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BY EMAIL

Mr. Michael Spehar
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Surface Deployment and Distribution Command (SDDC)
Operations Center

Re: **ATA Comments on CAR-07-11/21/0152: "Change to AMC Traffic Rules Publication No. 5 (AFTRP No. 5)," Dated Nov. 21, 2007**

Dear Mr. Spehar:

The American Trucking Associations ("ATA") respectfully submits the following comments in response to the "Change to AMC Traffic Rules Publication No. 5 ("AFTRP No. 5") as set forth in Carrier Advisory CAR-07-11/21/0152 ("SDDC Release") issued by the Surface Deployment and Distribution Command ("SDDC") of the U.S. Department of Defense ("DoD") on November 21, 2007. ATA is a united federation of motor carriers, state trucking associations from all 50 states, and national trucking specialty organizations created to promote and advance the safety, productivity, security and related interests of the trucking industry. Directly and through its affiliated organizations, the ATA federation encompasses more than 35,000 companies, including every type and class of motor carrier operation. ATA's Government Traffic Policy Committee represents the hundreds of motor carriers and freight brokers that contract with DoD to haul armaments, equipment, supplies, and everything else in the DoD inventory. As such, ATA has a vital interest in changes to DoD transportation rules that affect how its members do business with DoD transportation agencies.

Item 5 of AFTRP No. 5 previously read: "Shipments tendered to carriers for air service must move, all or in part, via air transportation unless extreme conditions (e.g., severe weather, strikes, etc.) warrant diversion to motor service." The SDDC Release announces the following interim change in the wording of Item 5: "Shipments tendered to carriers for air service must move, all or in part, via air transportation unless adverse weather conditions or mechanical failure of the aircraft or other causes due to circumstances beyond the control of the carrier warrant diversion to motor service."

We believe that the SDDC Release's interim change in Item 5 does not accomplish its stated purpose, for it does not provide any more clarity than the previous provision. As a result,

the Release missed an important opportunity to promote timeliness and economy in DoD freight transportation. Specifically, the Release failed to make clear that air freight forwarders (if not direct air carriers (airlines)) properly have the discretion, as to each DoD shipment, to choose either motor carrier transportation or air transportation, as long as they meet DoD's delivery deadlines and other service requirements. SDDC should issue a revised Change to AFTRP No. 5 either that confirms that a reasonable reading of Item 5 is that it governs only direct air carriers (airlines) and not air freight forwarders or that deletes Item 5 altogether, permitting DoD to benefit from the modal flexibility that is commonplace for commercial shipments. These points will be discussed more fully below.

I. Change in Language

The SDDC Release refers to the change in the language of Item 5 of AFTRP No. 5 as a "clarification" of the prior rule. Comparison of the prior and new provision suggest a continuing lack of clarity and specificity, leaving transportation providers at risk each time they rely on the provision to arrange motor service rather than air. For example, "strikes" are specifically mentioned in the prior language, but not in the revision, while "mechanical failure" is specifically mentioned in the revision but not in the prior language. The new language adds a requirement that the "causes" be "due to circumstances beyond the control of the carrier," while the prior language did not explicitly require that the "extreme conditions" be beyond the carrier's control. The result is that while the words may have changed somewhat, uncertainty relating to what the wording changes mean effectively deny transportation providers any added flexibility. In addition, the language of Item 5 remains so general that its application to specific DoD shipments will be highly fact-based. The high degree of variability is likely to discourage air freight forwarders and their motor-carrier providers from risking a later finding of noncompliance with AFTRP No. 5 by substituting motor for air transportation even when such a substitution would benefit DoD through cost savings and more timely service.

As the SDDC Release states, the new language largely "mirrors the exemption found in 49 USC § 13506," specifically § 13506(a)(8)(C).¹ However, there is no logical connection between the substitution of motor for air service in a DoD or other government contract and a statutory exemption from motor carrier regulation. It is AFTRP No. 5, as construed in light of government regulations, the standard agreement between air freight forwarders and SDDC, and other governing authorities, and not § 13506(a)(8)(C), that define the parameters for service, including the transportation mode utilized. Moreover, many transportation entities serving the government offer comprehensive transportation services and have affiliates with DoD-approved SCAC Codes for both air and motor modes of service. In such cases, the motor carrier affiliates hold adequate authority – through their interstate motor carrier registrations with the U.S.

¹ It is an imperfect reflection, however, because the statutory exemption applies to "circumstances beyond the control of the carrier *or shipper*." 49 U.S.C.A. 13506(a)(8)(C) (Westlaw 2007) (emphasis added).

Department of Transportation ("USDOT") – to furnish motor transportation and do not need to rely on any exemption from motor carrier regulation.

II. Modern Commercial Transportation

The history of civilian air cargo deregulation makes clear that market forces, not government mandates, are intended to govern air freight forwarders' selection of transportation modes. These market forces have led to the use of flexibility in mode selection by transportation service providers.

