

Note from the Field

Carrier Review Boards and Department of Defense (DOD) Transportation

John F. Jakubowski
Military Traffic Management Command
Attorney/Advisor

Introduction

This note introduces the Military Traffic Management Command's (MTMC) Carrier Review Board (CRB) process and discusses some of MTMC's transportation procurement programs and unique program provisions. This broad introduction to the CRB process, the programs, and procurement provisions should benefit military practitioners, especially legal assistance officers and claims attorneys.

Understanding the CRB process, and the practical effect of the MTMC's CRB authority, may provide claims attorneys with some leverage in pursuing collection actions against carriers. Legal assistance attorneys will find this information useful when dealing with carriers on behalf of disgruntled service members seeking remedies for inconvenience costs resulting from poor carrier performance. Staff Judge Advocates may want to share this note with their installation's Directorate of Logistics (DOL), emphasizing the need for installation transportation offices and personal property shipping offices to maintain solid performance data on carriers. In the past, ineffective oversight of carrier performance has resulted in inadequate protection of DOD property.¹ Timely and accurate performance data from installations and activities will greatly aid the MTMC in protecting the DOD's property and shipping interests.

Military Traffic Management Command (MTMC) Regulation 15-1

Purpose and Authority

Military Traffic Management Command Regulation describes a unique tool used by the MTMC to ensure that the DOD does business only with responsible carriers. Under *MTMCR 15-1*, a CRB, comprised of five traffic management experts, may disqualify a carrier from participating in certain military transportation procurement programs.² The CRB generally disqualifies a carrier after it reviews the carrier's performance data and determines that there is a pattern of performance failures. The goal of every hearing convened under *MTMCR 15-1* is to protect the DOD's shipping interest.³

The MTMC's statutory authority for CRBs can be traced to the Federal Property and Administrative Services Act of 1949.⁴ This statute gives the General Services Administration (GSA) authority to obtain transportation and traffic management on behalf of all federal agencies.⁵ Under 49 U.S.C.A. § 481(a), however, the Secretary of Defense may exempt the DOD from GSA action.⁶ Using this statute, the Secretary of Defense exempted the DOD from the GSA's authority and assigned responsibility for transportation and traffic management to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics).⁷ The DOD directed the Army, through the MTMC, to provide traffic management services for passenger, freight, and worldwide personal property movements. Specifically, the directive required the MTMC to manage "transportation resources to assure optimum responsiveness, efficiency, and economy to support the DOD mission."⁸

1. See General Accounting Office Report, GAO/NSIAD-92-96, subject: DEFENSE TRANSPORTATION, INEFFECTIVE OVERSIGHT CONTRIBUTES TO FREIGHT LOSSES, (June 1992).

2. MILITARY TRAFFIC MANAGEMENT REG. 15-1, DESCRIPTION OF PROCEDURES GOVERNING DISQUALIFICATION AND NONUSE OF CARRIERS OF DOD TRAFFIC para.7 (13 July 1993) [hereinafter MTMCR 15-1].

3. *Id.* para. 2.

4. 49 U.S.C.A. § 481 (West 1998)

5. *Id.* § 481 (a)(1).

6. *Id.* § 481(a)(4).

7. U.S. DEP'T OF DEFENSE DIR. 5126.9, EXEMPTION UNDER TITLE II OF THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT TRANSPORTATION AND TRAFFIC MANAGEMENT (2 Oct. 1954) [hereinafter DOD DIR. 5126.9]

In January 1993, the DOD assigned the United States Transportation Command (USTRANSCOM) the mission of providing air, land, and sea transportation for the DOD, both in time of peace and time of war. The USTRANSCOM became the DOD's "single manager" for transportation, with authority to obtain commercial transportation services.⁹ As the Army component of the USTRANSCOM, the MTMC has continued to provide traffic management services for passenger freight and worldwide personal property moves.¹⁰

