

SAFETEA: The end of licensing and bonding requirements for surface broker and freight forwarders?

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On August 10, 2005, President Bush signed into federal law the Safe, Accountable, Flexible, Efficient Transportation Act (SAFETEA – cute, huh?), a measure primarily designed to enhance highway transportation safety. But buried within SAFETEA’s numerous roadway provisions is a section that, at a minimum, gives the U.S. Department of Transportation (DOT) the option of eliminating surface transportation broker and freight forwarder licensing and bonding requirements. Some in the know urge that SAFETEA’s language is a Congressional mandate which already has nixed those requirements altogether. Others say we have to wait and see.

Surface transportation brokers are roughly the legal and functional equivalent of ocean freight forwarders, serving as “travel agents” for freight. Ensuring the monikers aren’t semantically convenient and easy, surface freight forwarders are the analogs of ocean non-vessel operating common carriers, operating concurrently as carriers of record to their shipper customers, and as shippers of record to the truckers and railroads that actually haul freight. Notwithstanding the confusing lingo and differing regulatory regimes, most enterprises that specialize in booking freight run wet, dry and often sky-high operations, typically in coordination with each other. What hat they’re wearing at any given time depends on how and with whom they’re doing business.

Surface brokers and forwarders have long been subject to federal licensing requirements. They also must demonstrate to DOT (through its Federal Motor Carrier Safety Administration) that they have insurance or surety bonding so that aggrieved shippers have recourse should the broker or forwarder screw up. Like their salty cousins on the ocean side, these species of transportation intermediary have remained the most regulated players in surface transportation.

SAFETEA provides that DOT’s Secretary “may” register an outfit as a broker or freight forwarder “if the Secretary finds that such registration is needed for the protection of shippers and that the person is fit, willing, and able to provide the service and to comply with this part and applicable regulations of the Secretary and Board.” Some, including the Transportation Intermediaries Association (TIA), a national trade organization promoting the transportation intermediary industry, feel the new legislation isn’t big news. At least not yet.

In their view, SAFETEA’s terms regarding brokers and forwarders are merely a legislative directive that DOT reexamine its regs, go through a notice of proposed rulemaking procedure (inviting public comment, etc.) if necessary, and decide whether continued intermediary licensing and bonding is all-in-all a good thing. They point out that DOT itself wrote and transmitted the provision to Congress with the intent that

current intermediary regulation be reexamined, and not that it be slashed. Thus, TIA feels the new rules don't change anything unless and until DOT says so.

Other players aren't so sure. They've expressed the view that the absence in SAFETEA of regulatory provisions requiring licensing and bonding, coupled with language that leaves registration in the Secretary's discretion means that, hey, intermediary regulation is a dead dog. The same type statutory language deregulated motor carriers a decade ago with no need for regulatory agencies to bless Congressional intent. Says noted transportation attorney Fritz Kahn, "[i]f in the discretion of the Secretary, brokers and freight forwarders of general freight are again to be regulated, [DOT] will need to institute a rulemaking proceeding to compile a record enabling the Secretary to find that registration is required for the protection of shippers and to promulgate rules pursuant to which [DOT] would make a determination that an applicant is fit, willing and able to provide the service and observe the regulations' requirements."

In other words, DOT must affirmatively seek to reinstitute a regulatory regime under Congressionally-specified guidelines. If it does nothing, intermediaries need not sign up and jump through the feds' hoops. It is incumbent on DOT to attempt to effect change if regulation is to continue.

DOT is expected to explain its own understanding of SAFETEA's provisions regarding surface intermediaries, as well as the agency's intentions, in short order. That pronouncement is sure to engender dissent, which might even get nasty. Deregulation remains a national trend and battle cry, guiding the direction of transportation economics and policy. It is fitting that transportation regulatory regimes embrace the industry's increasingly intermodalized nature by removing mode-specific regulatory impediments. With differing requirements and processes imposed on players depending on mode, how can efficiency, and therefore consumer costs, be optimized?

On the other hand, a loosening or removal of Uncle Sam's regulatory yoke from surface intermediaries' necks might increase shippers' risk of uncompensated loss, and complicate enforcement of transportation security regs. Without reliability and security, how can the system work at all?

DOT must balance these concepts in the context of Congressional intent.

Ref: The Safe, Accountable, Flexible, Efficient Transportation Act, Available at http://www.fhwa.dot.gov/reauthorization/safetea_bill.doc