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NOV 12 2019

Operations Division
N.C. UTILITIES COMMISSION

10 West Market Street
Suite 1400
Indianapolis, IN 46204

TIMOTHY W. COCHREN
tcochren@scopelitis.com

 SCOPELITIS
GARVIN LIGHT HANSON & FEARY

The full service transportation law firm

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Main (317) 637-1777
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October 31, 2019

Sent Via Email: njeffries@ncuc.net

Mr. Nicholas Jeffries
North Carolina Utilities Commission
430 N. Salisbury St.
Raleigh, NC 27603
919-733-7328

Re: Bellhops, Inc. Property Broker Operations in North Carolina

Dear Mr. Jeffries:

I am writing on behalf of Bellhops, Inc. ("Bellhops" or the "Company") to follow-up on our October 18, 2019 conversation and further explain Bellhops' operations and to respond to North Carolina Utilities Commission's ("NCUC") October 7, 2019 letter regarding Bellhops' operations in North Carolina. See Exhibit A, which suggests that Bellhops may be violating North Carolina state law by advertising and offering to engage in the intrastate movement of household goods ("HHG"). As more fully explained below, Bellhops is not a HHG motor carrier but rather a broker that arranges for the transportation of property by third party service providers. Although that property has traditionally been considered HHG under some states' laws (including North Carolina), federal law (specifically the federal Limited Service Exclusion ("LSE") codified in 49 U.S.C. § 13102(12)(C)) makes clear that Bellhops is arranging for the transportation of only property (e.g. general commodities) and not arranging for the transportation of HHG. It is our understanding that, as a result of federal preemption (discussed in more detail below), the Company must also be deemed a property broker for purposes of state laws and regulations (including those in North Carolina). The Company thus requests that the NCUC acknowledge that the Company is properly operating in North Carolina as a property broker and that neither the Company nor the third-party motor carriers to which the Company tenders freight are required to obtain HHG motor carrier under North Carolina law.

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Nov 12 2019

I.
Background

By way of background, Bellhops uses various technology platforms, including its website, to connect customers with independent authorized (and fully licensed and insured) motor carriers¹ and/or lumpers (i.e., loaders/unloaders or service providers) to assist customers with their transportation and/or labor needs. The Company does not operate any equipment itself or otherwise perform any motor carrier services, and neither the motor carrier performing the transportation for the customer nor its employees or agents load and/or unload or otherwise handle the customer's personal property. The loading and unloading of the personal property is entirely performed by lumpers that are selected by Bellhops and are independent from the motor carrier. In other words, the authorized motor carriers selected to perform the transportation do not perform any specialized HHG services.

Bellhops communicates its business model to each of its customers whenever customers place an order for transportation and/or labor services. Specifically, Bellhops informs each customer that Bellhops holds interstate property broker authority (MC-965964), is not a HHG broker or motor carrier, will not be providing any transportation and/or labor services itself, and is only arranging for independent third-party motor carriers and lumpers to perform the requested transportation and/or labor services.²

II.
The Transportation Arranged by Bellhops is Property Transportation

The transportation arranged by Bellhops should be regulated by the NCUC as property transportation pursuant to the LSE. Under the LSE, Bellhops is deemed a property broker and not a HHG broker, and states, including North Carolina, are preempted and prevented by 49 U.S.C. § 14501(b)(1) from regulating Bellhops as anything other than a property broker.

¹ Bellhops requires that all motor carriers operating on its technology platform submit to a background check and comply with strict requirements. For instance, all motor carriers must not only possess the requisite state and federal property carrier authority but must also maintain \$750,000 minimum liability insurance and \$25,000 minimum cargo insurance.

² Notably, Bellhops has operated in North Carolina for over a year and the company is not aware of any complaints to the NCUC and has not been a party to any litigation involving its North Carolina operations. Please let us know if the NCUC's inquiry is the result of a customer complaint so that Bellhops can remedy any perceived issues with its services as part of Bellhops' efforts to do right by its customers.

A.

Under the LSE, the Motor Carriers are Not Transporting HHG

Pursuant to the LSE, Congress excludes certain motor carriers from the definition of HHG motor carrier. Specifically, “when a motor carrier provides transportation of household goods in containers or trailers that are entirely loaded and unloaded by an individual (other than an employee or agent of the motor carrier),” the carrier is not considered to be a HHG motor carrier. *See* 49 U.S.C. § 13102(12).³ Following the enactment of the LSE, many states have acknowledged that motor carriers performing intrastate transportation that would be subject to the LSE at the federal level will also be considered to be performing property (as opposed to HHG) transportation at the state level, with some states even amending their state definitions of HHG transportation to comport with the LSE. To this end, the Firm is aware that the NCUC acknowledged in a letter dated August 8, 2003 that a motor carrier performing intrastate transportation that comports to the federal LSE would be deemed to be a property (and not HHG) motor carrier under North Carolina law. *See Exhibit B.*

As discussed above, neither the authorized motor carrier performing the transportation for the customer nor its employees or agents load and/or unload or otherwise handle the customer’s personal property. The loading and unloading of the personal property is entirely performed by lumpers selected by the Company, which are independent from the motor carrier. The authorized motor carriers selected to perform the transportation do not participate in the loading and unloading of the customer’s personal property on the vehicle. In other words, the motor carriers’ only role in connection with the move is to transport the truck/trailer loaded with the customer’s property from one location to another location. Thus, under federal law, the transportation the Company is arranging is property (and not HHG) transportation.

