NEWSLETTERS

Fairness From the FMC is on the Horizon

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A cloud of uncertainty hangs over the shipping industry with respect to violations of the Shipping Act-can a single act constitute a Shipping Act violation or does there have to be more pervasive or systematic conduct? But clear skies are not far off in the distance.

The Federal Maritime Commission (FMC) is in the process of clarifying the scope of 46 U.S.C. § 41102(c), previously known as Section 10(d)(1), of the Shipping Act of 1984. Section 41102(c) states that regulated entities, "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."

A combination of recent decisions straying from prior precedent and a clogged docket has forced the FMC to examine the limitations of section 41102(c). Possibly due to recent FMC decisions allowing a single act to constitute a Shipping Act violation, section 41102(c) is trending as a tool for solving mere commercial business disputes between or among cargo owners, non-vessel operating common carriers (NVOCCs), marine terminal operators carriers and ocean transportation intermediaries, as opposed to widespread issues affecting commerce. In some instances, section 41102(c) has been used by claimants to circumvent lower statutory limitations of liability and avoid shorter filing periods to which they would otherwise have been subjected.

The proposed rulemaking will clarify in 46 C.F.R. § 545.4 that to establish a successful claim for reparations for a Shipping Act violation under section 41102(c), there must be conduct occurring on a, "normal, customary, and continuous basis" as opposed to a one-time or occasional event.

How We Got Here

Prior to 2010, the FMC had been clear that isolated actions would not support a Section 41102(c) violation. For instance, a failure to notify a shipper of a reclassification of its cargo resulting in having to pay significantly higher shipping charges did not constitute a Shipping Act violation. See *European Trade Specialists v. Prudential-Grace Lines*, 19 SRR 59 (FMC 1979).

However, beginning in 2010, the FMC began issuing opinions stating that a regulated entity, such as a carrier or NVOCC, could be found in violation of the Shipping Act due to an unreasonable practice related to the handling, storing or delivery of a *single shipment* of cargo or a one-time occurrence-*not based on a course or history of bad conduct or dealings*. Decisions of this ilk were emboldening claimants to come forward and prosecute claims that likely could have been resolved without administrative law involvement, in light of the seemingly lower standard for establishing a Shipping Act violation. Starting with the decision in *Houben v. World Moving Services*, 31 SRR 1400 (2010), in which an unlicensed ocean freight forwarder and an NVOCC were found to have violated section 41102(c)

after the NVOCC failed to pay its destination agent for services resulting in the holding of the complainant's cargo and a six-month delivery delay, and culminating in the 2013 decision of *Kobel v. Hapag-Lloyd A.G.*, 32 SRR 1720 (FMC 2013), the FMC's prior position has morphed into one where a single incident-even if predicated on good faith intentions-may constitute a violation.

In the 2013 *Kobel* decision, the FMC found that *discrete conduct* with respect to a *single shipment*-the "unlawful" liquidation of damaged containers that remained in storage at the destination port after having been accidentally loaded on to a vessel-supported a violation of Section 41102(c) *regardless of whether that conduct was indicative of the respondent's practice*.

There was no explicit explanation given by the FMC for the change in its interpretation of Section 41102(c), just that a single violation could land an unsuspecting carrier in hot water. "While the FMC can change its interpretation of the Shipping Act, it is well-settled that it must explain why it changed its mind." World Shipping Council, Comment to Docket No. 18-06, Interpretive Rule, Shipping Act of 1984 (October 10, 2018) (citing *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009)). Hence, the FMC's proposed rulemaking has resulted in response.

The Impetus for Change

Given the FMC's subtle, but significant, turn toward embracing a single act as a possible violation of 46 U.S.C. § 41102(c), industry groups pushed for the FMC to clarify its stance on violations of Section 41102(c). This led to the FMC's publication of its *Notice of Proposed Rulemaking* on September 7, 2018 in Docket No. 18-06 (Notice).

Much concern had surfaced over whether, under the current construction of section 41102(c), *any dispute* concerning a single shipment *could* lead to a Shipping Act violation despite generally reasonable practices related to receiving, handling, storing or delivering cargo. Or whether, the Shipping Act could duplicate other statutory and common law maritime remedies enabling "legal regime shopping." For instance, why not avoid the one-year statute of limitations or $500 per package limitation of liability associated with filing a Carriage of Goods by Sea Act, 46 U.S.C. § 30701 note, formerly 46 U.S.C. § 1300 *et seq*. (COGSA) claim when a party can bring a claim under section 41102(c) two years later and possibly even recoup attorneys' fees?

On October 10, 2018, the FMC closed public comments on the proposed clarification and guidance regarding the interpretation of the scope of 46 U.S.C. § 41102(c). The FMC received four separate comments, all in support of the FMC's proposed clarification.

A common theme throughout the comments, submitted by industry leaders, is that the proposed action by the FMC is a welcome one, and will result in the removal of uncertainty currently hovering over the shipping industry when it comes to potential violations of the Shipping Act for a one-time occurrence. It is believed that the proposed clarification will strike the right balance between encouraging valid Shipping Act claims while directing litigants to file their other claims in another appropriate venue.

Finally, according to the industry groups, the proposed rulemaking would not result in prejudice against litigants, since just like prior to 2010, plenty of forums exist in which maritime and commercial claims not amounting to Shipping Act violations may be brought.

To Move Forward, Sometimes We Must Step Back

By returning to pre-2010 precedent, the FMC would again adhere to the true Congressional intent of 46 U.S.C. § 41102(c) in which only unjust and unreasonable conduct that is "normal practice or customary" on the part of respondent can be grounds for a violation of 46 U.S.C. § 41102(c). Most notably, the FMC itself stated in the Notice that for decades the FMC has held that to violate the Shipping Act, a practice could not be "an isolated or 'one shot' occurrence," but rather must be "habitually performed and impl[y] continuity," and be "positively established" by the regulated entity and imposed in a "normal, customary, repeated, systematic, uniform, habitual, continuous manner." *See Notice*, 83 Fed. Reg. at 45,369 (Sept. 6, 2018) (collecting cases).

Returning to the FMC's prior position on violations of 46 U.S.C. § 41102(c) should not leave claimants without remedies or provide carriers or other regulated entities with a "get out of jail free" card. Instead, clarifying section 41102(c) to require systematic problems over isolated incidents would be more in line with the true intention of the Shipping Act, which directs common breach of contract claims to the courts, not the FMC. According to the National Customs Brokers and Forwarders Association of America, Inc.'s comments, the proposed rulemaking should "serve to refocus the Commission's resources on issues that affect commerce, rather than converting civil disputes into quasi-criminal violations of the Shipping Act." Perhaps the change will better enable the FMC to concentrate on issues of broad application, *e.g.*, the reasonableness of ocean carrier and marine terminal detention and demurrage charges associated with abandoned shipments or containers not made available for pick-up.

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