

Legal Aftershocks from the West Coast's Port Closures: the FMC Wags its Finger at Carriers

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Given the stakes involved, it's hardly surprising that legal issues are surfacing port and starboard in the wake of October's west-coast ports lockout. Holiday season arrivals were impacted tremendously, and it may be months before we know the full extent of economic repercussions arising from the Pacific Maritime Association's labor dispute with the longshore union.

Those repercussions extend to all concerned and, naturally, everyone is doing his/her best to minimize the damage. A suggestion has arisen that certain players on the carrier side of the equation may be messing around with their freight rates in an effort to make up for losses resulting from the work stoppage. Carriers purportedly have been hitting shippers and intermediaries with "congestion surcharges," tacked onto freight bills for deliveries to west coast ports delayed by the lock out.

For those shipments moving pursuant to carriers' tariffs, a congestion surcharge would be legit only if the tariffs so specify. Yes, a carrier is free to amend its tariff to include new terms (such as a congestion surcharge), but no, it can't do so with retroactive effect. In fact, Section 8(d) of the Shipping Act of 1984, as well as regs implemented by the U.S. Federal Maritime Commission (46 CFR 520.8), won't let a carrier alter its tariff within 30 days of a proposed amendment's publication. Apparently, a new moon has not set since certain carriers have attempted to move their tariffs' goal posts regarding congestion surcharges.

True, only a relatively small percentage of cargo awaiting offload and delivery to the west coast was moved by tariff – at least directly. Privately and confidentially negotiated service contracts account for the vast majority of the affected freight. But it appears carriers are also trying to up the ante in those circumstances by way of "amended" tariffs, pointing to contract terms which incorporate (or are subject to) them. But here again, the incorporated tariffs can't be modified without 30 days notice, a provision certain carriers allegedly aren't complying with.

Enough noise over the issue has reached the FMC's ears, such that the Feds have issued an advisory "cautioning" the shipping public that, hey, the rules still apply. The advisory sternly directs players to keep their noses clean to avoid civil enforcement actions. Parties to service contracts can always change their agreement, but they must jump certain hoops to do so (namely, file amended contract terms with the FMC). These provisions might deter players from exerting too much leverage resulting from extreme circumstances.

On a similar note, carriers have been pointing to *force majeure* clauses in their service contracts, tariffs and/or bills of lading as a means of escaping implied and/or express contractual obligations. In other words, certain carriers are disclaiming liability for delayed delivery based on contract terms that relieve parties from performance when certain uncontrollable events render such performance impossible (See November 2002 Legal Lookout article for a description of how *force majeure* works). These carriers are advising shippers and intermediaries that either their cargo will be delivered to other (non west coast) ports, or that the cargo will be delivered by alternate transportation modes to originally specified destinations, with the increased expense charged to the shipper. These issues can be complex; anyone potentially affected should have an attorney review pertinent shipping documentation.

One problem with those carriers' position is that often the *force majeure* assertion was made *after* the lock out ended and performance is no longer "impossible" ("difficult" and "expensive" performance aren't excused). Other issues include whether a *force majeure* clause's language actually encompasses a port lock out; whether clauses found in bills of lading or tariffs are supplanted by service contract language; and whether the carrier gets to decide what happens next even if a clause does apply.

Parties to the labor dispute recently reported progress toward a workable agreement, with discussions centering around a timetable for the introduction of advanced technology into cargo management programs. But we're not out of the woods yet, and a potential relapse back into the standoff can't be ignored. Meanwhile, players impacted by the crisis must be mindful of applicable law in their efforts to minimize their losses, lest the labor dispute's impact be compounded with legal problems.

Ref: FMC Advisory, available on the FMC's website, www.fmc.gov.