B.

The Company is Deemed a Property Broker Under Federal Law

While the applicability of the LSE to brokers was historically subject to opposition in the moving industry, recent guidance from the FMCSA indicates that the LSE offers

³ *Am. Intermodal Servs., Inc., Extension-Nationwide Contract Carrier Serv.*, 1987 WL 100149, at *1 (DCSS Dec. 22, 1987), holding “the mere transportation of containerized household goods without the provision of the specialized service or equipment normally required for such commodities is not within the definition of household goods transportation and may be performed under ‘general commodities (except household goods)’ authority”; *American Red Ball Transit Co., Inc. v. McLean Trucking Co., Inc.*, 67 M.C.C. 305 (1956).

brokers the same protection it provides to motor carriers. Specifically, in 2012, the American Moving & Storage Association (“AMSA”) requested that the Federal Motor Carrier Safety Administration (“FMCSA”) regulate brokers which were arranging for the transportation of property to be used in a dwelling as HHG brokers even if the motor carrier performing the transportation was subject to the LSE. In a letter dated December 19, 2012 in response to AMSA’s request, the FMCSA rejected the AMSA’s request and found that brokers which arrange for transportation subject to the LSE are property brokers (and thus require only property broker authority) even though the transportation in question involves property used or to be used within a dwelling. See Exhibit C. The FMCSA’s position in the December 19, 2012 letter was later reaffirmed by the agency and published in the Federal Register. See Exhibit D. Accordingly, it is well settled under federal law that a broker arranging for transportation subject to the LSE is arranging for the transportation of property (as opposed to HHG) regardless of the property involved.

Because the transportation arranged for by the Company should be deemed property transportation for the reasons discussed in Section II.A, *supra*, the Company would be deemed/regulated as a property broker (and not a HHG broker) under federal law based on the above guidance from the FMCSA.

C.

Federal Law Preempts North Carolina from Regulating Bellhops as Anything Other than a Property Broker

The Supremacy Clause of the United States Constitution provides that the laws of the United States “shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of the any State to the Contrary notwithstanding.” U.S. Cons. Art. VI, c. 2. State laws that conflict with federal laws are therefore without effect. *Kozak v. Hillsborough Pub. Transp. Comm’n*, 695 F. Supp. 2d 1285, 1296 (M.D. Fla. 2010) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)) *aff’d sub nom. Kozak v. Hillsborough Cnty., Fla.*, 644 F.3d 1347 (11th Cir. 2011). “[P]re-emption may be either express or implied and is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

In 1994, Congress enacted the Federal Aviation Administration Authorization Act (the “FAAAA”) to specifically address the regulation of motor carrier operations, finding that the regulation of intrastate transportation of property by the states unreasonably burdened free trade, interstate commerce, and American consumers. See Pub. L. 103-105, § 601(a)(1). Congress amended the FAAAA in 1995 with the Interstate Commerce Commission Termination Act (the “ICCTA”). As amended, the

FAAAA and the ICCTA specifically “bar states from regulating freight forwarders/brokers and motor carriers of property.” *Alpine Fresh, Inc. v. Jala Trucking Corp.*, 181 F. Supp. 3d 250, 254 (D.N.J. 2016). Section 14501(b) of the ICCTA provides, in pertinent part:

No state or political subdivision thereof . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to intrastate rates, intrastate routes, or intrastate services of any freight forwarder or broker.⁴

49 U.S.C. § 14501(b)(1).

In other words, federal law expressly preempts any attempt by a state or a political subdivision of a state to enact or enforce any law or regulation that would affect the rates, routes, or services of property brokers. This would include any reliance by states (such as North Carolina) on state definitions of HHG and HHG carriers⁵ to regulate the Company’s brokerage as the brokerage of household goods in contravention of the federal LSE, as such regulation would have an impermissible effect on the rates and services of the Company. Stated differently, if states (such as North Carolina) do not recognize the LSE, including in their state definitions of

⁴ Unlike the federal preemption applicable to motor carriers (e.g. 49 U.S.C. 14501(c)), which allows states to continue to regulate HHG motor carriers, Section 14501(b)(1) does not distinguish between brokers arranging for the transportation of general commodities or household goods. In other words, pursuant to § 14501(b)(1), Congress intended that all brokers, regardless of the commodity involved, would be free from state regulation of intrastate routes, rates, or services. Further, while states (including North Carolina) may regulate motor carriers performing HHG transportation under 49 U.S.C. § 14501(c)(2)(b), that carve out only permits states to regulate transportation that would be deemed HHG transportation under federal (as opposed to state) law. *United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9 (1st Cir. 2004); *U.P.S., Inc. v. Flores-Galarza*, 275 F. Supp. 2d 155 (D.P.R. 2003), *aff’d in part, vacated in part, remanded sub nom. United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9 (1st Cir. 2004). Stated differently, the carve out only permits states to regulate transportation that is not subject to the LSE. See, *infra*, note 4.

