on the screen. That era of regulation ultimately came to a close with the Motor Carrier Act of 1980, the Negotiated Rates Act of 1994 and the Interstate Commerce Commission Termination Act of 1995.

Until that "dawn of deregulation," motor carriers could not serve or contract with any shipper or transport any cargo wherever they wanted. Transactions and lawsuits involving

brokers were rare. The industry was mostly concerned with interpreting, obtaining or opposing applications for regular and irregular route operating authority which were strictly defined and limited as to geographic scope and commodities authorized. Applications for operating authority were vigorously protested by competing, existing motor carriers; temporary and emergency temporary authority applications were routinely filed; byzantine restrictions were commonly negotiated to obtain the withdrawal of opposition/protests; and operating rights—valued at what then were astronomical prices—were purchased and sold in complex time-consuming finance applications filed with the ICC. Such was the nature of a transportation lawyer's practice.

At the time, "common" and "contract" carriers were distinguished.[1] Common carriers were those who held themselves out to the general public to provide transportation by motor vehicle over routes and in geographic territories strictly limited by the ICC and subject to the tariffs they filed with the ICC.[2] Common carrier applicants had to prove that the "public convenience and necessity" supported their applications and, if successful, they were granted "certificates of public convenience and necessity" based on the scope and extent of the public shipper support[3] for the application. To prevent discrimination, common carriers had to strictly enforce and comply with their filed tariffs—no discounts under any circumstances.[4] Of course, applications for motor common carrier authority could be and commonly were protested by

[1] "Prior to 1995, the Motor Carrier Act distinguished between two different types of motor carriers: motor common and motor contract carriers. *See* 49 U.S.C. § 10102(15)-(16) (1994) (omitted 1995.)" *M. Fortunoff of Westbury Corp. v. Peerless Insurance Company*, 432 F. 2d 127, 130 (2d Cir. 2005).
[2] 54 Stat 920; 49 U.S.C. §303(a)(14).
[3] Other than "grandfather" applications, which could be supported by the carrier applicant's evidence of its pre-1935 motor carrier operations.
[4] *See* Elkins Act, 49 U.S.C. §§14901-14914. The Elkins Act, enacted in 1903 and originally codified at 49 U.S.C. §§41-43, amended the Interstate Commerce Act of 1887 and authorized the imposition of heavy fines on railroads that offered rebates, and upon the shippers that accepted rebates. The Act became applicable to motor carriers with the passage of the Motor Carrier Act of 1935, and prohibited motor carrier discounts or rebates to shippers.

competing certificated motor carriers already authorized to transport the commodity in the geographic scope of the applicant's proposed service, even if they weren't actually doing so.

One method employed by carrier applicants and their lawyers to obtain operating rights, especially when they knew an application would face strong opposition, would be to draft creative, if not convoluted, commodity or geographic descriptions and restrictions to satisfy the protestants and obtain the withdrawal of their protests. Another was to seek "contract" rather than "common" carrier operating authority. "Contract" carriers were defined as those motor carriers who served only specific shippers "under continuing contracts with one person or a limited number of persons" by furnishing transportation services through specially assigned vehicles or services designed to meet the distinct needs of each shipper.[5] Contract carrier applicants were required to show—typically with the support of a specific shipper—that the proposed service was "in the public interest." If successful, a contract carrier applicant was granted a contract carrier "permit" which restricted the carrier's service to the shipper's specific facilities or commodities or to specialized or dedicated vehicles as required by the shipper and to only in the geographic area supported by the shipper. Contract carriers did not file tariffs with the ICC, but they did have to file copies of their contracts and their operations were limited to serving no more than eight shippers.[6] "At best it can be said that the number of shippers that may be served by a contract carrier, in the usual case, diminishes as the degree of specialization in physical services diminishes."[7]

Thus, from the enactment of the Motor Carrier Act of 1935 through 1982, certificated motor (common) carriers routinely and vigorously protested a competitor's application, as a