Part 47 of the Federal Acquisition Regulation (FAR) is important to the underlying authority of *MTMCR 15-1*.¹¹ This part prescribes the government's policies and procedures for acquiring transportation or transportation-related services. There are two methods for obtaining transportation services. The first is by express contracts as regulated by the FAR. The other procurement method is through a Government Bill of Lading (GBL) issued to common carriers and freight forwarders. The GBL typically incorporates either a carrier's public tariff, or a reduced rate (as compared to the public tariff) offered under specific transportation laws.¹² The FAR does not regulate the acquisition of transportation or transportation-related services when the GBL is the contract.¹³ Further, the FAR states that procedures for the acquisition of transportation-related services by sealed bid or negotiated contracts do not apply when the DOD relocates a person at government expense by the DOD under the Personal Property Traffic Management Regulation (PPTMR).¹⁴

Recognizing the unique nature of GBL procurements, the GSA implemented regulations for the temporary nonuse of commercial carriers transporting freight or household goods for

civilian executive agencies.¹⁵ The MTMC's procedures for disqualification and nonuse are the counterpart to GSA's temporary nonuse procedures. These procedures are similar to the debarment and suspension process promulgated by the Office of Federal Procurement Policy Letter 82-1, and implemented at FAR 9.4.

Due Process

When the MTMC disqualifies a carrier, the carrier is excluded for a period from participating in the programs established to transport DOD freight, personal property, or passengers.¹⁶ The period of disqualification depends on numerous facts and circumstances. These factors include: (1) the seriousness of the service failure, (2) the trend or pattern of failures, (3) the impact of a disqualification on the DOD as well as the carrier, and (4) whether the carrier has taken or planned any corrective action.¹⁷ In essence, the CRB may consider any relevant information necessary to protect the DOD's shipping interests. A CRB may take a variety of actions ranging from a two-year disqualification from participating in DOD's transportation business to a request that the carrier submit a technical or management plan detailing steps planned to prevent future service deficiencies.¹⁸

The principles of administrative due process apply to CRBs. In particular, the MTMC provides notice of service failures.¹⁹ The notice states the specific factual allegations concerning the service failures on a particular shipment. It provides the carrier with enough information to respond adequately to the allegations. The notice also specifies the hearing date and invites the

8. U.S. DEP'T OF DEFENSE DIR. 4500.9, TRANSPORTATION AND TRAFFIC MANAGEMENT (26 Jan. 1989). *See* U.S. DEP'T OF DEFENSE, DIR. 4500.34, DOD PERSONAL PROPERTY SHIPMENT PROGRAM (10 Apr. 1986).

9. U.S. DEP'T OF DEFENSE DIR. 5158.4, UNITED STATES TRANSPORTATION COMMAND (8 Jan. 1993).

10. *Id.*

11. GENERAL SERVS. ADMIN, ET AL., FEDERAL ACQUISITION REG., pt. 47 (June 1997) [hereinafter FAR].

12. In the past, common carriers could transport property without charge or at a rate that was lower than its tariff rate. In other words, they could discriminate to afford the government rate preferences. Shippers, other than government shippers, had to be treated equally in terms of rate application. Now, certain types of carriers may offer shippers any rate they want to offer. *See generally*, Interstate Commerce Commission Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (substantially codified at 49 U.S.C. § 10101 et seq) wherein Congress abolished the Interstate Commerce Commission and repealed laws (1) requiring that a carrier file tariffs for all types of goods it transports; (2) prohibiting discrimination and preferential treatment; (3) prohibiting government requisition of reduced rate treatment; and (4) permitting a carrier voluntarily to offer the government reduced rates.

13. FAR, *supra* note 11, at 47.000

14. FAR, *supra* note 11, at 47.200(d)(3).

15. 41 C.F.R. § 101-40.401 (1998).

16. MTMCR 15-1, *supra* note 2, para. 3.

17. *Id.* para. 7d(3).

18. *Id.* para. 3.

19. *Id.* para. 6.

carrier to explain its side of the story and how it intends to fix the problem. The notice letter advises the carrier that the specified failures may result in a disqualification from participation in DOD transportation programs.

The hearing affords the carrier an opportunity to contest or explain the service failures to the CRB.²⁰ Ideally, no factual dispute should exist in a CRB. If the performance data received from the field is accurate and the service failure is established by a preponderance of the evidence, the only issue would be appropriate corrective measures. Unfortunately, factual disputes often occur. It is important, therefore, that the installation transportation office provide the MTMC with timely and accurate performance data.

