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November 14, 2013

Ms. Anne S. Ferro
Administrator
Federal Motor Carrier Safety Administration
United States Department of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

Re: Request for Interpretation

Dear Ms. Ferro:

On behalf of the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA"), we are requesting the views of the FMCSA concerning its interpretation of several issues that have arisen concerning one of the statutory provisions of the MAP-21 legislation, specifically its section 32919, as codified as new section 14916 of the ICCTA. Subsection (b) of this section provided for several exceptions to the licensing and bonding provisions of the statute for (1) non-vessel operating common carriers ("nvoccs") and ocean freight forwarders with respect to the arrangement of inland transportation as part of an international through movement, (2) licensed customs brokers to the extent the arrangement of inland trucking involves "a movement under a customs bond or in a transaction involving customs business, as defined by" 19 CFR § 111.1, and (3) indirect air carriers (IACs") engaged in such activities as authorized by the Transportation Security Administration.

I. Meaning of term "International Through Transportation"

A. The Issue

How does one determine whether inland transportation is part of an international through movement? Must the carrier issue an intermodal through bill of lading that covers both the

inland US portion of the transportation as well as the ocean/water leg, or should the through movement character of the transportation be discerned by other evidence?

B. Views of the NCBFAA

The NCBFAA believes that the essential character of the transportation must be determined by considering the intentions of the shipper parties and not rely exclusively on the nature of the bills of lading issued by the carriers.

For over a hundred years, the Interstate Commerce Commission ("ICC") and the courts have concluded that the determination of whether the transportation of cargo was subject to jurisdiction under the Interstate Commerce Act ("ICA") was not determined by whether a single through bill of lading was issued, but rather by the essential character of the movement. If the shipper tendered the cargo with the intention of having the goods ultimately delivered to a specific destination in another state or country, the entire transportation was considered to be in interstate or foreign commerce whether or not one or multiple contracts of carriage were issued. *Kanutex Refining Co. v. A.,T. & S.F. Ry. Co.*, 34 I.C.C. 271, 276 (1915), aff'd 46 I.C.C. 495 (1915). *See also, for example*, *Dallum v. Farmers Co-Operative Trucking Assn.*, 46 F. Supp. 785, 788 (D. Minn. 1942)(the fact that shipment moved under separate bills of lading "does not destroy the continuity of movement" or its interstate character).

This principle was espoused by the ICC initially in a long line of matters involving rail transportation, but the same conclusion was reached in trucking cases once Congress made motor carriers subject to the ICA. For example, the case of *Rush Common Carrier Application*, 17 M.C.C. 661, 674 (1939), contains an excellent discussion of the evolution of the ICC's view on this topic. There the ICC reviewed a series of Supreme Court decisions starting with *Southern P. T. Co. v. Interstate Commerce Commission*, 219 U.S. 498 (1901), and determined that the character of transportation was determined by the ultimate destination intended by the shipper, rather than whether separate contracts of transportation were involved.

In determining the character of the transportation, it is common to do so by ascertaining the intentions of the parties to the transaction. The determination of a shipper's intent when tendering goods for transportation into the U.S. is dependent upon all of the facts involving the transaction. The issuance of a through intermodal bill of lading is one way to determine this, as that document reflects the transportation for which the shipper contracted. However, a significant amount of international ocean transportation into and out of the U.S. does not move on through bills of lading that cover the entire route of movement. Instead, shippers often contract with the ocean carriers only on a port-to-port basis and make their own arrangements for the inland transportation necessary to carry the goods to the port of departure and deliver them from the port of entry to the ultimate customer to whom the goods were sold. Notwithstanding the separate inland and ocean transportation contracts, the goods are still part of a through

international movement as the shipper intended that they be delivered to its customer at the ultimate inland point.

Moreover, although it is common to use the term "intent of the shipper" to determine the character of the transportation, when shipments are controlled by the buyer one must then look to that party's intention as well to determine the intent of the parties concerning when the through nature of the transportation comes to a halt. If a foreign party sells goods to a party in Chicago, for example, on an "FOB origin" or even "FOB Chicago" basis, the seller may not know the ultimate destination of the shipment in a situation where the importer intends that the goods be delivered to a point in Kansas. The fact that no through bill of lading was issued to the point in Kansas does not mean that the through international character of the transportation came to an end in Chicago, as the importer's intent was always to have the goods delivered to that Kansas location.