[5] 71 Stat 411; 49 U.S.C. §303(a)(15).
[6] *Contract Cargo Co.—Ext. of Operations*, 105 M.C.C. 683 (1967).
[7] *Motor Contract and Common Carriers: A Definitional Approach*, by James C. Hardman, Transportation Law Institute, *1968 Operating Rights Applications, Papers and Proceedings* (hereafter, "1968 TLI").

result of which applicants for new operating authority seeking to enter the trucking industry would carefully craft contract carrier applications with narrowly drafted commodity and route descriptions to satisfy the protestants, eliminate their opposition, and clear the way for a grant of their limited contract authority. Transportation lawyers were very busy.

2. *Dixie Midwest* Rocks the Transportation World.

Then along came the ICC's decision in *Dixie Midwest Express, Inc., Extension – General Commodities (Greensboro, AL),* 132 M.C.C. 794 (1982). Although its long-term effects were unknowable at the time, the decision was a seismic boost for transportation brokers—who until then had a very modest profile in the trucking industry—and ultimately transformed the freight brokerage business into the powerful economic force now commonly known as the "logistics" industry. *Dixie Midwest,* and the tripartite shipper-broker-carrier relationships it fostered, changed the way cargo moves and created a new universe of contracting rights, liabilities and issues. The practice of transportation law has never been the same.

Dixie Midwest involved applications[8] for motor common *and* contract carrier authority in which the applicants originally sought to serve two supporting property brokers, as opposed to typical shippers. The applications were opposed by motor common carriers, and the ICC's Review Board No. 1 denied them despite the applicants' proposed restriction "to service for the accounts of property brokers." In its supporting statement, one broker stated that it functions

> as a shipper's agent in effecting transportation cost savings through the assembly of small shipments into truckload lots with multiple stop deliveries over broad destination territories. We are offering the public an alternative to the traditional less than truckload service offered by the general commodities carriers and freight forwarders. *** Regular route general commodity carriers are not in a position to meet our requirements both because of the limited territorial authority which they possess and because these carriers would be competitors with us in such a program.

[8] Multiple applicants consolidated for decision.

132 M.C.C. at 800. The Commission went on to identify the "unanswered questions… about the status of the two brokers." *Id*. at 801.

The applicants appealed, arguing that their applications for common carrier authority, "restricted to service for the accounts of" either property brokers generally or particular named property broker, were relatively modest in scope and unlikely to draw protest. They contended on appeal that the Commission's rejection of the restrictions effectively expanded the scope of the applications enormously, thereby making them unrestricted national-wide general commodities applications, and thus attracting a great deal of opposition. The applicants also appealed the denial of their *contract* carrier applications because "they are told that a property broker cannot qualify as a contract shipper, or, if it can, 'the ability to qualify appears to be highly elusive.'" *Id*. at 803. Although they were invited to refile for authority and submit "exhaustive evidence" in support of contract carriage authority, the applicants had no guidance as to what evidence they would need to produce in order to justify contract carrier service for a broker. *Id*.

In its decision on appeal, the Commission ruled, "On the contrary, a property broker is a proper and competent witness to testify on behalf of a common carrier application; and if the testimony is sufficiently informative and convincing, the testimony of a single property broker could be found sufficient to establish a *prima facie* case of public demand or need for broad general commodities service." *Id*. at 804. "In short, if these brokers wish to support applications for common carrier authority, they appear to be in a position to do so successfully. . . ." *Id*. at 806.

Importantly, *Dixie Midwest* clarified who can be a qualifying contract shipper:

> The term 'shipper' means the person who controls the transportation and refers to the actual shipper rather than an intermediary. Such shipper may

> be nominally either the consignor or the consignee, but must be one or the other. The payment of the charges for the transportation is evidence that the person who pays is the person who controls the transportation and such person will be presumed to be the shipper. *However, this presumption is rebuttable and can be rebutted by evidence demonstrating that a person not paying the transportation charges controls the selection of the carrier and the routing of the shipment. In such an instance, the person selecting the carrier and controlling the routing of the shipment would be presumed to be the shipper*. (Emphasis added)

Id.