While the MTMC intends the hearing to be nonadversarial, in reality, many carriers view it as adversarial. Carriers often claim that the MTMC convenes CRBs to punish them. Therefore, many carriers seek representation by counsel. From the carrier's perspective, disqualification causes a loss of business and revenue. The MTMC's position, however, is that a CRB simply assesses whether or not the carrier is a "responsible carrier." In essence, the CRB prospectively determines whether the carrier, based on its past performance, has the necessary capacity, ability, resources, integrity, and skills to perform transportation movements safely and in accordance with program requirements.

Military Traffic Management Command Regulation 15-1 also permits immediate action to place a carrier in "temporary nonuse" (without notice and hearing) if this action is necessary to protect the DOD's shipping interest.²¹ The regulation, however, does not describe what instances might necessitate taking this action. Typically, the MTMC takes this action in emergencies, or in those situations when waiting for notice and a CRB hearing might result in some harm to the DOD's shipping interests. Normally, the MTMC does not impose temporary nonuse for more than thirty days.²² Further, the MTMC may convene a CRB to review the facts and circumstances that gave rise to the temporary nonuse. A CRB may determine that the situation, which resulted in temporary nonuse, warrants a disqualification period to protect the DOD.

20. *Id.* para 7d(3)(b).

21. *Id.* para. 6c.

22. *Id.*

23. *Id.* para. 10.

24. *Id.* For example, a bona fide change of management, or evidence establishing a correction of the cause or condition giving rise to the disqualification.

25. *Id.*

26. *See generally* FAR, *supra* note 11, pt. 47.

27. Qualification requirements are explained in various pamphlets published by the MTMC's program managers. The pamphlets provide a guide though the various program "wickets." These pamphlets are on the MTMC Home Page at www.mtmc.army.mil.

A carrier may appeal a disqualification determination by writing to the MTMC's Deputy Chief of Staff for Operations (DCSOPS); the appellate authority.²³ The appellate authority may terminate, suspend, or reduce the disqualification period if the carrier presents new evidence concerning the facts, or changed circumstances.²⁴ The appellate authority's decision is considered administratively final.²⁵

Unique Transportation Procurement Provisions and Practices

As noted, the provisions of the FAR do not govern many of the MTMC's transportation arrangements.²⁶ Consequently, the MTMC created additional transportation-unique contractual provisions to protect the DOD's shipping interests and meet the needs of those who rely on its traffic management expertise. When a carrier violates these, or any other provision of its tender or agreement, the installation transportation office should advise the MTMC. This allows the MTMC to take appropriate action under the provisions of *MTMCR 15-1* to protect the DOD's shipping interests. Attorneys counseling service members, or pursuing recoveries from carriers, should also provide performance data and other relevant information regarding the carrier to the installation transportation officers to help them track and monitor carrier performance.

Carrier Qualification

Generally, before a carrier is eligible to participate in procurement it must be "qualified."²⁷ To become qualified, a carrier must file various documents and forms that show it has the ability and capacity to operate lawfully. The program also serves as a prescreening tool to ensure that carriers can provide the needed service. Carriers are generally required to establish that they have the required operating authorities, public liability and cargo insurance, safety ratings, appropriate financial standing, and sufficient and adequate equipment or the ability to obtain such equipment.

The MTMC manages numerous procurement programs. These programs generally fall under three broad categories: freight, passenger, and personal property transportation. Once

qualified, carriers may voluntarily file “tenders” quoting rates for future movements, or respond to formal solicitations that request rates for regular movements of various commodities over different routes.

Inconvenience Claims

Many hardships are associated with a permanent change of station move. These hardships are illustrated by an incident involving the movement of privately owned vehicles (POVs) by a ship in the Gulf of Alaska. Rough seas destroyed or damaged many of the vehicles on the ship. The service members had little choice but to rent cars until the government resolved their claims for the actual damage. Although the service members were eventually reimbursed for the actual damage to their vehicles, they were not compensated for rental car expenses. Service members encounter similar incidents during household goods shipments.