A. Deregulation of Air Freight Forwarders

Beginning with the original Civil Aeronautics Board decision deregulating domestic U.S. air freight forwarding in the late 1970s and continuing through today's laws regulating air freight forwarders and interstate motor carriers, there has been a clear government policy that market forces, not government mandates, should govern air freight forwarders in the economic (as opposed to safety or security) sphere, and that such forwarders have the discretion to arrange entirely motor transportation, rather than air transportation, of particular domestic interstate shipments. Until 1979, § 404(a) of the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (Aug. 23, 1958) ("1958 Act") required air freight forwarders to "provide ... air transportation ... upon reasonable request." That year, the CAB relieved air freight forwarders of the requirement – thus removing an obstacle to such forwarders' election instead to provide motor transportation for a particular shipment. *Liberalized Regulation of Indirect Cargo Carriers*, 43 Fed. Reg. 6634, 6637 (C.A.B. Feb. 1, 1979). The way was thus clear for air freight forwarders to decide on their own whether to arrange entirely motor transportation, rather than air transportation, for any particular shipment. These deregulated conditions and rules remained in effect when economic regulatory authority over air freight forwarders (now included in the term "indirect air carriers") was transferred from the sunset-ed CAB to USDOT in January 1985. 50 Fed. Reg. 451, 452, 1985 WL 83047 (C.A.B. Jan. 4, 1985). These rules remain in place today, published at 14 C.F.R. Part 296.

Today, the same transportation company may operate both as an air freight forwarder (without registering or obtaining economic operating authority from any agency for its air operations) and as a motor carrier, surface freight forwarder, and/or motor freight broker (by registering with USDOT pursuant to 49 U.S.C. §§ 13902, 13903, 13904) – a step that many transportation entities serving DoD have taken. This regulatory freedom of transportation companies to operate both air and surface transportation providers further supports the conclusion that Congress and USDOT intend air freight forwarders to have the flexibility to decide what mode of transportation to arrange for any given shipment – whether in the commercial arena or for DoD.

B. Modern Commercial Transportation Practices

Substitution of motor for air service (and vice versa) is common in transportation services provided to commercial shippers. For example, the standard FedEx Express Terms and Conditions, available on the Federal Express web site,² provide that:

We will determine the routing of all shipments, including the mode of transportation used, and may use air transportation, ground transportation or any combination thereof in providing our services. We reserve the right to divert any shipment (including use of other carriers) in order to facilitate its delivery.

The goal of any shipper is to obtain timely service with no damage. Selection of the mode of transportation is a means to an end, not a goal in itself. For DoD and other government shipments, it means meeting the government's required delivery date (RDD). Without specifically intending to mandate use of air service, a shipper's representative may designate such service for a shipment out of a perceived need for quick delivery. In many instances, however, *motor carrier* service will better meet the RDD requirements of the government customer. In these cases, the somewhat imprecise requirements of Item 5 of AFTRP No. 5 – if applied to air freight forwarders and not, as Item 5's express terms provide, only to "carriers for air service," *i.e.*, direct air carriers (airlines) – may inhibit a transportation provider from making the professional judgments regarding DoD shipments it routinely makes on commercial shipments, thus artificially increasing its costs and reducing its efficiency in providing the transportation. These costs and inefficiencies can only be reflected, ultimately, in the rates charged to DoD.

It should be the air freight forwarder's job to use its professional judgment in furnishing transportation in a manner that meets the time and other service requirements of the DoD shipper. Heavy, large cargo (*e.g.*, freight weighing more than 500 pounds) can only be moved by wide-body or freighter aircraft, and yet most military installations are only served commercially by regional carriers (if at all). It is not hard to imagine situations in which an air freight forwarder, if required to make use of air service for part of the shipment's journey, must create artificial and circuitous routing, sometimes causing the shipment to travel many times the surface distance between origin and ultimate destination. Such inefficiency cannot possibly benefit DoD, and its transportation providers should be given the flexibility to avoid it. ATA's member-motor carriers stand ready to provide increased high-quality, on-time, cost-effective ground-transportation service to help strengthen our Nation's Defense capability without needlessly draining DoD's transportation budget – but are held back by uncertainty as to the scope and meaning of Item 5, old and new, of AFTRP No. 5.

² Go to <http://www.fedex.com/us/services/terms/us.html?link=2> and click on "Routing and Rerouting."

Mr. Michael Spehar
SDDC Operations Center
January 18, 2008
Page 5

III. Conclusion

SDDC should adopt an approach to meet DoD's freight transportation needs that is less confined to expensive air service – by permitting increased flexibility when circumstances, including economy and timeliness, suggest that air freight forwarders should substitute motor for air service. SDDC should issue a revised Change to AFTRP No. 5 either that confirms that a reasonable reading of Item 5 is that it governs only direct air carriers (airlines) and not air freight forwarders or that deletes Item 5 altogether, permitting DoD to benefit from the modal flexibility that is commonplace for commercial shipments. By doing so, SDDC and Air Mobility Command would be adopting commercial best practices, a goal often cited by the Commander of the United States Transportation Command (USTRANSCOM) in his role as the Distribution Process Owner. Failure to take this step would continue the inefficiencies described above, and unnecessarily burden taxpayers.

We appreciate the opportunity to submit comments on the above issues and invite any questions you may have concerning them.

Respectfully submitted,



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