

Wisconsin Movers Update

FMCSA ADOPTS INTERIM HHG CONSUMER RULES AS FINAL RULES

The Federal Motor Carrier Safety Administration (FMCSA) has adopted as final its interim regulations at 49 CFR part 375 published in the *Federal Register* on June 11, 2003 (68 FR 35064) and subsequent technical amendments published on March 5, 2004 (69 FR 10570), April 2, 2004 (69 FR 17313), and August 5, 2004 (69 FR 47386). The final rule is effective August 11, 2005.

The final rule specifies how motor carriers transporting household goods by commercial motor vehicle in interstate commerce must assist their individual customers who ship household goods. As no further amendments are necessary, the interim regulations at part 375 are adopted without change.

AMSA REPORT ON HHG MOVER OVERSIGHT ENFORCEMENT & REFORM ACT OF 2005

As reported, Congress passed a \$286.4 billion Highway Reauthorization Bill last week. The Highway Bill contains new household goods transportation legislation entitled, *Household Goods Mover Oversight Enforcement and Reform Act of 2005*. The final enacted legislation focused on addressing the rogue mover problem and didn't economically hurt the professional moving industry. The American Moving & Storage Association (AMSA) achieved most of its legislative goals and the final legislative provisions are reasonable, given the legislative challenges we faced over the past several years. A summary of the important HHG provisions applicable only to shipments of individual shippers of household goods (COD) is set forth below:

CARMACK AMENDMENT

The most important news is that the legislation does not change our industry's current liability regime (Carmack). The General Accounting Office has been tasked to study the impact on our industry if State consumer laws were applicable to the interstate household goods industry, but it is just a study and AMSA will provide justification to GAO urging no recommended changes in the Carmack Amendment. The GAO study is due no later than 18 months after enactment. In addition, the Surface Transportation Board has been tasked with a review and study of the liability protections currently available to consumers and, again, AMSA will be providing input into this study.

STATE ENFORCEMENT

State attorneys general (A.G.) can now help FMCSA enforce federal consumer protection laws, but their enforcement is limited to federal consumer protection regulations related to the interstate delivery and transportation of household goods, and any civil action is limited to federal court. State enforcement was also intended to be directed toward unlicensed movers and movers who have had a license (from FMCSA) for less than five years; however, the legislative language needs to be clarified through a technical amendment to ensure that intent. In addition to enforcement by State A.G.'s, a State authority (a State agency that has authority to regulate intrastate movers) can enforce federal consumer protection laws related to the interstate delivery and transportation of household goods and it appears civil action can be brought in State court.

PAYMENT AT DELIVERY

AMSA lobbied hard to improve the industry's ability to get paid at delivery for services rendered. The legislation maintains current requirements to collect at delivery no more than 100% of a binding estimate or 110% of a non-binding estimate; however, it also authorizes the collection of charges at delivery for additional services requested by a customer after the contract for service is executed that were not included in the original estimate.

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This provision will trump current FMCSA regulations that do not permit collection of charges at delivery for customer-requested services not included in the original estimate. The legislation also provides for carrier-imposed additional charges not in an original estimate but necessary to complete transportation (impractical operations) such as shuttles, to be collected at delivery as long as the charges do not exceed 15% of all other charges due at delivery. The 15% calculation was a compromise AMSA made to enable carriers to collect most if not all shuttle-type charges at delivery. Any remaining charges (in excess of 110%; shuttles in excess of 15% of total charges) are to be paid by the customer within 30 days after a carrier presents its freight bill. It is AMSA's opinion that the aforementioned trumps the current FMCSA rule that requires carriers wait 30 days before billing.

ESTIMATING REQUIREMENTS

Written estimates are required as they are today, but they must be based on physical surveys of the customers' household goods if they are located within a 50-mile radius of the location of the agent that prepares the estimate. The 50-mile requirement will no doubt be open to interpretation. A provision in the legislation authorizes a written waiver of a visual inspection if signed by a customer before a shipment is loaded.

