

Arkansas

Motor Fuel Supply Agreements: Documenting the Jobber/ Retailer Relationship

By Walter G. Wright, Mitchell Williams Law Firm

I. Introduction

A key part of many Arkansas motor fuel wholesaler or jobber operations is the segment of the business supplying motor fuel to retailers. Various aspects of this relationship can vary, such as:

- a) type of fuels supplied; and,
- b) size of retailer supplied (small rural grocery store to a high-volume truck stop).

The relationship between the jobber and retailer may take different forms. A key variable could be the jobber's control over the retail facility's motor fuel operation. This may range from a commission agent for which the jobber exerts some control on the retail facility's motor fuel operations to a straight dealer for which the opposite is true.

The reality for many jobbers is the pressure they face from suppliers to increase volume. Major oil company supply contracts with burdensome requirements addressing volume are increasingly common. Attaining such volumes can be difficult in markets where there are a limited number of retail outlets. As a result, the competition for independent retailers can be fierce.



This may raise two concerns.

First, the need to ensure the relationship with the retailer is adequately documented for purposes of demonstrating the commitment between the parties.

Second, care must be taken to not trigger liability by interfering with a third-party pre-existing jobber/retailer relationship. Potential liability can be incurred if there has been a determination that there has been interference with an existing jobber/retailer relationship.

Adequately and accurately documenting the jobber/retailer motor fuel supply relationship is important for a number of reasons. For example, jobbers sometimes use retailers with limited experience. This can be problematic because operating a retail motor outlet is a complex enterprise.

Equally important, operating these facilities can require a significant financial investment by both the jobber (tanks/pumps/signage, etc.) and retailer. Unfortunately, doing business with motor fuel retailers that have a less-than-stellar credit history is a fact of life for many jobbers. Therefore, the need to adequately document the credit arrangement is critical.

Responsibilities involved in operating these facilities are varied and significant. Depending on the nature of the jobber/retailer relationship, such responsibilities must be allocated to one of the two parties.

Difficulties may arise in allocating responsibilities between the parties and/or ensuring the responsible party fulfills the allocated obligation. Therefore, identifying the type of arrangement and the necessary components is an important exercise when entering into a relationship with a retailer.

Examples of responsibilities to be allocated might include fees, equipment maintenance, environmental requirements, etc. A written agreement between the parties that clearly documents responsibilities better ensures that each party understands their respective obligations.

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A jobber's perspective on pursuing particular terms or conditions in an agreement will, of course, also depend on competitive issues. The ability of one party or the other to dictate certain terms or conditions will be driven to a great extent by which party has greater leverage.

A high value retailer in an important market may have several competing offers. Nevertheless, it is still important prior to entering into an agreement to identify/quantify what terms/conditions are included so that the jobber can plan for the associated financial responsibilities.

II. Retailer/Jobber Relationships.

a. Structure of the Relationship.

i. Straight Dealer.

The retailer controls all aspects of facility operations, including motor fuel sales such as pricing, ordering products, and—while it may vary—maintaining the pumps and tanks.

ii. Commission Agent.

The retailer, in reality, has two separate businesses at the facility. The jobber typically sets motor fuel prices and controls related activities. The retailer may be compensated on a cents-per-gallon basis. The retailer controls the non-motor fuel activities (inside sales, food services, etc.).

iii. Retail Level Consignee.

The motor fuel is consigned to the retailer. The jobber retains ownership of the fuel until it is sold to the retail customer.



b. Branded/Unbranded.

The jobber may or may not supply branded motor fuel (i.e., supply a major oil company trademark to the retailer). The branded relationship is subject to the requirements of the Petroleum Marketing Practices Act and the supplier's branding requirements.

III. Key Components of the Supply Contract.

This discussion is not intended to imply that all of these terms or conditions should be utilized on a supply agreement. Instead, the intent is to simply convey potential items that may or may not be in a given situation.

a. Parties.

- i. Who are the parties to the contract?
 - A. The contract should clearly specify the parties that are to be bound by its terms. This will include the relevant business entity [e.g., limited liability company (LLC), corporation, partnership, etc.] and/or individuals. The question of whether a guaranty should be obtained from an additional entity or individual must also be addressed.
- ii. Is the retailer a viable entity?
 - A. Has or should the jobber ensure that the entity executing the contract has the financial or operational capability to address the responsibilities (financial or otherwise) for which it has assumed responsibility. Many businesses use multiple

corporations or LLCs to segregate their liability. Some of these entities will have minimal assets. If there is a concern about financial viability, a jobber might seek additional security or a guaranty by an affiliated entity or individual.

b. Term/Duration.

