LEGAL UPDATES

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West Coast Ocean Container Chaos

Services

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The current marine container logjams at terminals and containership backups on the West Coast have caused grave concern for all stakeholders in the supply chain. In recent weeks there have been anywhere from 16 to 35 vessels awaiting berth availability at LA/Long Beach and other West Coast Ports. The matter has escalated to the President's desk with Labor Secretary Tom Perez and Commerce Secretary Penny Prizker weighing in on the labor union/maritime employers side of the problem. The causal factors for this situation that began last July appear to stem from stalled negotiations between the International Longshore and Warehouse Union (ILWU) and the Pacific Maritime Association (PMA) resulting in allegations of slowdowns and lockouts.

At the heart of the crisis, lie myriad factors that primarily concern the means of cargo delivery - namely chassis - creating the perfect storm. The chassis crisis arose many months back when ocean carriers divorced themselves from the means of delivery (the chassis) by selling their fleets to three or four chassis leasing companies. Additionally, the recent implementation of the new ocean carrier Alliances has disrupted on-dock rail services for some ocean carriers when on vessels pursuant to the new Alliances that do not discharge at locations with those services.

The issues that brought commerce to a standstill on the West Coast are more properly addressed with policy solutions. However, those in the supply chain subjected to actions by carriers that have caused real damages do have legal remedies available through either federal court or the Federal Maritime Commission (FMC). Additionally, shippers should pay special attention to the problems on the West Coast and seek to minimize risk in that environment as they consider new contracts.

Breach of Contract – Legal and Regulatory Remedies

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In the midst of the financial crunch, some ocean carriers have blatantly breached their service contracts with shippers by unilaterally imposing additional charges for trucking services, unilaterally raising base rates for shippers, and other one-sided acts contrary to terms in service contracts. In some cases, carriers force the changes by refusing to take bookings until the changes have been agreed to by the shipper parties. The service contract, a regulatory device over which the FMC has oversight, has not necessarily been a stabilizing device, nor has the FMC been an enforcement force - yet. However, as the dust settles judicial remedies are on the horizon to right such unilateral practices, which arbitrarily shift risk allocations in service contracts from carrier to shipper.

The Abuses

Types of damages that have been imposed on shippers/importers by those who disregard service contract and/or tariff terms include:

1. Refusal to deliver cargo by truck unless paid additional sums over those contracted, when bills of lading are clearly in place, with door delivery terms obligating the carrier to such a delivery.

2. When the above occurs and delays follow due to the carrier's difficulty in obtaining chassis/truckers, cargo becomes subjected to demurrage charges, effectually caused by the ocean carrier's delay in delivery and failure to meet its obligation under service contract terms.

3. Outright unilateral increases in base freight rates by ocean carriers without any negotiations. In one example, the ocean carrier increased rates by $1,500 per container.

4. Refusal to book cargo at service contract rates or charges.

5. Additional charges incurred for delivery of cargo at inland points moving by rail.

While not exhaustive, these constitute the most blatant acts. More egregiously, carriers have refused to book cargo unless changes are accepted. This in itself is a violation of the Shipping Act of 1998, as amended. (See Remedies, No. 2)

Remedies

The Act provides relief that can be sought in a Complaint proceeding at the FMC or in federal court, based on the violation:

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1. Charging rates and charges not in accordance with the rates, charges, classifications, rules, and practices contained in a published tariff or service contract.

2. **Retaliation against a shipper by refusing (or threatening to refuse)** cargo space accommodations when available, or resort to other unfair or unjustly discriminatory methods because the shipper patronized another carrier, filed a complaint, **or any other reason.**

3. A common carrier, marine terminal operator or ocean transportation intermediary may not fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property.

4. A person may file a sworn complaint with the FMC alleging violations of the Act, if the complaint is filed within three years after the claim accrues. The complainant may seek reparations for an injury caused by the violation.

In the current environment, ocean carriers are refusing to perform door delivery service (wherein an ocean carrier has responsibility for transport up to the time of delivery at the importer's door) at contracted levels because trucking costs have increased. In many cases, this results in demurrage that the carrier passes on to the shipper. While negotiating a door delivery term, some ocean carriers have disingenuously included a tariff provision in its Rule Tariff, instead of in the service contract. This passes on the demurrage charges to the importer when there is "a shortage or unavailability of motor carriers or trucks." There are trucks available, but the cost has increased for their usage. Such a tariff provision should be found to be an "unreasonable" practice relating to the "delivery" of property. (See no. 3 above.)

In any case, there may be legal remedies for past offenses as described above and this topic must be carefully considered in on-going negotiations by shippers with ocean carriers in the current contract negotiation period.

What This Means to You

Some shippers will reach amicable commercial resolutions to damage caused by recent events. However, jams at West Coast ports have caused real damages and created a regulatory environment that is ripe for legal remedies to redress the most blatant violations of the Act including rate gouging, unilateral increases and retaliatory refusals at port. Such relief can be sought in a Complaint proceeding at the FMC or in federal court with the assistance of legal counsel.

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Policy solutions should continue to top stakeholder agendas as political involvement would help bring about more government scrutiny over the chaotic shipping environment, as we have seen with recent involvement in the bargaining standoff. The 2015 TPM conference March 1-4 in Long Beach, CA is an excellent forum for shippers to interact with ocean carrier interests and others who affect policy.

Lastly, but perhaps most importantly, with the new contract negotiation season in full swing, renewed and more intense focus should be placed on the contracting process to avoid the pitfalls that painfully arose last season due to port congestion.

Port congestion is not likely to disappear soon.

Contact Us

We are closely monitoring the situation on the coast and the related legal remedies. If you have any particular client needs or questions, please contact Carlos Rodriguez at 202.378.2365 or your Husch Blackwell attorney.

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