⁵ When interpreting a federal statute, federal, and not state, definitions and guidance are applicable. See *Atlas Van Lines, Inc. v. Tax Appeals Tribunal of State*, 123 A.D.3d 168 (N.Y. App. Div. 2014) (holding federal definition of household goods preempted New York’s definition); *A.A. Metcalf Moving & Storage Co. v. N. St. Paul-Maplewood Oakdale Sch.*, 587 N.W.2d 311, 314 (Minn. Ct. App. 1998) (holding the application of Minnesota’s definition of household goods resulted in the creation of an impermissible conflict with the express federal intent to further deregulate the motor carrier industry); *Kozak v. Hillsborough Pub. Transp. Comm’n*, 695 F. Supp. 2d 1285 (M.D. Fla. 2010), *aff’d sub nom. Kozak v. Hillsborough Cty.*, Fla., 644 F.3d 1347 (11th Cir. 2011); *United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9 (1st Cir. 2004); *U.P.S., Inc. v. Flores-Galarza*, 275 F. Supp. 2d 155 (D.P.R. 2003), *aff’d in part, vacated in part, remanded sub nom. United Parcel Serv., Inc. v. Flores-Galarza*, 385 F.3d 9 (1st Cir. 2004).

Mr. Nicholas Jeffries
North Carolina Utilities Commission
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HHG and HHG motor carriers, they would be in direct conflict with the express language of § 14501(b)(1) and (c)(1) and the intent of Congress to essentially deregulate the transportation brokerage and property motor carrier industry. *Flores-Galarza*, 275 F. Supp. 2d at 160 (finding that failing to use the federal definition of HHG or HHG motor carrier to determine the scope of preemption under § 41713 would be “inconsistent with intent to eliminate a patchwork of state laws related to the prices, routes, and services of carriers”); H.R. CONF. REP. 103-677, 83, 1994 U.S.C.C.A.N. 1715, 1755 (“[Congress does] not intend for States to de facto regulate prices, routes or services of intrastate trucking through the guise of some form of unaffected regulatory authority”). Accordingly, we respectfully submit that the NCUC should recognize the federal LSE and find that the Company is a property broker arranging for the shipment of freight by property motor carriers so long as carriers and their drivers or agents do not provide any loading or unloading of the freight.⁶

III. Bellhops’ Advertising and Website

Based on the email notification that Bellhops received on September 9, 2019 and the letter it received on October 7, 2019, it appears that the NCUC is predominately concerned with how Bellhops is representing itself to its customers and the public. Bellhops agrees that, as a property broker, it cannot advertise or hold itself out to be a motor carrier. To that end, Bellhops has already conducted a review of its website and sales process to ensure that Bellhops is clearly conveying to its customers that Bellhops merely arranges for independent trucking companies and lumpers to provide services to the customer and Bellhops does not perform any of these services itself as a motor carrier. Every customer that orders transportation or labor services is required to acknowledge that they are familiar with the nature of Bellhops’ operations before the customer is able to complete the order process. In addition, every customer is given the opportunity to cease/terminate the order process (at no charge) after receiving this notice.⁷ Bellhops has not been subject to any customer complaints or been a party to any litigation involving its North Carolina operations.

It is not Bellhops’ intent to mislead its customers or the public as to its operations as a property broker. One of the difficulties with the LSE, however, is the fact that there

⁶ North Carolina does not require property motor carriers or property brokers to obtain state motor carrier authority. Thus, neither Bellhops nor the third-party motor carriers to which it tenders freight are required to possess any type of North Carolina operating authority to perform the above described services.

⁷ Customers can also cancel a submitted order without any cancellation fee, provided that such order is cancelled at least two days prior to the service date.

Mr. Nicholas Jeffries
North Carolina Utilities Commission
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is little guidance available discussing how a motor carrier performing or a broker arranging transportation subject to the LSE can advertise its services to the public without being accused of holding itself out as an HHG motor carrier. Bellhops believes its advertising and website is consistent with other transportation providers operating under the LSE (e.g. Pack Rat), and Bellhops makes efforts (discussed above) to ensure that every customer is aware (or should be aware) of the role Bellhops will play in the transportation services. To this end, while Bellhops believes it has taken significant steps to clarify its business operations to the public and its customers, Bellhops is willing to discuss with the NCUC additional steps Bellhops can take to further clarify its operations if the NCUC deems this necessary.

IV. Conclusion

For the forgoing reasons, Bellhops believes it is correctly operating as a property broker, and it should be regulated as a property broker by the NCUC and requests that the NCUC confirm this will be the case.

If you have any questions or need additional information, we can be reached at (317) 637-1777 or alight@scopelitis.com and/or tcochren@scopelitis.com. Thank you for your attention to this matter.

Very truly yours,

/s/ Andrew Light

/s/ Tim Cochren

Andrew K. Light
Timothy W. Cochren

AKL/tb
Attachments

4828-8825-7195, v. 3

Exhibit A

BELLHOPS

Bellhops, Inc.
1110 Market Street, Ste 502
Chattanooga, TN 37402
September 12, 2019

Krishna K. Rajeev
Director, Transportation Rates Division
Public Staff – North Carolina Utilities Commission
(919) 733-0878
<https://publicstaff.nc.gov/transportation>

Re: Bellhops Operations in North Carolina

Krishna Rajeev:

I am writing on behalf of Bellhops, Inc. ("Bellhops") in response to an email notification that we received on September 9, 2019 suggesting that Bellhops may be violating North Carolina state law by advertising and otherwise offering to perform unauthorized household goods ("HHG") moving services in North Carolina. Bellhops respectfully submits that it has not violated North Carolina law, as Bellhops is not operating any equipment/trucks itself or performing any motor carrier services in North Carolina (or for that matter in and out of North Carolina), nor does Bellhops hold itself out as a household goods mover.