The PPTMR states that the “carrier industry has generally shown a willingness to honor reasonable inconvenience claims.”²⁸ Under program rules, carriers must consider reasonable inconvenience claims.²⁹ While this provision is admittedly weak, it imposes some duty on the carrier. If an inconvenience claim is not reasonably considered, the MTMC may review the carrier’s actions.³⁰

To aid service members, Congress recently passed legislation authorizing reimbursement for rental car expenses following a POV shipment.³¹ Section 653 of Public Law 105-261³² permits the government to reimburse service members for rental care expenses up to \$30 per day for up to seven days when the POV does not arrive on its scheduled delivery date. Before Congress enacts this reimbursement provision, however, the Secretary of Defense must certify that the DOD has a system to recover the cost from the contractor that is responsible for the delay.

Because of this legislation, service members may soon experience some relief from inconveniences they suffer from delayed POV shipments. No corresponding legislation exists, however, that authorizes payment for household good shipment delays. Accordingly, a legal assistance attorney assisting a service member who was inconvenienced by a move should be

familiar with the MTMC’s inconvenience claim provisions and the CRB process. If the attorney does not believe the household goods carrier reasonably considered the service member’s claim, he should report this information to the MTMC. Under program rules, a service failure results if a carrier does not reasonably consider an inconvenience claim. Legal assistance attorneys who are familiar with the provisions of *MTMCR 15-1* may wish to explain to a carrier the consequences of a failure to reasonably consider inconvenience claims.

Performance Bond

As part of the qualification process, a carrier must submit a performance bond.³³ The MTMC uses the bond as a tool to recover excess procurement costs incurred in acquiring substitute carriage. The MTMC’s performance bond creates a triangular relationship between the principal or carrier, the surety, and the beneficiary—the government. The bond provides that the surety will assume the principal’s liability to the government for excess procurement costs. The surety will assume this liability when, due to the principal’s failure to complete delivery of a shipment, the MTMC deems it necessary to procure transportation services.

When a shipment is, or may be, delayed at origin or in transit (for example, failure by a prime carrier to pay its agents or other subcontractors), transportation offices should notify the MTMC of the problem through command channels. The MTMC may use timely and accurate shipment data from the field such as the location, destination, GBL information, and other pertinent data to assert a demand on the surety to arrange for the shipment’s onward movement.³⁴

Installation transportation offices need to notify the MTMC of shipment delays and frustrations. Shipment delays and problems at a particular installation or base may be just the “tip of the iceberg.” As the DOD’s traffic manager for the surface movements of freight, personal property, and many passenger groups, it may be necessary to take broad and comprehensive action against a carrier to protect the DOD’s shipping interests. This protective action includes disqualification or nonuse under *MTMCR 15-1*. The MTMC may follow the disqualification or nonuse by federal-wide suspension or debarment.

28. U.S. DEP’T OF DEFENSE, DIR. 4500.34R, PERSONAL PROPERTY TRAFFIC MANAGEMENT, para. 10,002 (1 June 1995) [hereinafter DOD DIR. 4500.34R].

29. *Id.*

30. MTMCR 15-1, *supra* note 2, para. 5.

31. The POV, of course, must have been shipped at government expense.

32. Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1, 112 Stat. 1920-98 (1998).

33. MTMCR 15-1, *supra* note 2.

34. DOD DIR. 4500.34R, *supra* note 28, app. A, para. 10,007(j).

Hostage Shipments

Shipment delays often are a precursor to future problems. Carriers that stop performing their transportation obligations, for whatever reason, often leave their agents, port handling contractors, warehousemen, and ocean carriers unpaid. Many of these unpaid parties attempt to assert some type of lien as justification for holding the commodity. A few years ago, the MTMC's legal office helped pass legislation prohibiting the assertion of any lien on a DOD sponsored household goods or POV shipment. The law is broad in that, in addition to the prohibition against asserting a lien, no person may "interfere" with the movement of the property.³⁵

Typically, the MTMC's position when billing disputes occur is that it is a private matter between the individual or the company holding the shipment, and the carrier; not the government. As reflected on the GBL, the government's privity relationship is with the carrier. Therefore, the MTMC expects carriers to resolve disputes in a timely manner, to avoid any disruption in service.

