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# Cabotage Primer: The Basics and Pitfalls of Cross-Border Motor Carriage

FEBRUARY 23, 2021

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Cabotage as a legal principle is neither new nor specific to the United States. It exists as a legal means to shield domestic carriers and their workforce from foreign competition. This protectionist goal is tempered by the need for efficient international supply chains, particularly for valuable North America trade. The challenge that arises for motor carriers and their enterprise shippers when modeling traffic flows and the lanes on which goods will travel is to navigate applicable regulation and policy.

The regulatory basis for cabotage restrictions arises from two distinct agency jurisdictions with two very different areas of focus. U.S. Customs and Border Protection (CBP) promulgates and enforces regulation regarding the entry of goods and equipment. U.S. Citizenship and Immigration Services (Immigration) promulgates and enforces regulation regarding the entry of persons. The application of these competing perspectives on cross-border movements can yield conflicting results. Liability can arise for motor carriers, as well as their drivers personally, where a movement violates one or both of these areas of enforcement. It is often the case that a particular movement is in fact compliant under CBP regulations and yet runs afoul of Immigration regulations, which is a conflict yielding very real risk of enforcement.

## CBP Framework

The general rule is that foreign-based operators may engage in international traffic, even if carriage occurs in the United States, but those operators may not engage in purely local traffic: “Trucks, busses, and taxicabs, however owned, which have their principal **base of operations in a foreign country** and which are **engaged in international traffic**, arriving with merchandise or passengers destined to points in the United States, or arriving empty or loaded for the purpose of taking out merchandise or passengers, **may be admitted without formal entry or the payment of duty**. Such vehicles **shall not engage in local traffic** except as provided in paragraph (c) of this section.”[i]

This general rule operates to prohibit point-to-point movements that would be otherwise performed by domestic motor carriers. However, this is not a binary analysis. In the interest of promoting North American trade, it is permitted for foreign carriers to complete movements in domestic interstate or intrastate commerce provided that any such movement is incidental to the immediately prior or subsequent engagement of that vehicle in international traffic.[ii] This concept of movements “incidental to international traffic” is the critical point of analysis when examining the lawfulness of traffic from a CBP enforcement perspective.

CBP has released informal guidance to help Canadian operators identify permissible movements that the agency would consider as satisfying the “incidental to international traffic” requirement.[iii]

- Drivers may deliver a shipment from Canada to one or more U.S. locations.
- Drivers may then pick up a return shipment from one or more U.S. locations for delivery to Canada.
- Drivers may deliver a shipment from Canada to a U.S. location, deadhead with the same trailer to another U.S. location, and load that trailer for delivery to Canada.
- Drivers may deliver a shipment from Canada to a U.S. location, deadhead with the same trailer to another U.S. location, drop the trailer, and pick up a second trailer for delivery to Canada.
- Drivers may drop a loaded trailer from Canada at one location in the U.S., bobtail to another location, and pick up a loaded trailer for delivery in Canada.
- Relay drivers may drive entirely domestic segments of an international delivery if the drivers are employed by the same company and the domestic portion is necessarily incident to the international nature of the trip (HOS Compliance).
- Drivers may perform activities that are "necessary incidents" of international commerce, such as loading and unloading international cargo.

To further exemplify the concept, CBP has take a step further and identified movements that are impermissible, as they prohibit cabotage movements.[iv]

- Drivers may not pick up a shipment at one U.S. location and deliver that shipment to another U.S. location.
- Drivers may not reposition an empty trailer between two points in the U.S. when the driver did not either enter with or depart with that trailer.
- Drivers may not "top up" an international shipment with U.S. domestic shipments.
- Drivers may not solicit shipments for domestic deliveries while in the U.S.

In summary, the key question arising from the "incidental to international traffic" consideration is exactly what occurs with the vehicle and its load before the domestic leg of the transportation and what happens after the domestic leg of the transportation. The CBP enforcement risk is arguably low if each side of the domestic leg involves cross-border international movement. Even traffic in domestic commerce may be allowed if movements are in the general direction of necessary activity to further international traffic. This can be valuable in the interest of facilitating trade, but it is unfortunately not the end of the analysis. Immigration regulations play a key role that is also prohibitive of certain cross-border movements.

Immigration Framework

United States immigration regulations are based on the concept that foreign drivers are considered business visitors, alien non-immigrants.[v] Because of this status, foreign drivers must generally meet the entry requirements as a visitor for business and must only transport cargo traveling in the stream of international commerce within the meaning of immigrations laws and Immigration

regulations. The transportation operator provisions are intended to allow the free movement of goods across the border, an activity that is international in scope, but not to facilitate access to the domestic labor market: “Purely domestic service or solicitation, in competition with the United States operators, is not permitted.”[vi] Therefore, care is due to ensure that the driver of a movement is in compliance with all applicable Immigration regulations, which ofte times includes the need to apply for and secure a B-1 Visa as a business visitor.

Navigating the Cabotage Conflict

Cross-border motor carriers must observe both the CBP regulations as well as the Immigration regulations. The second, Immigration-related restrictions, are often the greatest obstacle to modeling a cross-border supply chain at the lane level. The immigration statutes governing the entry of drivers are more restrictive than those governing customs activities and do not allow as much flexibility in the regulatory and policy process. The USMCA and precedent decisions interpreting the visitor for business statute expressly forbid point-to-point hauling within the United States by alien drivers-without the availability of cover from an “incidental to international traffic” exception.

The practical reality is that a Canadian driver may enter the United States with a load, drop that load, and then deadhead back to Canada or pick up another load for cross-border movement into Canada. Any movement between those inbound and outbound activities in international commerce may be subject to a high, and sometimes insurmountable, level of scrutiny. Immigration has been known to take the enforcement position that such movements are prohibited even where clear guidance exists from a CBP perspective-because such guidance only addresses the movement of equipment and cargoes. A driver faces a far steeper challenge, which, in the extreme, can result in the denial of entry privileges back into the United States as well as civil and criminal penalties for both him or her and the employer motor carrier. This challenge, and the resulting necessity to employ local drivers or to incorporate unprofitable deadheading without cargo, can often turn the economics of a lane model upside down and thereby prevent the commercial feasibility of an operation.

Benesch’s deep bench of transportation, customs, and immigration attorneys are experienced in examining cross-border traffic models to determine operational and regulatory feasibility. In the event of enforcement, Benesch is experienced in representing clients facing investigations and penalties from both CBP and Immigration.

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[i] 19 CFR § 123.14(a) (emphasis added).

[ii] 19 CFR § 123.14(c).

[iii]

Guidelines for Compliance of Motor Vehicles (CMV) and CMV Drivers Engaged in Cross-Border Traffic May 2012), https://www.dhs.gov/sites/default/files/publications/dhs-cross-border-trucking-guidelines_0.pdf.

[iv] *Id.*

[v] 8 USC § 1101.

[vi] 8 CFR § 214.2(b)(4)(i)(E).