Bellhops brokers all of its transportation services in North Carolina to authorized and insured third party motor carriers, and this fact is made clear on our website in our Terms of Service and again prior to booking. See Section 2.1 ("Bellhops is a technology and communications company that matches individuals who are seeking local, regional, and other moving services with . . . independent third party motor carriers capable of providing property transportation services Bellhops is not a household goods mover or other transportation provider and does NOT provide moving services. Bellhops is a property broker that connects you, a "User" of the Bellhops Platforms, with other Users or Third Party Providers.") (emphasis in original).

Because Bellhops does not operate as a HHG motor carrier but rather brokers all of its transportation to independent third party motor carriers who are authorized to transport such property, Bellhops should not be required to obtain a HHG Certificate of Exemption in North

Carolina, and we would ask that the North Carolina Utilities Commission acknowledge the same in response to this letter.¹

I trust that this letter is fully responsive to your concerns. Please do not hesitate to contact me directly with any additional questions.

Thank you,



Dustin Carlton
VP, Legal & Compliance

BELLHOPS

¹ Significantly, the third party transportation providers also do not participate in the loading, unloading, or packing of the property but rather only transport the property to the authorized destination. Because such motor carriers provide only limited services, their operations are subject to the federal Limited Service Exclusion ("LSE") under 49 U.S.C. § 13102(12)(C), which we understand preempts contrary state law. Under the federal LSE, property that has been traditionally considered to be HHG is deemed to be ordinary property (e.g., general commodities), and as such, the third party transportation providers are only required to obtain intrastate or interstate property carrier authority (which all of our carriers possess). See 49 C.F.R. § 375.103 ("Household goods motor carrier . . . does not include any motor carrier providing transportation of household goods in containers or trailers that are entirely loaded and unloaded by an individual other than an employee or agent of the motor carrier.").



**NORTH CAROLINA
PUBLIC STAFF
UTILITIES COMMISSION**

October 7, 2019

Dustin Carlton
VP, Legal & Compliance
Bellhops, Inc.
1110 Market Street, Ste. 502
Chattanooga, TN 37402

Re: Bellhops, Inc. Operations in North Carolina

Dear Mr. Carlton:

Thank you for your September 12, 2019 letter. Unfortunately, the Public Staff does not agree with your conclusion that Bellhops, I structure as a broker of household goods transportation exempts it from the certificate requirement of North Carolina General Statute § 62-262. Bellhops' website implies Bellhops is engaged in the transportation of household goods in North Carolina. A person utilizing Bellhops website would have no reasonable way of knowing Bellhops is not authorized to transport household goods in North Carolina unless he or she reads the terms of service. Advertising through the internet that a person or entity, or implying that a person or entity, is authorized to transport household goods, is prohibited by statute. N.C. Gen. Stat. § 62-280.1.

Specifically, Bellhops website states it "performs moves," and the entire moving process - scheduling, billing, the physical portion of the move - is controlled by Bellhops. Testimonials from movers employed by Bellhops state they work for Bellhops, in contradiction of Bellhops' claim that it "connects you to the most qualified movers and drivers." Also, the amount of control Bellhops exerts over ostensibly independent movers negates any claim Bellhops is merely a broker of moving services. Further, the advertising of the transportation of household goods is, in itself, a violation of North Carolina law.

Executive Director
(919) 733-2435

Communications
(919) 733-5610

Economic Research
(919) 733-2267

Legal
(919) 733-6110

Transportation
(919) 733-7766

Accounting
(919) 733-4279

Consumer Services
(919) 733-9277

Electric
(919) 733-2267

Natural Gas
(919) 733-4326

Water
(919) 733-5610

Based on the above, the Public Staff cannot agree with Bellhops' assertion that a certificate to transport household goods is not needed. If you wish to continue operations that comply with North Carolina statutes and regulations, an application for a certificate is attached. If you have any questions, please contact me or Krishna Rajeev at 919-733-0878.

Sincerely,

/s/ John D. Little
Staff Attorney
john.little@psncuc.nc.gov

c: Krishna Rajeev

BELLHOPS

Dustin Carlton <dustin.carlton@getbellhops.com>

You've been assigned to a conversation for Rajeev, Krishna K

1 message

Kustomer Notifications <notifications@kustomerapp.com>
To: dustin.carlton@getbellhops.com

Mon, Sep 9, 2019 at 3:07 PM



ASSIGNMENT

Hi Dustin Carlton,

Jay Pannkuk – Customer Care Manager assigned you to a conversation:

Good Afternoon,

The North Carolina Utilities Commission (NCUC) is the state government agency that oversees the moving industry in NC. In order for companies to legally transport household goods (HHG) within NC, they must hold a Certificate of Exemption issued by the Commission.

You cannot lawfully perform full service residential moves within North Carolina without a certificate of exemption, nor may you advertise the capability to provide such services.

For every violation, you are subject to a \$1,000 citation issued by the State Highway Patrol.

Please be aware that in accordance with G.S. 62-280.1, you cannot legally advertise as a mover without having a certificate from the NCUC. If you are advertising as a full service mover, please make the necessary changes to your advertisements to reflect that you cannot perform full service moves at this time. <http://www.ncga.state.nc.us/enactedlegislation/statutes/html/bysection/chapter62/g62-280.1.html>

You are allowed to perform non-regulated serv*Customer: Rajeev, Krishna K*

10/15/2019

Bellhops Mail - You've been assigned to a conversation for Rajeev, Krishna K

Open Conversation

Made with love by Kustomer, Inc.