When a carrier to whom the MTMC has tendered freight or household goods allows a hostage scenario to develop, as often occurs when there are billing disputes, it is not complying with the terms and conditions of its agreement. In most cases, a hostage situation develops because a carrier has declared bankruptcy. Simple billing disputes, however, unrelated to a bankruptcy, are common. Carriers agree to "perform prudent traffic management." They also accept "through responsibility" for household goods shipments from their origins to their destinations.³⁶ Thus, carriers that require the government to intervene in managing a shipment because of a billing dispute may be violating the terms of their agreement with the MTMC. The MTMC may use this information in a CRB.³⁷

A Few CRB Success Stories

Something has gone wrong if a CRB must convene. Ideally, the MTMC would approve or "qualify" only responsible and reliable carriers. Unfortunately, items often tend to break during a move, even though a carrier has exercised appropriate care. In addition, some shipment delays are unavoidable. The CRB evaluates the facts and circumstances surrounding service failures and determines whether the MTMC should take any measures to protect the DOD's shipping interests. The following scenario illustrates some cases evaluated by the MTMC CRB.

35. 37 U.S.C.A. § 406 (West 1998); 10 U.S.C.A. § 2634 (West 1998).

36. DOD DIR. 4500.34R, *supra* note 28, app. A (discussing tender of service).

37. See generally MTMCR 15-1, *supra* note 2, para. 5.

An installation transportation officer issued a GBL directing delivery of a shipment from Florida to Ohio. The carrier, in violation of program rules, arrived late at the service member's residence. After packing the service member's personal property, the carrier's driver determined that there was not enough room on the truck. To complete the "pack-out," the driver had the service member's spouse drive him to town to rent a U-Haul truck. The driver also allegedly tossed \$20 at the service member and requested "some KFC and Coke for dinner." The shipment missed the required delivery date and sustained substantial damage.

The personal property shipping office at the installation relayed the facts and circumstances of the move to the MTMC. The MTMC notified the carrier that it intended to convene a CRB and advised the carrier that it faced worldwide disqualification.

Because of the CRB process, the carrier sent the service member a check for \$10,000, although the amount initially claimed was \$3700. The carrier fired the driver and other employees, and sent an emphatic apology to the service member regarding the move. The carrier also provided the MTMC with detailed corrective plans to ensure that such a dramatic service failure would not recur. No service failures have been reported against this carrier since MTMC's review of the situation.

Passenger Transportation Program

A state highway patrol stopped a bus, owned and operated by a DOD qualified carrier, for speeding. At the time, the bus was carrying a group of DOD passengers. After a blood-alcohol test determined that the driver was under the influence, the state trooper arrested the driver. Consequently, the passengers were stranded, and the mission was delayed until the company provided a substitute driver.

The MTMC immediately placed the company in nonuse and advised the company that a CRB would review not only the circumstances surrounding the movement, but also the company's overall performance and safety record. Before the hearing, during the nonuse period, the carrier took a number of remedial actions. Specifically, it fired the driver, placed saliva testing kits on board all of its buses for use by the base traffic management offices, hired a safety consulting firm, and hired a management firm to administer a drug and alcohol testing program. After a six-month disqualification period, the company emerged as a safe and reliable passenger transportation firm.

Freight Transportation Program

A CRB convened to review the facts and circumstances of a rail carrier's failure to provide surveillance for military equipment it was transporting. The program requirements obligated the carrier to inspect its rail cars on an hourly basis. The inspection records, however, indicated that the carrier had not inspected the cars before discovering missing military items.

Based on information and reports from the transportation office, the CRB concluded that the rail carrier did not meet its contractual obligations. The CRB further discovered that, due to the nature of rail movements, rail carriers should improve security procedures. The carrier expedited reimbursement for the lost equipment, and military industry meetings were convened to discuss rail movement security issues.

Conclusion

Ideally, anyone affected by or involved in the DOD's transportation process might use some of the information in this note to assist clients, pursue recoveries against carriers, and aid MTMC's efforts to protect the DOD's shipping interests.

When carriers violate program rules, *MTMCR 15-1* can be a useful tool in protecting the DOD's shipping interests. Program violations and service failures, however, must be reported through command channels in a timely and accurate manner. Legal offices, working as a team with traffic managers and service members, can improve the transportation process and assist the MTMC in "weeding out" the poor performing carriers.

Address questions regarding the DOD's transportation procurements, or the CRB process to Mr. Jakubowski, (703) 681-6580, DSN 761-6580, jakubowj@baileys-emh5.army.mil.