

BY AIR OR BY GROUND – DOES IT MATTER?

By George Carl Pezold

Federal Express recently announced that its FedEx Express unit, which handles time-definite shipments typically moving by air, will contract with its FedEx Ground unit to deliver residential parcels as long as they meet specific operating criteria. Under the new arrangement, FedEx Express drivers will pick up eligible parcels and transfer them into the FedEx Ground network for the line-haul and delivery to U.S. residences. The shipments to be transferred are classified as “day definite,” meaning they have specific delivery windows but are not considered the most time-sensitive shipments. FedEx Express will continue to handle business-to-business (B2B) traffic and it will also continue to manage the delivery of urgent, longer-haul residential parcels that can’t meet service commitments with a ground service.

This “new arrangement” no doubt reflects the amazing growth of E-Commerce over the last few years, but has accelerated dramatically in recent months due to the Coronavirus pandemic, as millions have turned to shopping through the Internet, and should result in greater efficiency and lower costs to FedEx.

So, what is the problem?

Air carriers, parcel/package carriers, and surface freight carriers are subject to different legal regimes. Domestic air freight transportation is virtually unregulated; while motor carriers, brokers and surface freight forwarders are subject to the provisions of the Interstate Commerce Act and regulations of the Federal Motor Carrier Safety Administration (FMCSA). As such, the liabilities will vary depending upon the mode of transport.

Commercial practices among these services are also significantly different. Air carriers and air freight forwarders usually issue airbills or air waybills; parcel/package carriers also issue airbills (whether the shipment moves by air or only by ground), and LTL and TL freight carriers issue bills of lading, typically some version of the Uniform Straight Bill of Lading published in the National Motor Freight Classification (NMFC). The air waybill or bill of lading operates as the “contract of carriage” for the shipment. All of these “contracts of carriage” typically have terms and conditions either on the face or reverse side of the document and/or language that incorporates tariffs or “service guides” that are published or maintained by the carrier.

Questions arise, however, as to what law applies when a shipment that is designated as “air freight” or parcel/package but actually is transported by truck and never moves, either wholly or partially, by air. In limited circumstances, such a shipment may nevertheless be exempt from federal regulations that would ordinarily apply to ground transportation and essentially be treated as an “air” shipment. There are generally two exemptions (the “continuous movement” exemption and the “bad weather/mechanical failure” exemption) which are found in 49 USC 13506(a)(8)(B) and (C) which provides:

(B) transportation of property (including baggage) by motor vehicle as part of a continuous movement which, prior or subsequent to such part of the continuous movement, has been or will be transported by an air carrier or (to the extent so agreed by the United States and approved by the Secretary) by a foreign air carrier; or

(C) transportation of property by motor vehicle in lieu of transportation by aircraft because of adverse weather conditions or mechanical failure of the aircraft or other causes due to circumstances beyond the control of the carrier or shipper.

Ground shipments moving under these exemptions are considered “air freight,” and typically move on airbills or air waybills, with terms and conditions governed by Service Guides. Shipments that move only by truck and do not qualify for exemption are subject to different laws, regulations and practices, such as the “Carmack Amendment” that governs the liability of motor carriers and freight forwards for loss or damage to goods, as well as different bills of lading and tariffs.

As far as Federal Express is concerned, its new service arrangement is only supposed to apply to “residential deliveries”, but what liability regime will apply to these over-the-road shipments?

This is not an entirely new question, but has only been addressed in a few court decisions where the liability limitations in an air waybill was challenged because the shipment moved by truck.

See, for example, *Hartford Fire Ins. Co. v. LTD Air Cargo, Inc.*, 1998 U.S. Dist. LEXIS 23229, (S.D. Fla. 1998), where the court held:

Finally, HASSETT [the carrier] can take little comfort by the fact that the bills were entitled ‘air waybills’ rather than ‘bills of lading’. A bill of lading by any other name is a bill of lading. A Company may not evade the strict liability imposed by Carmack by calling its contract form an ‘air waybill’, then arranging for shipment by ground transportation.”

In another case, a federal court in Tucson, AZ refused to enforce the liability limit of \$.50 per lb. in an airbill issued by a freight forwarder when it trucked the shipment over-the-road, see *KPX, L.L.C. v. Transgroup Worldwide Logistics, Inc.*, 2006 WL 411255 (D. Az. Feb. 21, 2006); *rev’d on other grounds*, 267 Fed.Appx. 667 (9th Cir. 2008). See also *Phoenix v. Kmart*, 977 F.Supp. 319 (D.N.J. 1997) (Court referred to the Department of Transportation the question of whether air freight forwarder exemption applied).

Since so much merchandise consisting of parcels and/or packages is now being shipped by vendors directly to residential customers, the question is: if the shipper uses a FedEx Airbill (or an on-line shipping software program), which terms and conditions will apply? What liability limitations and rates will apply?

It will be interesting to see how loss and damage and/or overcharge charge claims will be handled.