New York, NY

Notification Preferences

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Exhibit B



State of North Carolina
Utilities Commission

4325 Mall Service Center
Raleigh, NC 27699-4325

COMMISSIONERS
JO ANNE SANFORD, Chair
J. RICHARD CONDER
ROBERT V. OWENS, JR.

COMMISSIONERS
SAM J. ERVIN, IV
LORINZO L. JOYNER
JAMES Y. KERR, II
MICHAEL (MIKE) S. WILKINS

August 8, 2003

SCOPELITIS, GARVIN, LIGHT & HANSON

AUG 13 2003

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Mr. Andrew K. Light
Scopelitis, Garvin, Light & Hanson
Attorneys at Law
10 W. Market Street, Suite 1500
Indianapolis, Indiana 46204

Re:

Dear Mr. Light:

This will acknowledge receipt of your recent letters via telefax requesting an opinion as to whether certain transportation services provided by your client, would be considered household goods transportation. Your letters also included copies of opinion letters from Illinois, Florida, and Pennsylvania regarding operations in their states and a copy of an opinion letter from the Federal Motor Carrier Safety Administration defining household goods transportation service.

As you are aware, in June 2000 I wrote a letter to Ms. [redacted] with advising that certain types of services provided by [redacted] as outlined in its advertising brochure would require a certificate of authority from the Commission.

After careful review of the opinion letters, the Commission Staff is now of the opinion that the type service provided by [redacted] does not constitute household goods transportation in North Carolina and that a certificate from the Commission is not required. The type services provided by [redacted], as described in your recent letters, are more of a general transportation service instead of the more specific type services provided by a household goods mover, such as packing, loading, and unloading.

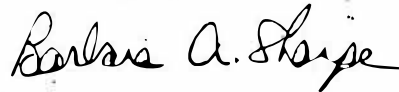
Mr. Andrew K. Light
August 8, 2003
Page 2

In summary, while the basic transportation provided both by _____ and by household goods movers in North Carolina is virtually the same, the additional services provided to the shipper by household goods movers are not. Therefore, it is the opinion of the Commission Staff that _____ is not providing household goods transportation within North Carolina and does not need to apply for a certificate from the Commission.

The Public Staff of the Commission also concurs in this opinion letter.

If you have additional questions or I can be of further assistance, please advise.

Yours very truly, -



Barbara A. Sharpe
Transportation Utilities Analyst

cc: Carol Stahl, Transportation Rates Division – Public Staff
Pam Stanley, N. C. Movers Association

Exhibit C



U.S. Department
of Transportation

**Federal Motor Carrier
Safety Administration**

Administrator

December 19, 2012

1200 New Jersey Avenue, SE
Washington, DC 20590

Refer to: MC-BCC

Mr. Paul Oakley
Senior Vice President, Government Affairs
American Moving & Storage Association
1611 Duke Street
Alexandria, VA 22314-3406

Dear Mr. Oakley:

Thank you for your letters of July 20 and October 12 regarding the American Moving & Storage Association's (AMSA) concerns about violations of Federal consumer protection and household goods broker regulations by companies either providing or arranging for the interstate transportation of household goods (HHG) for individual shippers.

The AMSA requested that the Federal Motor Carrier Safety Administration (FMCSA) review practices of entities claiming that they are subject to the Limited Service Exclusion (LSE), a statutory exception from the definition of HHG motor carrier, at 49 U.S.C. § 13102(12)(C). The AMSA asserts that a number of container companies are failing to comply with FMCSA's licensing and HHG consumer protection regulations because these companies use their own agents to load and unload HHG. The AMSA requested clarification as to whether these container companies are eligible for the LSE.

Definition of a Household Goods Motor Carrier

Congress defined a HHG motor carrier in 49 U.S.C. § 13102(12) as a motor carrier that provides transportation of HHG, and offers some or all of the following additional services: binding and nonbinding estimates, inventorying, protective packing and unpacking of individual items at personal residences, and loading and unloading at personal residences. Through the LSE, Congress specifically excluded certain motor carriers from the definition of HHG motor carrier. "[W]hen the motor carrier provides transportation of household goods in containers or trailers that are entirely loaded and unloaded by an individual (other than an employee or agent of the motor carrier) . . ." the carrier is not considered a HHG motor carrier. Shipments eligible for the LSE are not subject to the consumer protection regulations applicable to HHG shipments.

However, FMCSA must address the applicability of the LSE on a case-by-case basis, and determine the relationship between a container company and the individuals or entity that loads and unloads the HHG. A critical factor is whether an "agent of the motor carrier" is performing loading and unloading services.

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Definition of the Term "Agent"

The FMCSA interprets the term "agent" by applying its commonly accepted meaning: "one who is authorized to act for or in place of another; a representative." Black's Law Dictionary, (8th ed. 2004). Whether a principal-agent relationship exists will depend on the details and circumstances of the parties' relationship. Factors relevant to this decision include, but are not limited to, the following:

- 1) Nature of the operational control by the motor carrier, including scheduling, employee assignment and other factors
- 2) Corporate ownership and structure
- 3) Commonality of employees and corporate officers
- 4) Nature of referrals
- 5) Shared revenue arrangements and other sources of business income
- 6) Advertising and other statements describing the transportation services or packing/loading services

The FMCSA anticipates issuing public guidance, including publication in the Federal Register, which will outline the Agency's position on the definition of "agent" in more detail.

