CLIENT ALERTS & INSIGHTS

TSA Authorized Representatives-Emerging Practice of Engaging Freight Brokers and Its Practical Implications

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Featured Industries: Transportation & Logistics, International Trade & Supply Chain Management

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Air transportation safety has long been of critical supply chain importance and geopolitical significance, and that role is growing. Supply chain constraints over this decade have driven a need for adaptation, modal diversification and cost containment. To do so, authorized air cargo providers have increasingly explored new ways to add capacity for regulated surface transportation.

The primary regulated air cargo providers in the United States are air carriers and indirect air carriers. Direct air carriers operating under 14 CFR Part 119 are certificated by the U.S. Department of Transportation, the Federal Aviation Administration, and DHS's Transportation Security Administration. The operating rules associated with direct air carriage are found in 14 CFR Parts 121 or 135. Indirect air carriers, on the other hand, are persons or entities within the United States that do not possess an FAA air carrier operating certificate but undertake to engage indirectly in the air transportation of property, utilizing the services of a direct air carrier for all or part of the transportation. Indirect air carriers are also required to maintain a license with the Transportation Security Administration.

Surface transportation providers are sometimes relied upon to perform secure regulated transportation incident to the air cargo supply chain functions. Security requirements necessitate that air providers engage ground transportation providers through strict security terms and indemnity obligations. Historically those surface functions were performed through direct contractual engagements known as authorized representative relationships. Recently however, there has been growing interest from indirect air carriers to engage property brokers to ensure capacity needs are met.

Key Air Cargo Compliance Obligations - The bedrock requirement for both direct and indirect air carrier operations is compliance with the TSA security program they were issued. Direct air carriers must adopt and implement an Aircraft Operator Standard Security Program (AOSSP) or its full all-cargo version, and indirect air carriers implement an Indirect Air Carrier Standard Security Program (IACSSP). Security programs are issued by the TSA and are by their nature designated as Sensitive Security Information (SSI). The actual content of the security program is strictly protected from disclosure by SSI statutory restrictions absent certain narrowly tailored exceptions.

Only general public themes may be discussed in this article due to the SSI nature of the material. All regulated parties designate Security Coordinators and Cyber Security Coordinators to liaise with the agencies in managing compliance under the security programs. Basic public categories of those

compliance obligations include protection of SSI, managing Security Threat Assessment (STA) screens of personnel, observing chain of custody and Known Shipper requirements, and incident reporting, as well as training requirements.

Incidental Ground Transportation for Air Cargo - All air cargo traffic is naturally just one leg in an item's supply chain journey. All cargo must be picked up from its origin and delivered at a cargo screening facility or airport only to be picked up once again at its destination airport facility and delivered to its final destination. The entire process includes many regulated and unregulated handlers, traffic through secure areas, screening, consolidation and deconsolidation in unit load devices (ULDs), and multiple different surface vehicles.

Ground transportation providers who participate in secure regulated functions do so under their authorized representative relationship with air carriers and indirect air carriers. Authorized representatives serve as agents of the regulated parties they serve. Essentially, authorized representatives are tasked with fulfilling certain vital security functions associated with tender of air cargo as if those roles were performed by the regulated parties themselves. For example, a typical authorized representative structure includes air carriers' engagement of motor carriers directly to ensure that ground transportation is achieved in compliance with the security program.

Market Trend Toward Engaging Brokers - Surface transportation in support of regulated air cargo has traditionally been accomplished through engagement of asset-based motor carriers. In this market, there is a noticeable trend toward regulated air cargo providers engaging non-asset brokers who then arrange for that surface transportation. The motivation is understandable since this expands available capacity and potentially eases cost pressures. It is not impossible for brokers to participate in authorized representative relationships. The challenge is those brokers increase the degree of separation between authorized air carrier or IAC, and as a result, introduce new risks and potential vulnerabilities that must be addressed if this model is deployed.

Operational Challenges for Brokered Transportation - There may be an opportunity for some security-conscious brokers to meet this market demand by building strong operating relationships within their network of ground transportation providers. The starting point for building these structures is alignment with the regulated provider on the role that the broker serves. In most cases it never has physical possession over the cargoes. It also has no direct relationship with individuals who may have unescorted access to those cargoes. A regulated air cargo provider cannot self-blind to these operational facts. The next step in building these relationships is to effectively flow-down operating requirements as directed by the regulated air carrier or IAC, through the broker, and to the underlying motor carrier.

In most cases this model is reasonably achievable in ways similar to how any complex high-risk arrangement of transportation can be accomplished through brokers. STA requirements and all other operating procedures required under the applicable AOSSP or IACSSP are built into contractual and load-specific terms. If the underlying motor carrier is familiar with regulated air transport, perhaps by serving as an authorized representative for other regulated parties, then there may be a high degree of trust in service performance and therefore a lower practical likelihood of risk. If on the other hand the carrier is inexperienced, and typically hauls general commodities, then the risk of error and high-dollar exposure flowing through the value chain increases dramatically.

Enforcement Risk -

We handle a high volume of TSA enforcement defense cases in our practice, many of which are successfully resolved with low or no civil penalty exposure. The monetary face value of these Notices of Civil Penalty as issued are significant, with ranges often extending from tens of thousands to tens of millions of dollars. Among the many tools for successful defense are the basics of operational review through root cause analysis, development of appropriate corrective actions, and then credibly deploying those actions. This exercise is made far more difficult when multiple third-party providers are introduced into the supply chain as authorized representatives.

The TSA will in the first instance look to the regulated service provider during enforcement actions. The question of whether a violation occurred, the magnitude of risk for air cargo security, and the risk of reoccurrence often drive the tone of settlement. This remains true regardless of how operations were conducted, even if, for example, an underlying motor carrier utilized a driver that did not hold an STA to perform the operation. As a result, the otherwise simple review for root causes, and implementation of corrective actions, can be much more complex when defending enforcement actions. Authorized representative letters will typically include strong indemnity so that exposure is compensable, such as in our example of a brokered carrier's driver. There the broker (and by extension likely its carrier) will suffer liability for contractual indemnity arising out of the incident. However, any damage to the TSA relationship and the negative enforcement history will remain with the regulated party even if monies are collected.

Taking Care Before Offering or Accepting AR Responsibility - This emerging trend of arranging for regulated surface transportation through brokers very well may grow in the years to come, absent policy or regulatory change. It may be attractive from a business growth perspective, but this is not for the faint of heart. Brokers are particularly vulnerable to enforcement risk because of their intermediary role in these fact patterns. The broker will undoubtedly bear indemnity exposure to the air carrier or IAC. It will flow down operational requirements to the carrier, but it has no oversight or control over performance by the carrier. If there were to be a technical regulatory violation during carriage, then the regulated air cargo provider will face enforcement, and require assistance as well as indemnity from the broker, who will then turn around and require the same from the carrier. This may appear very similar to most brokered relationships, but here are two key differences: The magnitude of regulatory risk is astronomically higher as is the possibility for technical operational errors on the part of the carrier that caused the risk.

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