In addition to the indicia discussed above, there are various ways to establish the intent of parties in international shipping transactions. For example, the intent of the parties to the transaction concerning the destination of goods tendered for transportation can be determined by the sales contract, the buyer's purchase order or the seller's commercial invoice. Even more telling are the various security information filings that are required to be submitted to the U.S. government before international shipments can be imported into or exported out of the United States that often specifically detail the intended destination of cargo. For example, for imports into the United States, U.S. Customs and Border Protection ("CBP") requires two separate types of filings to be made prior to cargo arriving in the U.S. First, under 19 CFR § 4.7a(4)(ix), the carrier (steamship line, nvocc, or airline) is required to file advance manifest data with CBP that provides, inter alia, the complete name and address of the intended consignee of each shipment. Similarly, 19 CFR § 149.3(a), the importer is required to transmit an importer security filing to CBP that includes the name and address of the importer, the name and address to whom the goods are to be delivered after being released by CBP, and the city where delivery is to be made. Consequently, even if the foreign shipper did not know the ultimate destination when the transportation commenced, the transactional documents and/or filings with the government by the importer would evidence the intended destination of the goods.

It is also clear that the character of the transportation can be determined by the intentions of any of the parties to the transaction, not just the shipper who sold goods and dispatched them on the initial leg of the movement. For example, in the *Southern Pacific* case, a party bought cotton seed cake from various parties in Texas, had them shipped to Galveston, where the cake was ground into meal. As it was clear from the facts that all of the cotton seed cake was, once processed, going to be exported, the Court concluded that the initial movement within the state of Texas was still subject to the ICA as it was part of an international move where (1) the seller did not know where the goods would eventually go, (2) it was the buyer's intent to have that cargo move beyond Galveston, (3) there were no through bills of lading and (4) there was a clear stoppage in transit for the purpose of grinding the cake into meal. The international character of

the entire transportation was based upon the facts that there was no market for the cotton cake or meal in Galveston, that the location of the Galveston facility was at the wharves, that the buyer's exclusive business at that location related to the sale of the cotton meal in various foreign countries. (*See,* also, *Texas & N.O.R. Co. v. Sabine Tram Co.,* 27 U.S. 111 (1912), where the buyer had lumber delivered from various in-state locations, all of which was purchased for export and led to the holding that the entirety of the movement, regardless of the lack of through billing and the stoppage in transit, was international in nature so that the inland transportation was subject to the ICA.)

The principle of looking at "all of the facts and circumstances surrounding the transportation" to determine the essential character of a shipment has been consistently applied by the courts and the ICC. A few of the relatively more recent cases include *Armstrong World Indus., In., Transportation Within Texas,* 2 I.C.C.2d 63, 69 (1986), *aff'd sub nom. State of Texas v. United States,* 866 F.2d 1546, 1556 (5th Cir. 1989); *International Brotherhood of Teamsters v. ICC,* 921 F.2d. 904908 (1990); *Northwest Terminal Elevator v. Minn. P.S.C.*, 576 F. Supp. 22, 25-26 (1983), aff'd 725 F.2d 80, 81 (1984). More recent cases come to the same conclusion.[1]

Hence, the issue of when the international character of a shipment comes to an end, and when any inland transportation becomes subject to the requirements of sections 13094 and 13096, is dependent upon both the seller and buyer's intended destination for the goods, and this can only be determined by reviewing all of the facts concerning the transaction, and not just the bill of lading between the foreign origin and the U.S. port of entry. That is not to say that the international character of transportation never comes to an end, as there are many situations where goods are imported, customs cleared and then delivered to an importer's designated warehouse or distribution center awaiting further disposition instructions from that party. In those situations, the through nature of the inbound transportation may come to an end when the goods arrive at the warehouse. In that case, any subsequent movement out of that location could be domestic transportation and thus subject to the requirements of the MAP-21 legislation. But where the facts make it clear that one or both of the parties intended that the transportation not come to an end until the goods reach a specific point, the international character of the transportation continues until that occurs.