Whether an Entity is Operating as a HHG Broker

The AMSA also contends that a broker cannot claim that it is not a "[h]ousehold goods broker" under FMCSA regulations by stating that it only arranges for so-called "do it yourself" shipments of HHG. The FMCSA defines a HHG broker in part, as a person who arranges for "transportation of household goods" by a motor carrier for compensation (49 C.F.R. § 371.103). Whether HHG broker authority is required, therefore, is directly related to the meaning of "transportation of household goods" and whether such transportation is taking place.

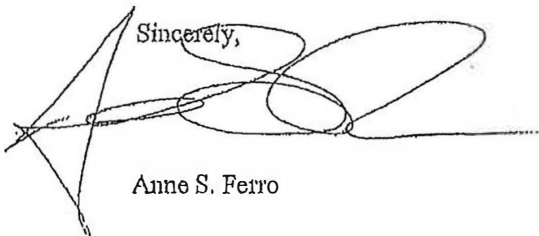
The FMCSA and its predecessor, the Interstate Commerce Commission (ICC), focused on the nature of the service provided, as opposed to the physical goods being transported, to determine whether HHG transportation is taking place. *See, e.g., American Intermodal Services, Inc., Extension – Nationwide Contract Carrier Service*, No. MC-194196 (Sub-No. 3)(P), 1987 WL 100149, at *2 (ICC decided Dec. 22, C.C. 1987) ("[T]he mere transportation of containerized household goods without the provision of the specialized service or equipment normally required for such commodities is not within the definition of household goods transportation and may be performed under 'general commodities (except household goods)' authority.") The FMCSA has adopted the underlying rationale of the ICC decisions -- that the HHG regulatory requirements are directed at a discrete segment of the transportation industry that provides specialized services in specialized equipment.

For the reasons noted above, FMCSA does not consider the arranging of transportation subject to the LSE to be arranging for "transportation of household goods" even though the container in question may contain property used or to be used within a dwelling. Therefore, only property broker authority is required when arranging for the transportation of shipments eligible for the LSE.

The FMCSA appreciates AMSA's interest in ensuring compliance with the consumer protection regulations. The Agency will include a discussion of the HHG brokering issue in its public guidance as well. The Agency will review allegations of non-compliance and evaluate them on a case-by-case basis, and work directly with the companies involved, as appropriate.

I hope this information is helpful in responding to AMSA's concerns. Should you have questions or need additional assistance regarding this issue, please contact Kenneth Rodgers, Chief, Commercial Enforcement and Investigations Division, at (202) 366-0073 or by email at kenneth.rodgers@dot.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'Anne S. Ferro', with a large, stylized flourish extending to the right.

Anne S. Ferro

Exhibit D



19568

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two, please indicate the name of the application in the "Type Comment" field.

For any comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters "BC". Any page containing business confidential information must be clearly marked "BUSINESS CONFIDENTIAL" on the top of that page. Filers of submissions containing business confidential information must also submit a public version of their comments. The file name of the public version should begin with the character "P". The "BC" and "P" should be followed by the name of the person or entity submitting the comments or reply comments. Filers submitting comments containing no business confidential information should name their file using the name of the person or entity submitting the comments.

Please do not attach separate cover letters to electronic submissions; rather, include any information that might appear in a cover letter in the comments themselves. Similarly, to the extent possible, please include any exhibits, annexes, or other attachments in the same file as the submission itself, not as separate files.

As noted, USTR strongly urges submitters to file comments through www.regulations.gov if at all possible. Any alternative arrangements must be made with Ms. Jamison in advance of transmitting a comment. Ms. Jamison should be contacted at (202) 395-3475. General information concerning USTR is available at www.ustr.gov.

4. Public Inspection of Submissions

Comments will be placed in the docket and open to public inspection, except business confidential information. Comments may be viewed on the <http://www.regulations.gov> Web site by entering the relevant docket number in the search field on the home page.

Douglas Bell,
Chair, Trade Policy Staff Committee.
[PR Doc. 2013-07430 Filed 3-29-13; 8:45 am]
BILLING CODE 9200-FJ-P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA-2013-0087]

Limited Service Exclusion for Household Goods Motor Carriers and Related Registration Requirements for Brokers

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice; request for public comment.

SUMMARY: FMCSA provides notice and requests comments on the Agency's process for determining the appropriate use of the Limited Service Exclusion (LSE), a statutory exception to the definition of Household Goods (HHG) motor carrier provided at 49 U.S.C. 13102(12)(C). In addition, this notice explains the registration requirements of brokers that arrange for the transportation of shipments that are eligible for the LSE.

DATES: You must submit comments on or before May 1, 2013.

ADDRESSES: You may submit comments identified by Federal Docket Management System Number FMCSA-2013-0087 by any one of the following methods:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- **Fax:** 1-202-493-2251.

- **Mail:** Docket Management Facility, (M-30), U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, West Building Ground Floor, Room 12-140, Washington, DC 20590-0001.

- **Hand Delivery:** Same as mail address above, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. The telephone number is 202-366-9329.

To avoid duplication, please use only one of these four methods. All submissions must include the Agency name and docket number for this notice. See the "Public Participation" heading below for instructions on submitting comments and additional information. FOR FURTHER INFORMATION CONTACT: Mr. Kenneth Rodgers, Commercial Enforcement and Investigations Division, U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590-0001. Telephone (202) 366-8031 or CIE_mailbox@dot.gov. Office hours are from 8:00 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal and/or copyrighted information you provide.