The legislation also contains a new requirement that charges under a non-binding estimate must be based on the actual weight of a shipment, subject to a carrier's lawful tariff. While this requirement will not affect most AMSA members, we have a few members who, under independent action, base their rates on cubic or linear feet or hourly charges. Of all the changes required by the legislation, the new estimating requirements will directly address many of the estimating tactics of rogue movers. However, AMSA members that routinely conduct phone or Internet shipment surveys will either have to amend their procedures or ensure they obtain a written waiver signed by the customer, so as to allow/accept the estimate without the visual inspection. (There are no provisions for waiving the requirement that the charges for shipments moving under non-binding estimates must be based on actual weight.)

REQUIRED PUBLICATIONS TO BE GIVEN TO CONSUMERS

The Act requires that when a written estimate is given to a customer, the DOT pamphlet entitled Ready to Move must also be given to the customer. This brochure can be found on FMCSA's website at <http://www.protectyourmove.gov/documents/readytomove-14x8.5.pdf>. However, we have asked FMCSA to check all of the referenced phone numbers, etc. contained in the brochure, since it is not a new publication. Therefore, don't print copies until we receive feedback from FMCSA. Also, before execution of a contract for service, the carrier must continue to give the customer the *Your Rights and Responsibilities booklet*.

LIABILITY OF CARRIERS

The legislation requires that, unless a mover receives a waiver in writing, a carrier's maximum liability is equal to the replacement value of the household goods, subject to the maximum declared value of the shipment. This requirement is essentially the current requirement under Released Rates Order MC-999 (Amendment 4); however, if the full replacement value protection is not waived in writing by selecting on the bill of lading 60¢ per pound per article, full replacement value applies, not depreciated value as now required. Certain provisions on the industry's bill of lading will need to be amended. If it is the shipper's intent to release his shipment at the 60¢ level, it is important that this waiver is executed, since depreciated value is no longer the default liability threshold.

ARBITRATION

The legislation increases the current mandatory arbitration threshold from \$5,000 to \$10,000 and broadens arbitration to include transportation payment disputes in addition to loss or damage disputes. Also, language was added under Attorneys Fees to Shippers to address the recent 9th Circuit decision that granted attorneys fees when arbitration was not used to resolve a dispute.

FMCSA CONSUMER COMPLAINT DATA BANK

AMSA did not lobby hard against the requirement that FMCSA establish a complaint data bank because they have already set up a data bank. However, AMSA lobbied against the requirement that carriers file periodic claim reports with FMCSA and we were successful in eliminating the requirement in the Senate version, but at the last minute the House version containing the requirement was adopted. Therefore, a quarterly claims report requirement has been established. FMCSA will be required to issue regulations to require the quarterly reporting; therefore, AMSA should be

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able to provide input. The claims report requirement will be subject to a rulemaking proceeding, so it will be at least a couple of years before reports are required to be filed. We also lobbied to ensure that carriers are permitted to challenge information in the complaint data bank and it is contained in the legislation. Currently, FMCSA is using its complaint data bank for enforcement purposes and it will be some time before they develop procedures for public access.

BROKER REQUIREMENTS

The legislation provides that if a broker gives a customer an estimate before entering into an agreement with a carrier to provide transportation, the broker is liable for a civil penalty of not less than \$10,000. A similar requirement is contained in the current FMCSA Consumer Protection Regulations. Also, brokers are required to provide a customer with their DOT broker permit number, the Rights & Responsibilities booklet, a list of all motor carriers providing transportation on behalf of the broker, and information that states that the broker is not a motor carrier. The latter requirements are to be established within one year of enactment, and since there is already an ongoing rulemaking on these issues, these new broker requirements may well be finalized within one year.

PENALTIES FOR HOLDING SHIPMENTS HOSTAGE

As indicated under estimating requirements, collecting no more than 110% of the original estimate at delivery is still a requirement (plus charges for shipper-requested services and shuttle capped at 15% of the total bill due at delivery). A mover cannot hold a shipment hostage while attempting to collect more than 110% of the original estimate. If a mover holds a shipment hostage for such payments, a civil penalty of \$10,000 for each day the shipment is held can be assessed and a mover's authority suspended for as long as three years. Also, criminal penalties can apply for holding a shipment hostage by falsifying documents or demanding payment for services not performed or not necessary. A fine and imprisonment up to two years can be incurred.

