



Jim Dowd

BROKERS, FORWARDERS & NVOs

FMC ruling clears up co-loading issue

Carlos Rodriguez, the Washington, D.C.-based maritime and transportation attorney, believes the U.S. Federal Maritime Commission's final ruling on confidential service arrangements for shippers' associations with non-vessel-operating common carrier members will clear up an issue that predates even the Ocean Shipping Reform Act of 1998, which gave confidential contracts to the steamship lines.

By allowing NVO Service Arrangements (NSAs) between NVOs and shippers associations that include NVO members, the FMC has in the process cleared a legal fog that surrounded the practice of co-loading between NVOs, said Rodriguez, who has handled many cases for freight forwarders and NVOs.

Co-loading, which most commonly involves a small ocean transportation intermediary, lets one NVO move a less-than-containerload shipment using another NVO. The receiving NVO will have enough cargo to build a full containerload for a destination for which the other NVO does not have the needed volumes.

While co-loading is a common practice that has been seen as an absolute necessity for the NVO industry, it has also been surrounded by controversy. At the most basic level, critics charge, it clouds the picture of who is actually handling a shipment. While the small company accepts the shipment as a common carrier, it is actually passing the shipment to an NVO not necessarily visible to the shipping public.

It touches a nerve ending that goes back to the old accusations NVOs can be questionable companies that are nothing more than "a desk and a phone," competing against companies that have invested millions in transportation infrastructure.

In reality, a co-loader today is often from the other end of the spectrum, a multinational integrator that simply does not have a weekly service to a given destination. By co-loading with an NVO that does serve that destination, an integrator can effectively expand an already extensive service network.

Rodriguez, who submitted formal comments on the NSA rules to the FMC on behalf of neutral NVO Caro-Trans International, said there has historically been a potential problem related to FMC co-loading regulations. From a legal point of view, does co-loading constitute a carrier-to-carrier relationship, or a carrier-to-shipper relationship?

Longstanding FMC regulations on co-loading said that if an NVO tenders cargo to another NVO, who in turn issues a bill of lading, "a shipper-to-carrier relationship shall be presumed to exist."

On the other hand, if two NVOs say they are acting under a carrier-to-carrier relationship — as is often the practice — then the existence of such a contract needs to be noted in the tariff, but the carriers are not required to publish rates like they would under a carrier-shipper relationship.

"If you go back to the co-loading regs, you'll see that when an NVO issues a bill of lading to another NVO, that raises a 'presumption' that it is a carrier-to-shipper arrangement," Rodriguez said. "Then the next part is that if that's the case, then you, as an NVO, had to have that rate in your tariff."



Rodriguez

Pointing out the legal significance of the exact wording of the co-loading regulations, Rodriguez explained: "In legal talk, presumptions can be rebuttable presumptions or irrebuttable presumptions. But since the regulations don't say it outright, the industry's been merrily going its way entering these carrier-to-carrier agreements, assuming that they had rebutted the presumption. They don't do it pursuant to tariff filings; they do it pursuant to these (carrier-to-carrier) agreements."

With the new FMC ruling that take effects Oct. 28, however, all the ambiguities have been eliminated.

While most of the attention has been focused on the surface concept of expanding NSAs for shippers' associations with NVO members, one legal key is that the new regulations revised the definition of a "shipper." The shipper definition has been expanded to include "a cargo owner, the person for whose account the ocean transportation is provided, the person to whom delivery is to be made, a shippers' association, or an ocean transportation intermediary (as defined in the Act) that accepts responsibility for payment of all applicable charges under the NSA."

Since NVOs can have NSAs with confidential terms for any shipper, co-loading now fits neatly into the new regulations.

"The NSA now is going to provide a vehicle that can take everything out of that ambiguous area," Rodriguez said. "It's an area I think the FMC has always had some concerns about, but never really gotten into it, and never really wanted to get into it."

The FMC did start the process of reviewing co-loading regulations in 1993, but dropped the issue without making any decision.

Greg Howard, president of Union, N.J.-based Caro-Trans, said he and Rodriguez worked closely together during the summer after the FMC had issued a preliminary ruling and asked for comments on expanding the scope of NSAs.

"We needed to put forth our comments to allow the FMC to see it's not just BAX Global and the multinationals that are concerned about this," Howard said.

He said that with the issue of the relationship between co-loading NVOs settled, it will be easier to give better service to a wider range of customers.

"It will be easier to work with other NVOs," Howard said. "Co-loading OTI-to-OTI has always been a gray issue. This makes what we do very, very clear in terms of the regulations."

It will also simplify rates.

"When you look at shippers' associations with OTI members, it has been difficult to produce a rate mechanism. If you had a shippers' association with 25 members, you might have to have 25 agreements," Howard explained. "This will eliminate a whole lot of work, and reduce our costs associated with filing tariffs."

Howard predicts NVOs will gain volumes and be in a better position to negotiate rates with steamship lines — all to the benefit of shippers, especially smaller LCL shippers.

"This is a fair solution," he said. "We should be able to enter into agreements with our customers just like the steamship lines do."



Howard