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA-2013-0087), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and a mailing address, an email address, or a phone number in the body of your document so the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to <http://www.regulations.gov> and insert "FMCSA-2013-0087" in the "Search" box, and then click the "Search" button to the right of the white box. Click on the top "Comment Now" box which appears next to the notice. Fill in your contact information, as desired and your comment, uploading documents if appropriate. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8 1/2 by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and material received during the comment period and may change this enforcement policy based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this notice as being available in the docket, go to <http://www.regulations.gov> and insert "FMCSA-2013-0087" in the "Search" box and then click on "Search." Click on the "Open Docket Folder" link and all the information for the notice, and the list of comments will appear with a link to each one. Click on the comment you would like to read. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of

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the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays.

Privacy Act

All comments received will be posted with personal information you have provided to <http://www.regulations.gov>. Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System published in the Federal Register on December 29, 2010 (75 FR 82132), or you may visit <http://www.gpo.gov/fdsys/pkg/FR-2010-12-29/pdf/2010-32876.pdf>.

Background

The Limited Service Exclusion (LSE) is a statutory provision that pertains to the definition of "household goods motor carrier" at 49 U.S.C. 13102(12)(C). Congress defined a HHG motor carrier in 49 U.S.C. 13102(12)(A) as a "motor carrier that, in the ordinary course of its business of providing transportation of household goods, offers some or all of the following additional services: (i) Binding and nonbinding estimates; (ii) Inventorying; (iii) Protective packing and unpacking of individual items at personal residences; and (iv) Loading and unloading at personal residences."

Through the LSE, Congress specifically excluded certain motor carriers from the definition of HHG motor carrier: "[W]hen the motor carrier provides transportation of household goods in containers or trailers that are entirely loaded and unloaded by an individual (other than an employee or agent of the motor carrier) . . .," the carrier is not considered a HHG motor carrier. 49 U.S.C. 13102(12)(C). Transportation falling under the LSE is not subject to the consumer protection regulations applicable to HHG shipments at 49 CFR Part 375, HHG motor carrier registration requirements at 49 CFR Part 365, or the cargo insurance requirements at 49 CFR Part 387.

The FMCSA is issuing this notice to provide clarity on those transportation services which fall within the scope of the LSE. The Agency has examined the legislative history relating to this provision, which makes clear that Congress intended to distinguish traditional, full service moving companies that offer some or all of the "additional services" noted above from

"a motor carrier solely providing transportation of household goods entirely packed in, or unpacked from, one or more containers. . . ." Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, § 4202(b), Public Law 109-59, Conf. Rep. No. 109-203.

The FMCSA understands that Congress thereby intended to create an economic opportunity for companies providing a lower cost, "no frills" moving option for shippers willing to pack their own belongings or to hire separate labor. Congress directed, however, that the loading and unloading may not be provided by an agent or employee of the company transporting the packed container.

Enforcement Policy and Process

Regarding the applicability of the LSE to specific entities, given the varied nature of the moving industry, FMCSA has concluded that whether an individual motor carrier is or is not eligible for the LSE must be determined on a case-by-case basis, taking into account the entirety of the relationship between a motor carrier and the individual that loads and unloads the HHG.

For enforcement purposes, the factors relevant to the determination of whether or not the LSE should apply are:

- (1) Web site statements and other advertising, including claims or statements implying that the container company will provide HHG packing or other specialized services, or, by contrast, disclaiming HHG motor carrier status and clarifying that the company does not provide such services;
- (2) The level of control by the motor carrier over the individual providing packing and loading services;
- (3) The organizational structure of the motor carrier and the relationship of that entity to the individual providing loading and unloading services;
- (4) Commonality of employees between the motor carrier and any entity providing loading and unloading services, including, but not limited to corporate officers;
- (5) The nature of referrals for loading and packing services;
- (6) The nature and extent of business income derived from the referral for packing and loading services;
- (7) Other factors that may be relevant to defining the relationship between the motor carrier and individual providing packing and loading services; or
- (8) Other factors relevant to a determination that a motor carrier holds itself out as providing "full service" HHG services.

FMCSA believes that Congress did not intend the LSE as a mechanism for companies engaged in traditional household goods moving to evade regulatory oversight. Thus, the Agency will examine very closely any company statements on the Internet or in other advertising claiming to offer "full service moving" or similar comprehensive moving service packages. The Agency will generally deem companies holding themselves out as HHG movers through such statements to be, in fact, HHG movers and ineligible for the LSE.

By statute, the LSE also does not apply where the relationship between a motor carrier and the individual that loads or unloads the HHG is determined to be that of an employer/employee or principal/agent. Under these circumstances, FMCSA will consider the container company a HHG motor carrier if it meets the definition of HHG motor carrier under 49 U.S.C. 13102(12)(A).

While no single factor is paramount in assessing the business relationships between a container company and loading/packing labor, the extent of a motor carrier's control over the individual performing the loading/packing service is highly significant. Generally, the closer the relationship between the motor carrier and the individual loading/unloading the HHG, the less likely the motor carrier will be to qualify for the LSE. FMCSA will take into account the totality of the circumstances in defining the relationship between the motor carrier and the individual loading and unloading. As noted, FMCSA determines eligibility for the LSE on a case by case basis, utilizing factors including those above.

We are seeking comments on the Agency's factors for determining if the operation is eligible for the LSE.

The following examples illustrate how FMCSA would determine if the LSE applies.