Given these penalties, movers must ensure that all of their employees and contract drivers understand the estimating, payment and collection requirements, especially the 110% requirement. Movers must be careful to document reasons why a shipment is put in SIT because delivery cannot be made; understand fully the collection requirements at delivery, especially shuttle; ensure a non-visual inspection is made ONLY with a written waiver and stress the requirement to provide accurate initial estimates and not just estimates to get the job. These and other operational circumstances not properly handled can establish in the customer's mind the perception that the mover is holding a shipment hostage, even if there are lawful reasons to retain possession of a shipment while requesting payment.

TOUGHER LICENSING REQUIREMENTS

The legislation includes more stringent registration (license) requirements. The legislation will require new household goods carrier applicants to provide evidence of participation in an arbitration program (AMSA or others) rather than just checking a box. Also, the applicant must identify the tariff it will use and the notice of availability of the tariff for inspection. An applicant must also provide evidence that it has access to, has read, and is familiar with the Consumer Protection Regulations and limitations of liability requirements. Lastly, an applicant must disclose any relationship with other carriers involving common stock, common ownership, common management, etc.

This last requirement should make it more difficult for rogue movers to change their name through the DOT application process when another entity they control is feeling the heat from enforcement actions.

DEFINITIONS.YOU LOAD WE HAUL PROBLEM

The legislation contains a definition of a household goods carrier designed to essentially codify (into law) a previous DOT ruling that services such as ABF's .you load we haul. are not considered household goods transportation and, therefore, are not subject to the federal consumer protection requirements. AMSA lobbied Congress to level the playing field and there is language in the legislation that allows a carrier who is considered a mover pursuant to the definition of a household goods carrier to offer the same or similar services (customer loads trailer, container, POD, etc.) without being subject to the consumer protection requirements of FMCSA.

Serving Moving Companies in Wisconsin

Wisconsin Movers Association

562 Grand Canyon Dr P.O. Box 44849
Madison, WI 53719 Madison WI 53744-4849

Phone: 608-833-8200 x11
Fax: 608-833-2875
Email: ctuhus@witruck.org

www.wismovers.org

The Wisconsin Movers Association was established in 1944 as a non-profit trade association representing the interests of household goods movers within the state of Wisconsin. The stated purposes of the Association are to promote a positive image of the industry with consumers, educate members relative to safety and better business practices, and to promote and insure a viable business climate in Wisconsin for members of the industry.

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ENFORCEMENT

The HHG legislation becomes law on the date the President signs the bill, likely in the next two weeks. At that time, most of the provisions become effective (except for those subject to future rulemaking proceedings). It will take both the industry and FMCSA time to review, analyze, and educate movers and FMCSA enforcement inspectors on the new requirements. Therefore, the industry shouldn't be concerned that FMCSA enforcement of the new requirements will be immediate. It will likely be months before FMCSA will be in a position to enforce the new requirements and we will stay in contact with FMCSA's enforcement staff in order to communicate to members their timing and approach to enforcement of this legislation. It is assumed most members will implement the new payment at delivery procedures soon after the bill is signed into law. Using actual weight for non-binding estimates should not be a problem since that is industry practice; however, visual inspections, the 50-mile requirement, and the written waiver need to be addressed by every member to ensure compliance in the future. Also, the distribution of the *Ready to Move* brochure is a new requirement. AMSA will amend its arbitration program to be in concert with the new requirements within the next several months to be in a position to handle shipments transported after enactment that ultimately will be subject to arbitration.

CONCLUSION

As more analysis and review of the legislation are accomplished, along with input from FMCSA, we will ensure that AMSA members are further informed regarding compliance with the new HHG legislation. Thanks to all members who helped us with this rather protracted lobbying effort, either by helping us with our grass roots lobbying, directly lobbying Congress, or providing contributions to AMPAC.

Our next challenge, of course, will be to continue to impress upon regulators and Congress the importance of Carmack to the economic viability of the moving industry and of our commitment to retain its safeguards.

In addition, it is important that each affected AMSA member understands the new requirements, improve their communications with their customers, and continue to provide the best service possible to improve our image. Hopefully, this will avoid Congressional interest in future consumer protection legislation that will surely be more difficult to resist if major consumer problems manifest themselves.

A copy of the HHG legislation is available on AMSA's website by clicking on www.promover.org.

Courtesy American Moving & Storage Association