This conclusion is fully consistent with the letter and spirit of the MAP-21 legislation. Congress was concerned about abuses existing in the heretofore lightly regulated domestic trucking and property brokerage industry, but did not seek to impose new regulatory burdens on the already heavily regulated intermediaries involved in international transaction. To the

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[1] *See Mena v. Mcarthur Dairy*, 352 Fed. Appx. 303, 2009 WL3004009 (11th Cir. 2009) (driver operating solely within single state was nonetheless exempt from Fair Labor Standards Act overtime pay provisions since goods he transported out of a warehouse were always intended to be part of interstate movement); *Bilyou v. Dutchess Bear Distributing*, 300 F.3d 217 (2d Cir. 2002) (essential character of transportation was interstate even though the segment in question moved solely within a single state out of a warehouse).

contrary, Congress specifically exempted nvoccs, ocean forwarders, IACs and customs brokers from the legislation.

With respect to the bill of lading issue, if Congress had intended to limit the international through movements exempted from the MAP-21 requirements to instances where a through intermodal bill of lading was issued, it would have used language to that effect. Indeed, during the drafting process for the MAP-21 legislation, that limitation was proposed by one of the groups that supported enactment of the licensing and bonding provisions of the statute. But that proposal was not adopted, so that the exemption must be read broadly to include any transportation involving an international through movement without regard to whether a single bill of lading covers the entire transportation.

II. Scope of the Customs Broker Exemption

A. The Issue

To the extent a customs broker issues a delivery order or otherwise engages a motor carrier to handle the inland portion of an international through movement, are these activities exempted from sections 13904 (licensing) and 13906 (bonding) of the Act by virtue of the language in section 14916(b)(2)?

B. Views of the NCBFAA

The NCBFAA believes that the exemption applies to customs brokers and the arrangements they make for inland transportation, without regard to whether they are doing so for compensation, as long as the trucking activities either (1) involve movement to various locations being conducted under a customs bond, or (2) are part of the international through transportation intended by the shipper and the transaction also involves the performance of customs services as that term is defined in 19 C.F.R. §111.1, by the customs broker.

With respect to the first part of the exemption, we suspect that there is no issue with the NCBFAA's interpretation since the statute literally exempts any inland transportation arranged by a licensed customs broker that is moving under a customs bond. So, this involves a movement of bonded cargo by a bonded carrier from the port of entry to: a bonded location within the U.S., such as in a bonded warehouse or Foreign Trade Zone; an inland port of entry, such as Dallas, St. Louis or Charlotte, where the goods are cleared and any duties, fees paid; a port of export, where the goods will be shipped to a foreign destination. The exemption would also include a movement under bond to an examination station pursuant to instructions from U.S. Customs and Border Protection ("CBP"), the Food and Drug Administration or other government agency.

With respect to the second prong of the exemption for customs brokers (*i.e.*, those transactions involving customs business), the NCBFAA is aware that some in the trade community have suggested that the "customs transaction" is completed when customs has released the shipment, so that the scope of the exemption necessarily ends at that point. However, this interpretation fragments the international movement, by placing the "movement" from the port of entry (*i.e.*, the place where the customs entry is processed) to the ultimate consignee outside of the parameters of the "transaction" regardless of the intention of the parties to the international transaction. This interpretation is not supported either by the plain words of the statute or the underlying purpose of the exemption.

Initially, it is clear that the trucking activities incidental to the customs clearance process are not considered by CBP to be "customs business" within the meaning of 19 C.F.R. §111.1. [2] Although there are few decisions defining the scope of this regulation, in Headquarters Ruling 224406, CBP has made it clear the "inland transportation arrangements the importer wishes to make after the merchandise has been entered are not within the purview of the Customs Service." Consequently, since trucking services are not "customs business", the phrase "transaction involving customs business" necessarily refers to something outside of the customs clearance process or the phrase would be a nullity. In other words, the phrase has to cover the arrangement of trucking services for import shipments in the course of movement to the importer's intended destination.

Moreover, if the exemption applies *only* to transportation prior to CBP releasing the goods, there would be no need for the second prong of the exemption. The first prong – an exemption for movements under a customs bond – would be coterminous with the second prong. Since every word of an Act of Congress is presumed to be of some effect, the second prong – exemption for a transaction involving customs business – cannot be rendered meaningless by limiting it to the same range of movements covered by the first prong.