Example A

Bach's Movers, a container company, advertises itself as "The Lowest Cost Moving Option" on its company Web site. The Web site has a link to "XYZ Moving Helpers" and recommends that Bach's customers contact XYZ directly for assistance with packing and unpacking. FMCSA investigation reveals that XYZ pays Bach's a 3 percent referral fee for every customer that contracts with XYZ after visiting Bach's Web site. Two of Bach's employees work part time for XYZ on weekends. The two companies have separate management, however, and FMCSA has

no information suggesting that Bach's owns or controls the operations of XYZ. Bach's is eligible for the LSE and is not a HHG mover.

Example B

Q-Bic Crates Movers, Inc. claims on its Web site to be a "Top Notch Moving Company" and to provide "the lowest cost, high quality moving services." Q-Bic Crates provides binding and nonbinding estimates and inventorying services. The company's Web site refers customers to Q-Bic Muscles, Inc. for assistance with packing and unpacking. FMCSA has received complaints that when Q-Bic Crates employees deliver containers to shippers' homes, they attempt to pressure shippers into signing agreements for labor from Q-Bic Muscles. Investigation reveals that Q-Bic Crates Movers and Q-Bic Muscles have owners and officers in common, are run out of the same location and pool their revenue to pay salaries to several of the same individuals. Approximately 95 percent of Q-Bic Muscles' revenue is from Q-Bic Crates customers. Q-Bic Crates is not eligible for the LSE and must comply with the consumer protection and other regulations applicable to HHG motor carriers.

Definition of the Term "Agent"

One determinant of whether or not a carrier is providing transportation that qualifies for the LSE is whether an "agent" of the carrier is performing loading and unloading services. The FMCSA defines the term "agent" by applying its commonly accepted meaning: "one who is authorized to act for or in place of another; a representative." Black's Law Dictionary, (8th ed. 2004). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control and the agent manifests assent or otherwise so consents to act." Restatement (Third) of Agency § 1.01. What does or does not constitute authorization to act for or in place of another will depend upon the details and circumstances of the parties' relationship.

Whether an Entity Is Operating as a HHG Broker

The FMCSA defines a "household goods broker," in part, as a person that arranges "for transportation of household goods by motor carrier for compensation." 49 CFR 371.103. Therefore, whether or not a broker is a "household goods broker" is based

upon whether "transportation of household goods" is taking place. The FMCSA and its predecessor, the Interstate Commerce Commission (ICC), have long focused on the nature of the service, as opposed to the physical goods being transported, to determine whether HHG transportation is taking place. See e.g., *American Intermodal Services, Inc., Extension—Nationwide Contract Carrier Service*, 1987 WL 100149, at *2 (ICC decided Dec. 22, 1987) ("[T]he mere transportation of containerized household goods without the provision of the specialized service or equipment normally required for such commodities is not within the definition of household goods transportation and may be performed under 'general commodities (except household goods)' authority."). In June 2001, FMCSA issued an opinion that was in agreement with the underlying rationale of the ICC decisions—that the HHG regulatory requirements are directed at a discrete segment of the transportation industry that provides specialized services in specialized equipment. Therefore, arranging for shipments that are transported subject to the LSE will not convert a property broker into a "household goods broker," as FMCSA does not consider the underlying transportation to be the "transportation of household goods."

Moreover, 49 CFR 371.105 states that "[y]ou may only act as a household goods broker for a motor carrier that has a valid, active U.S. DOT number and valid operating authority issued by FMCSA to transport household goods in interstate or foreign commerce." In other words, HHG brokers may not act as property brokers ("You may only act as a household goods broker * * *"). Unless HHG brokers have separate property broker authority, they are not permitted to perform brokerage of regular freight loads or for carriers that do not have valid HHG operating authority. Thus, a HHG broker is an entity that brokers transportation for a HHG motor carrier. However, as defined in 49 U.S.C. 13102(12)(C), a motor carrier operating subject to the LSE is not considered a HHG motor carrier. Accordingly, the entity that brokers such transportation is not a HHG broker.

However, as with a container company that engages in activities associated with HHG movements, if a broker makes claims on its Web site or elsewhere about "full service moving" or other specialized services, FMCSA may investigate whether the broker meets the definition of HHG broker, i.e., "holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for,

transportation of household goods by motor carrier for compensation." 49 CFR 371.103. If FMCSA makes such a finding, the broker would be subject to the consumer protection regulations at 49 CFR part 371, subpart B "Special Rules for Household Goods Brokers." In analyzing a broker's regulatory status, FMCSA will look at whether the broker is making claims that it arranges services for HHG motor carriers as defined at 49 U.S.C. § 13102(12)(A). Those carriers offer some or all of the following services: Binding and nonbinding estimates, inventorying, protective packing and unpacking of individual items at personal residences and loading and unloading at personal residences.

In sum, only property broker authority is required when arranging for the transportation of shipments eligible for the LSE. However, if a broker also performs activities constituting the arrangement of "transportation of household goods by motor carrier for compensation" (49 CFR 371.103), it needs HHG brokerage authority as well.

Issued on: March 26, 2013.

Anne S. Ferro,
Administrator.

[FR Doc. 2013-07400 Filed 3-29-13; 8:45 am]
BILLING CODE 4910-EX-P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Proposed Information Collection; Comment Request

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.
ACTION: Notice and Request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995. An agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. The OCC is soliciting comment concerning its information collection titled, "Community and Economic Development Entities, Community Development Projects, and Other Public Welfare Investments—12 CFR part 24." DATES: Comments must be submitted on or before May 31, 2013.