The ICC then addressed whether a property broker can employ a *contract* carrier. Citing its decision in *Copes Broker Application*, 27 M.C.C. 153(1940),[9] the Commission observed that while brokers had no ownership interest in the goods shipped, they typically routed the goods, selected the carriers and, in most cases, paid or assumed responsibility to pay for the transportation charges. *Id*. at 809. The Commission, in *Dixie Midwest*, observed that "if by explicit agreement with the owners [the broker] selects carriers and routes all or a substantial part of the shipments of property confided to him," the broker is qualified "as a contract shipper." *Id*. at 811. "[T]here should be no difficulty in the [broker] qualifying as a contract shipper." *Id*. at 812. The Commission found the owners of the shipments delegate "to the broker . . . working control over the transportation of the goods. The owners of the goods may develop a continuing relationship with a broker, looking to him to arrange transportation on a regular basis over a period of time, or as part of a continuing distribution scheme." *Id*. at 813.

The Commission identified "the key issue being the degree of control over the transportation exercised by the broker," and disagreed with its earlier decisions and "their excessively legalistic interpretation of the word 'control.'" *Id*. at 814. Instead, it looked to the fact that the brokers had the "legal right of control and in doing so was serving the owners'

[9] *Copes* was the Commission's first look at the possible circumstances under which brokers might use contract or common carriers.

convenience. These facts, and not the fact that the distribution specialist happened to be a bailee, should justify the decision qualifying him to be a contract shipper." *Id*. at 815.

> In our view, if a broker is performing same function beyond that of acting purely and exclusively as a traffic solicitor and sales agent for carriers on a shipment-by-shipment basis, and if it is shown that either by agreement with the owners of the goods, or by their habitual acquiescence, the broker is *in fact* exercising control of the ttransportation, by selecting carriers and routing shipments, then the inference should be drawn that this control facilitates the broker's performance of his functions or serves the owners' convenience. In other words, *if the owners are in fact choosing not to exercise their legal right to control the transportation, but are in fact delegating this power to the broker, it should be inferred that they have valid business reasons for doing so. If in fact the broker exercises working control of the ttransportation, he can qualify as a contract shipper.* Nor need he control the transportation 100 percent of the time (see *Jacobs);* it is sufficient if he controls the transportation of enough traffic to justify a grant of the authority sought.
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> *Intermediaries have been found to be proper contract 'shippers' in numerous instances where they in fact controlled the transportation. Similarly, the designation of particular persons as 'consignor' and 'consignee' on a freight bill is not determinative; the key issue remains always actual control of the transportation.* (Emphasis added)

Id. The door was now wide open to broker-carrier contracts.

3. <u>The Aftershock</u>.

It took a while—into the 1990s—for the long term effects of *Dixie Midwest*, especially agency approval of broker-motor carrier contracts, to fully manifest themselves in the transportation industry, but now such contracts are virtually the standard rather than the exception—a far cry from the pre-1982 regulatory regime. The holding in *Dixie Midwest*, together with Congress' elimination of the distinction between common and contract carriage[10]

[10] *See* n. 1.

its authorization for motor carriers to enter into contracts with *shippers*, 49 U.S.C. §14101(b), have become the foundation for today's omnipresent broker-carrier transportation contracts.[11]

Today huge volumes of freight[12] are handled through or controlled by freight brokers, logistics companies and similar third-party intermediaries, often without formal written contracts. The new tripartite shipper-broker-carrier relationship has also spawned a new world of contract, casualty and cargo claim litigation for the parties, lawyers and courts to sift through and determine. In casualty litigation alone, while I do not have statistics to confirm this, prior to the 1980s, rarely, if ever, were transportation brokers named as defendants in casualty lawsuits for "negligent selection or hiring" of the underlying motor carrier or on the theory that the broker was "vicariously liable" for the motor carrier's negligence.