The only sensible reading of the statute, accordingly, is that a "transaction" encompasses the entire transaction – including the customs processing at the border and the movement to its destination in the U.S. Thus, a customs broker who arranges for the just cleared shipment to be transported inland to its destination would be exempt from the MAP-21 requirements. By contrast, a customs broker who handles a domestic movement of goods that either never was or no longer is part of a transaction involving "customs" activity would be subject to the MAP-21 requirements.

This is consistent with the underlying purpose of the statute and the exemptions. The intent of this section of MAP-21 was to address unregulated property brokers in domestic

[2] Under 19 CFR §111.1,"customs business" means "those activities involving transactions with CBP concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collected by CBP on merchandise by reason of its importation, and the refund, rebate, or drawback of those duties, taxes or other charges."

commerce. The exemptions for licensed customs brokers, nvoccs, ocean freight forwarders and IACs acknowledged the fact that these types of companies are already highly regulated by CBP and other regulatory agencies. Accordingly, Congress sought to avoid creating a new, duplicative layer of regulation, seeing little justification for requiring customs brokers or these other intermediaries to register and be licensed and bonded with yet another agency when engaged in the international movement of cargo from or to a foreign port.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

Edward D. Greenberg

Proposed FAQs

The issues raised in the Memorandum have generated a number of questions from members of the NCBFAA and the public. In order to help clarify the situation, we have condensed those questions into a few general topics that and drafted several proposed Frequently Asked Questions and Responses ("FAQs") for the consideration of FMCSA. We would also appreciate your review of these drafts and request that, assuming you agree, the agency consider issuing these and/or other materials that would provide guidance to the industry.

The NCBFAA's proposed FAQs are as follows:

Question 1 Does an international through movement for a shipment being imported into the United States come to an end when the international carrier's undertaking, as set forth in its bill of lading, comes to an end?

Answer 1: An international through movement retains that character until the transportation, as intended by the shipper and consignee parties at the time the transportation commenced, comes to an end. That intent may be determined by reviewing the transportation documents, commercial invoices and purchase orders, informational or security filings with the government or any other facts that would evidence what the parties intended to be the destination. Accordingly, the fact that the goods moved by multiple carriers in several modes does not necessarily indicate that the international through movement ended when the international carrier (steamship line, airline, or cross-border trucking company or railroad) completed the service for which it was contracted.

Question 2: Does the international through movement of goods being imported into the United States end once they are cleared through U.S. Customs at a port of entry?

Answer 2: If it was the intention of the foreign seller of the US importer that the goods travel to a different inland point than the port of entry, the international through movement continues even if the inland carrier completes the desired transportation under its own contract of carriage.

Question 3: If a licensed customs broker has engaged in providing customs services, as that term is defined in 19 CFR § 111.1, is it covered by the exemption in section 14916 of the MAP-21 legislation if it also arranges for inland transportation subsequent to the customs clearance process for those goods?

Answer 3: The arranging for inland trucking by a customs broker that occurs in any situation where the customs broker has provided customs services falls within the exemption as long as the inland transportation is part of the international through movement of the goods.

Question 4: Is the answer to FAQ 3 in any way dependent upon whether the customs broker charges a fee for its service in arranging for the inland trucking?

Answer 4: As long as the inland transportation is part of an international through movement and the customs broker provided customs services in connection with the transaction, the exemption in section 14916 is applicable whether or not the customs broker assessed a fee for its services.

Question 5: If a customs broker, acting in accordance with the exemption in section 14916, arranges for the inland movement of imported goods from the port of entry to a warehouse or distribution center where the goods will remain for some indefinite period of time, does the international through movement of goods necessarily cease once the goods have reached the warehouse?

Answer 5: Consistent with the answer to FAQ 1, although there would likely be a presumption that the international character of the transportation came to an end once these goods reached a warehouse or distribution center, it is possible that this was only a temporary halt to the international through movement. However, the burden at this point would be on the US importer and/or the customs broker to demonstrate that the essential character of the transportation was still international in nature.