CAN AN UNLICENSED BROKER RECOVER COMMISSIONS FROM A MOTOR CARRIER?

Christenberry Trucking & Farm, Inc. v. F&M Marketing Services, Inc., 2010 Tenn. App. LEXIS 236 (Ct. App. TN).

In 2003, Christenberry Trucking & Farm, Inc. ("Christenberry") entered into a contract with F&M Marketing Services, Inc. ("F&M") that described Christenberry as a motor carrier and F&M as an "Agent". The agreement provided that the Agent would receive 2.5% for shippers brought to Christenberry by the Agent. Later a handwritten addition was made which stated, "Account specific: Americold Logistics/Ashland City, Tennessee."

Prior to this case, both Christenberry and F&M had a prior working relationship with a broker, UPS (not the small package carrier). F&M had been working to get carriers for a UPS/Dell account and Christenberry sent F&M a rate to quote UPS which included commissions for F&M. UPS approved the rate and then F&M disclosed the identity of UPS to Christenberry, and Christenberry to UPS. F&M then faxed a Commission Sales Agreement to Christenberry which included a commission rate of 6% for the UPS/Dell account, but Christenberry never signed and returned it. Christenberry then asked F&M to negotiate a higher rate of $100 per load (increase) which apparently F&M did. Christenberry began transportation of the UPS/Dell freight at the agreed rate between May 2004 and September 2005 and actually paid F&M in 44 separate checks. Christenberry then asked F&M to secure a still higher rate. The relationship broke down and Christenberry refused to pay F&M for several invoices and claimed that there was no contract. The amount in dispute is not stated in the opinion, but it can only be assumed it was significant enough to warrant this litigation.

The central issue in the case was whether F&M was acting as an unlicensed broker, and if so, was its contract unenforceable as a matter of public policy. F&M argued that it was acting as an "Agent" and that its agreement with Christenberry was enforceable. It asserted that it was under contract with hundreds of carriers to find freight for them to transport. The Trial Court analyzed the conduct of F&M and examined the statutory definition of broker, and found that F&M was indeed acting as a broker. After examining the case law, the Trial Court then ruled that F&M's lack of broker registration prevented it from enforcing its contract with Christenberry.

The Tennessee Court of Appeals thoroughly analyzed the two schools of conflicting decisions regarding the enforceability of a contract by an unlicensed broker to collect commissions on shipments arranged on behalf of a carrier.

One school of thought is represented by a case titled Paul Arpin Van Lines, Inc. v. Universal Trans Services, Inc., 988 F.2d 288 (1st Cir. 1993). In this case, the 1st Circuit followed the rule that "illegal promises will not be enforced in cases controlled by federal law." In the Arpin case, the party acting as a broker was aware of the broker's licensing requirements of the ICC, and still did not obtain a license. In Arpin, Id., Arpin misrepresented himself as a broker and in the instant case, F&M argued that this was a distinguishing factor which saved it from the result in Arpin. The Tennessee Court was nor persuaded that lack of misrepresentation should require a different result.

F&M argued that the opposing school of thought which holds that enforcement of a contract is acceptable despite the fact that there is no broker license. Citing Reo Distrib. Servs. v. Fisher Controls International, 985 F. Supp. 647 (WD Va. 1995); Roadmaster (USA) Corp. v. Cal-Modal Freight Sys., 153 F. Appx. 827 (3rd Cir. 2005); and Concord Industries, Inc. v. KTI Holdings, Inc., 711 F. Supp. 728 (ED NY 1989).

The Tennessee Court stated that Reo v. Fisher provided the most thorough treatment of the issue and found that the Interstate Commerce Act did not expressly void contracts made in violation of its provisions. Thus, the analysis is to be focused on whether the contract is unenforceable as a violation of public policy. Thus, under Reo v. Fisher, that Court stated, "The underlying purpose of this contract is not in any way illegal. Moreover, there are already sufficient regulatory mechanisms in place to ensure compliance with the ICA's licensing provision." Thus, voiding the contract here would be a remedy vastly disproportionate to its deterrent effect. The Court then distinguished whether it should deal with the public policy of the state in which the action was brought, or whether it would violate U.S. public policy since the contract in question was premised on a violation of the federal statutes. The Court concluded, at least in Tennessee, the lack of a broker license would not prevent F&M from recovering from Christenberry for breach of contract. The case was remanded to Trial Court for further proceedings.

This case reiterates the common mantra that the agreement between the parties will not "control" the actual roles performed in the course of dealing between the parties. It also raises an interesting broader question of whether the organizations who now hold themselves out as "3PL's" and who are in reality arranging for transportation of freight between shippers and carriers are setting themselves up for this type of contract litigation as apparent in this case. Since the results may differ depending upon what U.S. Federal Circuit or what State Court law may be controlling, it would appear

that obtaining a broker license and filing a bond is an inexpensive form of "insurance" to avoid a lawsuit such as this.

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