- i. A critical provision since the jobber's budgets and plans are based on a term of years. This projected revenue is an asset that allows a return on investment.

c. Products Supplied.

- i. Types.
- ii. Volume (minimum/maximum?).
- iii. Changes authorized.

d. Property Description/Location.

e. Branded/Unbranded.

f. Quantity.

g. Price – [cent(s) over net rack, rack plus cent(s), etc.].

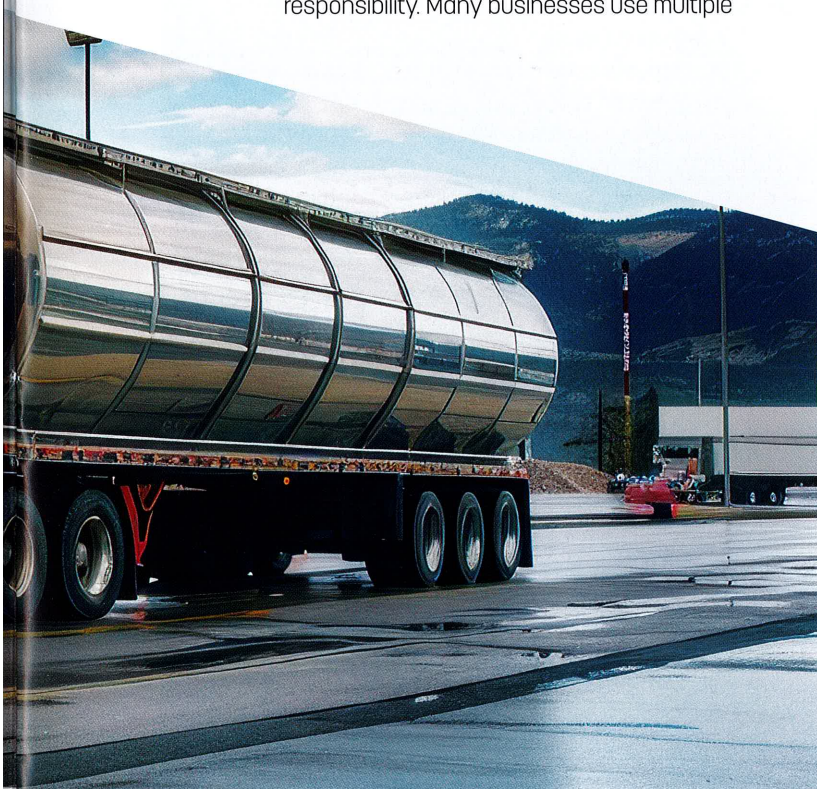
h. Incentives/Rebates.

i. Responsibility/Liability.

j. Storage Tanks and Related Equipment

(e.g., pumps, dispensers, credit card readers).

- i. Does the agreement clearly delineate the ownership of jobber installed fixtures/equipment? Concurrently, if the storage tanks are the retailer's, it is important for environmental liability to ensure that is documented (i.e., retailer owns the tank).
- ii. Underground Storage Tanks.
 - A. Release reporting.
 - B. Closure.
 - C. Training.
 - D. Leak detection/prevention.
 - E. Trust fund requirements.
- iii. Above Ground Storage Tanks.
 - A. Trust fund requirements. Optional in Arkansas for above-ground storage tanks. Should seeking coverage by the trust fund be clarified in the agreement?
 - B. Fire Code.
 - C. Maintenance requirements.
 - D. SPCC (if applicable).
- iv. Regulatory Compliance (with or without provision of storage tanks, pumps, etc.).



- A. Dealer, consignee, commission agent, sub-jobber, etc. must comply with all governmental statutes, regulations, etc. (UST, AST, fuels/additives regulations, etc.).
- B. Require notification to jobber of governmental investigations/inspections, alleged violations, correspondence, and product/petroleum releases.
- C. Authorization to inspect equipment, facilities, leak detection records, etc.
- D. Noncompliance with governmental requirements as a basis for termination.

k. Arkansas Petroleum Storage Tank Trust Fund.

- i. Storage tank registration.
- ii. Storage tank fees.

l. Credit/UCC Financing.

- i. The jobber should determine if financing statements may need to be filed as a part of a security agreement arrangement. Documents such as promissory notes or letters of credit may be needed.

m. Delivery Location/Risk of Loss.

n. Freight Charges.

o. Taxes.

p. Nonperformance.

q. Quantity/Quality.

r. Warranties/Representations.

s. Insurance.

- i. Types.
- ii. Amounts.
- iii. Documentation.
- iv. Waiver of Subrogation.

t. Audit/Inspection.

u. Equipment Loan Provision.

v. Assignment.

- i. Is consent required?

w. Waiver.

x. Indemnity.

