Derived from…

NEW YORK NEW JERSEY FOREIGN FREIGHT FORWARDERS AND BROKERS ASSOCIATION INC

Newsletter

Volume LXII Fall/Winter 2013

OCEAN TRANSPORTATION INTERMEDIARIES IN THE CROSS-FIRE,

by Carlos Rodriguez, Partner Husch Blackwell, D.C.

THE MOVEMENT OF HOUSEHOLD GOODS, PERSONAL EFFECTS

Introduction.

The handling of relocations (household goods “HHGs”), and or shipments of personal effects, and small packages, for people moving privately, as opposed to corporate HHG moves, which are handled by large and reputable international relocation companies have become timely topics for discussion due to current enforcement interest in that sector by the Federal Maritime Commission.

The regulatory focus by the Federal Maritime Commission, as well as the Federal Motor Carrier Safety Administration is on what is normally referred to as the “barrel trade.” In particular, there is a thriving business in almost all U.S. urban areas where unlicensed persons or entities offer international and domestic transport services to targeted ethnic communities. The Commission’s central guidance to shippers of HHGs or personal effects in those ethnic communities is the advice to hire a reputable mover as the first line of defense in protecting personal goods and/or vehicles. However well-meaning this advice may be, in reality, these are not the companies with a presence in the targeted ethnic communities. Rather it is the unlicensed persons/companies, which are part of those communities themselves that seek to book that cargo through FMC licensed ocean freight forwarders or NVOCCs.

The obvious issue is that there are shipping statutes and corresponding regulations which make it unlawful for OTIs and ocean common carriers to accept cargo from these unlicensed entities. Both the FMC and the FMCSA devote much attention and enforcement efforts in the enforcement of these prohibitions which result in monetary penalties and other sanctions to OTIs, ocean common carriers, and the unlicensed entities. If the new FMC rules are implemented, OTIs that accept cargo from unlicensed entities could result in the loss of licenses for these OTIs.

How can the OTI community deal with this sector lawfully so as to avoid or at least minimize regulatory issues? After all, this is a very vibrant sector that needs servicing and can be commercially attractive if done correctly.

The Legal Issues.

On the FMC side. The legal issue that is commonly dealt with is the statutory and regulatory requirement that prohibits common carriers (including NVOCCs) from knowingly and willfully accepting cargo from or transporting cargo for the account of an ocean transportation intermediary that does not have a tariff, a bond, insurance, or other surety as required----in short, if the person or entity is not a licensed NVOCC. This has become a hot button regulatory issue at the FMC, as recent compromised settlement agreements or informal dockets well illustrate. The “knowingly and willfully” element is readily reached in these cases by, among other things, that the name of the unlicensed entity that tenders this cargo usually employs “Express”, “Transport”, and other similar names which leave no doubt but that further inquiry needs to be conducted as to the license status of that entity. Further, these types of firms clearly hold out in their advertisements that they provide full services from door to door. One only has to do a cursory review of the Commission’s web site to conclude that this is a high interest area of concern.

Even more telling about the interest in this area by the FMC are certain provisions which were included in the Commission’s Advance Notice of Proposed Rulemaking (ANPR) with comments filed on July 26, 2013. The proposed rules also reflect recommendations adopted by the Commission in the Final Report for Fact Finding Investigation No. 27, Potentially Unlawful, Unfair or Deceptive Ocean Transportation Practices Related to the Movement of Household Goods or Personal Property in U.S.- Foreign Oceanborne Trades, 1(Fact Finding 27 or Fact Finding 27 Final Report). The level of interest by the Commission can be gauged by a new proposed rule in the ANPR that provides that an NVOCC’s license may be revoked or suspended if it knowingly and willfully accepts cargo from an OTI that does not have an OTI license or has not registered, or fails to provide proof of financial responsibility. Extreme care has to be exercised by OTIs in handling this traffic.

The FMCSA side. Without going into too much detail, suffice it to say that the unlicensed entities which are causing the grief to shippers and OTIs, subject of this article, also provide pick-up services at the customer’s door, usually in vans or trucks owned by them. Usually these entities have neither proper HHG Motor Carrier authority, insurance, nor do they meet other basic FMCSA requirements for companies of this type. Recently it has not been uncommon for an FMCSA and FMC investigators to jointly make investigative calls. While the FMCSA has penalty provisions for breaches of their regulations, they do not have a corresponding prohibition, as does the FMC, for parties such as OTIs or ocean carriers, to accept goods for shipments from these unlicensed and uninsured entities. However, as we will subsequently note, OTIs should also be aware of these FMCSA requirements when entering relationships with entities that tender HHGs or personal effects for ocean carriage.

The Solutions. The solutions we have seen implemented by conscientious OTIs (NVOCCs) who see this industry segment as an opportunity involve the following:

Identification and selection of persons/companies in targeted communities with whom to partner, which have their own pick-up and delivery vans here in the U.S. and at the overseas points of interest. These should be companies with a good reputation in the community they are serving. We suggest that if the staff of these companies do not qualify for NVOCC licenses, which most do not, that the OTI structure a written agency relationship with these companies closely following the elements of the *Landstar* case, and FMC interpretations of that case as expressed in the recent ANPR. The agency agreements must be made available to the FMC upon request.

Since these entities would likely be picking up HHGs and personal effects across state lines, the OTI should insist that these companies obtain HHG Motor Carrier status from the FMCSA, and the corresponding insurance required for the various-sized vehicles. These companies are more than eager to comply with these requirements. We have successfully assisted several of these companies in obtaining such FMCSA licenses.

OTI’s agents must include the following information on shipping documents, stationary, billing forms, and all papers and invoices: the OTI principal’s name, license or registration number. FMCSA license information for the agents should also be disclosed to the shipper customers. Additionally, the OTI must instruct its agents to promptly make available documents to the FMC upon request.

Documents issued by the agents to shippers must clearly indicate the portion of the transport for which the OTI is responsible. This is usually from the location where cargo is consolidated to the Port of Discharge. The pick-up and delivery functions of the FMCSA licensed party must also be clearly indicated. Claims procedures must be clear, and the requirement for the agent to report all claims to the NVOCC is essential in order to allow the OTI the opportunity to avoid larger issues.

Documents issued by the agents must include both the terms and conditions of the ocean carriage as well as provisions required by the FMCSA for the U.S. inland segment of the transport. These requirements require careful structuring of documentation to insure compliance.

Conclusion. While the above may seem somewhat daunting, it has been our experience that these relationships do function properly if the OTI carefully selects the companies with whom it wishes to partner. Additionally, the massive flow of personal effects and HHGs for some of the ethnic communities makes these relationships well worth it. Selecting the right partners, and structuring the relationship correctly, are the key ingredients for success in this important niche market.