Fast forward 50 years. Such claims are now commonplace—many would say "misplaced." Given the extensive involvement of brokers in today's logistics chain, virtually every casualty lawsuit involving a truck transporting a brokered shipment now includes the broker - intermediary as a defendant,[13] and the defense of brokers in such cases has evolved into a specialized practice in itself. Transportation law programs today almost always include one or more topics related to transportation brokers and intermediaries, their status under present law, the rights, duties and liabilities of tort victims against brokers and broker defenses to such litigation.

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[11] 49 U.S.C. §14101(b) refers only to contracts between "shippers and carriers." Yet, there is no logical way of construing and applying that language than to include brokers within the term "shipper," based on *Dixie Midwest* and other more recent decisions. *See, e.g., Celtic International v. J.B. Hunt*, 234 F.Supp.3d 1034, 1041 (E.D. Cal. 2017) ("The definition of a shipper may extend beyond the person who owns the cargo and may include an agent or an independent contractor who contracts with a carrier for transportation of cargo. [citations] Under this definition, Plaintiff, as a broker who contracted with a carrier, may be considered a shipper.").

[12] By my estimation, at least 60-65%.

[13] The floodgates to these claims were opened by *Schramm v. Foster*, 341 F. Supp. 2d 536 (D. Md. 2004).

4. <u>A Look Back 50 Years</u>.

The Table of Contents and topics of the first Transportation Law Institute, in 1968, can easily shock and bewilder today's young transportation lawyer and beg the question: are we really representing the same businesses today that we did 50 years ago? Is this the same practice? Virtually all the topics covered in the first TLI involved substantive issues of practice and procedure before the late ICC: foreign-sounding topics such as what transportation is regulated, the distinction between private and for-hire carriage, motor common versus contract carriers, routes and territories, tacking, interline and interchange, commodity descriptions, unacceptable descriptions, restrictions and the like—subjects we never think about today. The "Papers and Proceedings" of the first TLI were published in an 800-page hard cover tome which was "the Bible" for transportation lawyers. Now the book is basically a testament to an obsolete, archaic administrative law practice. Where trucking companies and their lawyers once went through complex, convoluted maneuvers to obtain interstate operating rights or prevent competitors from obtaining operating rights, drafted complex restrictions, service and route descriptions at great expense, today an applicant seeking to register for motor carrier or broker authority can simply file an on-line application in a matter of minutes (without a lawyer), pay a $300 filing fee and receive authority to transport "general commodities" between all points in the United States."[14]

In 1968, there were "14,682 motor common and contract carriers of property."[15] As far as I can determine, transportation brokers were not even mentioned at the 1968 TLI.[16] At most they were a small blip on the transportation industry's radar screen at the time. In 1968

[14] Such broad authority likely never even existed pre-1995, and, if it did, it would have been priceless.
[15] *History, Background and Purposes of Part II of the Interstate Commerce Act*, by Bertram E. Stillwell, 1968 TLI.
[16] The word "broker" does not even appear in the 800-page Bible.

transportation lawyers, particularly members of TLA, *nee* the Motor Carrier Lawyers Association, seldom represented cargo transportation brokers[17] or had to deal with broker-related issues, and the word "logistics" did not appear in our daily practices, trade publications, industry seminars or the like. Broker-intermediaries simply did not play much of a role in cargo transportation in 1968. They were more of an afterthought.

How did we get where we are today? I say *Dixie Midwest*, in 1982, was the spark that led to the explosion of transportation brokers' involvement in today's logistics and transportation industry. It materially changed our clients' businesses and our practice of transportation law.

[17] With the possible exception of travel agents who were considered brokers of passenger transportation and were regulated by the ICC.