- i. Recognize in the case of underground storage tank regulations if the jobber owns them the jobber may regardless be held responsible if the retailer operator cannot undertake the requirements.

y. Compliance with Law

(catchall for other governmental requirements).

z. Government Price Regulation.

aa. Security Agreement/Financing.

Motor fuel supplied to retailers on a COD basis means that at any given time tens of thousands of dollars may be at risk as fuel is placed at the retail location. This may be

due to a retailer filing bankruptcy, the product and retailer disappearing, having a bank claim the product due to a lien, etc. Prudent jobbers attempt to ensure that their supply agreements are documented and that the credit arrangement is clear and binding.

bb. Notices.

cc. Termination/Nonrenewal Provisions.

- i. The supply agreement should include grounds or reasons it can be terminated. The notice or other procedural requirements that must be followed should be outlined. It is also important that noncompliance with environmental requirements be a potential ground for termination or nonrenewal.
- ii. The Petroleum Marketing Practices Act (PMPA) prohibits a branded refiner/oil jobber from terminating or failing to renew a lease/motor fuel supply agreement with a retailer without complying with notice provisions and unless termination/nonrenewal is based on certain statutory grounds. These PMPA grounds for termination/nonrenewal should be included in agreements with covered branded retailers. Further, PMPA notice provisions should be followed in undertaking termination/nonrenewal.
- iii. Other non-PMPA grounds for termination may need to be identified.

dd. Modification of Agreement.

ee. Entire Agreement/Integration.

- i. Integration Clause.
 - A. Disputes sometimes arise over what a particular condition or term in an agreement means. One of the parties may cite a prior agreement or claim a verbal commitment was made regarding a particular issue. This may lead to expensive legal disputes.
 - B. An "integration" clause is often included in an agreement to make certain that the final document constitutes the final agreement of the parties.
 - C. The integration clause makes it more difficult for one of the parties to cite prior representations, whether written or oral, to attempt to change the terms of the lease. An example of such a clause in the contract context might read as follows:
 - a. Except as is otherwise provided herein, this contract constitutes the entire agreement among the parties with respect to the subject matter contained herein and supersedes all other agreements, letters, memoranda, or any other prior understanding of any type whatsoever, whether written or oral.

ff. Prior Agreements (See "ee").



IV. Interference with an Existing Motor Fuel Supply Contracts/Risks?

- a. When a jobber or any business enters into an agreement to their benefit, they do not typically expect an outside party to interfere with that arrangement or relationship. If a third party (i.e., another jobber) interferes with a business relationship (such as a supply agreement), it may in certain circumstances be deemed tortious interference in a business relationship.
- b. An example of actionable interference might include convincing a retailer leave a relationship with a jobber in certain circumstances (i.e., a preexisting binding agreement). For a jobber to incur liability the following elements will be present:
 - i. The business (jobber) has a relationship with another business (retailer).
 - ii. An outside business/third party (jobber) knew this relationship existed.
 - iii. The outside party purposely and by wrongful means disrupted that relationship.
 - iv. The outside party's interference with the business relationship caused harm.
 - v. This does not mean a jobber cannot inquire about a retailer's current supplier and the status of the agreement (i.e., in year nine of a 10-year agreement, etc.). Further, indicating interest when the agreement is concluded is likely not an issue. However, there should never be an attempt to encourage or facilitate a retailer to leave or breach a current/binding supply agreement.



V. Conclusion.

- a. This article does not address every term, condition, or issue that might need to be addressed in supplying a retailer. Nevertheless, it hopefully illustrates why jobbers should spend some time and effort ensuring contracts they enter into address all matters relevant to the facility and transaction.
- b. Note the discussion does not address a number of agreements that are/may be needed for other related commercial relationships such as:
 - i. Leases.
 - ii. Sub-jobber agreements.
 - iii. Terminating agreements.
 - iv. Retail facility buy/sell agreements.
 - v. Industry/farm supply agreements.
 - vi. Bill of sale for equipment.
 - vii. Equipment loan agreement.
 - viii. First right of refusal agreement.
 - ix. Amortization agreement.
 - x. Guaranty of note and performance. ■

Walter G. Wright is a partner with the Little Rock, Arkansas, office of Mitchell Williams Law Firm. He has served since 1989 as General Counsel to the Arkansas Oil Marketers Association. Prior to joining Mitchell Williams, he was employed as an Assistant General Counsel to the Petroleum Marketers Association of America in Washington, D.C. He has also served since 1990 as Adjunct Professor at the University of Arkansas at Little Rock Law School. Walter's practice includes representation of petroleum jobbers, wholesalers, chain retailers, transporters, and terminals.