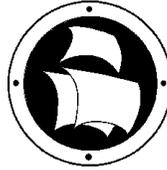


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TO: Secretary, Federal Maritime Commission, Washington D.C.  
FROM: Neil B. Mooney  
DATE: December 21, 2011  
SUBJECT: U.S. Containerized Cargo Flows—Response to NOI

## **BY EMAIL ONLY**

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Madame Secretary,

The Commission has asked for comments regarding reasons cargo with U.S. origin or destination might be diverted via Canadian or Mexican ports. A recent decision by the Commission provides a useful legal subterfuge to foreign or domestic OTIs, making it available only if they divert cargo from U.S. ports of lading or unloading. In light of that fact, we make a recommendation which would serve U.S. shippers and consignees, as well as U.S. ports.

In the case of informal docket no. 1916(I) GUM TREE FABRICS, INC. v. EVERLOGISTICS INTERNATIONAL FORWARDING LIMITED d/b/a EVEROK INTERNATIONAL FORWARDING CO., LTD. the plaintiff, a U.S. importer and consignee on NVOCC bills of lading, had cargo extortionately withheld from delivery by a Chinese NVOCC operating in the U.S. trade with FMC authority. In that case, the US OTI agent of the Chinese OTI had gone bankrupt without paying the Chinese company certain sums it had collected in the USA from consignees of ocean cargo. To collect the sums again, the Chinese NVOCC illegally detained cargo consigned to Gum Tree Fabrics, one of the bankrupt agent's customers. Fully aware that Gum Tree had already paid the Chinese company's bankrupt agent what it owed, the Chinese NVOCC nevertheless extortionately withheld other cargo until Gum Tree paid nearly \$20,000 of the bankrupt OTI's debts.

After paying the Chinese again what it had already paid to the bankrupt agent, Gum Tree filed a complaint with the FMC hoping to collect its duplicate payments from the Chinese OTI's bond. For ten months the matter was heard by the Office of Consumer Affairs and Dispute Resolution. At the conclusion of those ten months, and after the time to make submissions was over, the Chinese NVOCC claimed that the Federal Maritime Commission had no jurisdiction over its illicit conduct because it used Canadian ports to first discharge the U.S.-bound cargo. The FMC agreed and dismissed the complaint without providing relief to Gum Tree or addressing the bond and/or tariff violations.

The ruling eviscerates the American shipping community's ability in certain circumstances to rely upon the bond and tariff which an NVOCC posts. The Chinese NVOCC was (and is) formally authorized by the FMC to operate in the United States maritime trade. Such NVOs represent to the American shipping public that they have posted a bond and filed a tariff in accordance with agency rules. Shippers infer from these facts that the entity will conduct itself in accordance with the law, FMC regulations, and the posted tariff and that relief via the bond is available if needed. However, the GUM TREE ruling held that Canadian diversion frees the bonded and tariffed NVOCC to ignore the terms of its tariff and avoid risking its bond as a consequence of improper conduct *as long as* it diverts cargo from U.S. seaports. According to the FMC, such diversion provides a safe harbor from liability under the bond, notwithstanding the public's reliance on FMC licensing/permitting procedures.

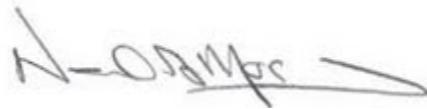
Because the diversion exempted the NVOCC from having to answer to the cargo owner or the FMC for its conduct, it is clear that FMC licensing of NVOCCs and their being compelled to post a bond and tariff may, in certain circumstances, be reduced to a charade. All the NVO has to do is divert the cargo via Mexican or Canadian ports. It can extort or otherwise abuse U.S. shippers without fear of Mexican or Canadian intervention (since the extortion/abuse will be committed in United States), and it can take comfort in the FMC's position that it has no authority over the NVOCC in those circumstances. The harmed shipper/consignee cannot invoke the terms of the OTI's tariff or bond or seek the agency's assistance as long as the cargo is diverted via Mexico and Canada. This is the case with licensed, tariffed, and bonded NVOCCs.

In previous rulings the FMC had said that it could not require untariffed or unbonded OTIs using Mexican or Canadian ports to post bonds and tariffs, or obtain other FMC authority to operate between the United States and foreign nations if they avoided U.S. seaports. It said it

lacked jurisdiction over unlicensed entities using non-U.S. ports of loading or discharge. We are unaware of previous holdings that *tariffed and bonded* NVOCCs providing ocean services between the U.S. and foreign countries via third country ports were exempted from FMC jurisdiction as well. Yet in the subject case the agency claims, on the narrowest of grounds, to lack jurisdiction over the entities it licenses or otherwise authorizes when they so divert. It is a dramatic declaration of policy sure to encourage diversion from U.S. ports. Now American shippers and consignees may unwittingly deal with tariffed and bonded entities in ocean shipping only to find that they have no recourse against those tariffs and/or bonds. The extension of this exemption to entities which have voluntarily approached the FMC and obtained the cloak of official authority opens wide the door to cargo mischief.

Taking this into consideration, OTI's should be required to provide, in advance of accepting cargo for carriage, notice to American shippers and consignees when such cargo will not be arriving or departing by sea from a U.S. port and to advise the implications of that fact. This would help the cargo owner to affirmatively select an OTI which is operating under FMC jurisdiction and has a tariff to abide with a bond at risk. It would avoid the Gum Tree situation where a shipper unknowingly placed its trust in an OTI which only presented the facade of FMC jurisdiction. Such a regulation could also strongly encourage the use of U.S. ports in place of cargo diversion to Mexican or Canadian seaports.

Sincerely,  
**THE MOONEY LAW FIRM, LLC**

A handwritten signature in dark ink, appearing to read "N. Mooney", written over a horizontal line.

Neil B. Mooney  
*For the Firm*

NBM/k