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TRANSPORTATION OF CARGO ACROSS THE U.S. – MEXICO BORDER

WARREN A. GOFF*

I. INTRODUCTION

There have been numerous debates about the economic effects on both the U.S. and Mexico of the North American Free Trade Agreement (“NAFTA”), of which much appears to have been politically motivated. There can be little doubt, however, that NAFTA has resulted in a huge expansion of trade between these two countries. Hence, this article was not written to expressly qualify those results, or to defend NAFTA, rather it attempts to define the numerous barriers that still exist with the cross-border transportation of goods. This article will focus on four important issues that bear considerable impact on the cross border transportation of cargo: transportation by air, transportation by truck, customs clearance and infrastructure development.

II. TRANSPORTATION BY AIR

Transportation by air is governed by the U.S./Mexico Bilateral Agreement, which was originally signed on August 15, 1960.¹ Since then, it has been the subject of numerous extensions and changes. In recent times, the U.S. and Mexico have been meeting once a year to discuss bilateral issues such as transportation by air. The site of those meetings generally alternates between Mexico and the United States.

The bilateral process may be explained as follows: in the early days of aviation, an air carrier desiring to serve a foreign country negotiated with the respective foreign government for the right to enter that country and for access to its airports. At that time, the U.S. was virtually the only country in the world without a state owned flag carrier. Thus, the independent U.S. carrier did not fare well in those negotiations because the foreign government was intent on protecting its state owned carrier from outside competition.

It became clear that governments should be negotiating with each other rather than directly with air carriers. The Chicago Convention, convened in 1944,² reaffirmed a basic aeronautic principle that “every state has complete and exclusive sovereignty over the airspace above its territory.”³ That Convention then created the International Civil Aviation Organization (“ICAO”) to facilitate safety and

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1. The U.S./Mexico Bilateral Agreement provides that both parties shall “cooperate in monitoring and spot-checking transboundary shipments.” U.S.-Mexico Bilateral Agreement, art. III, S3.

2. The Chicago Convention originally consisted of 52 nations and resulted from great concern for the safe and orderly development of international civil aviation, as well as the desire to avoid friction and promote cooperation between nations and peoples.

3. The Paris Convention of 1919 was the first significant multilateral development in international air transport. Its first article stated: “every state has complete and absolute sovereignty...”

navigation.⁴ The issue of rates became the province of the International Air Transport Association ("IATA").⁵ Conversely, issues such as routes, designations and capacity were left to bilateral negotiations between individual countries.

This notion of sovereignty was informally codified through accepted working rules for bilateral negotiations. Dubbed "freedoms," they also were originated at the Chicago Convention and consisted of: (1) the privilege to fly across the territory of another state without landing; (2) the privilege to land for non traffic purposes; (3) the privilege to off load traffic originating in the carriers' homeland; (4) the privilege to transport traffic originating in the host country and destined to the carriers' homeland; and (5) the privilege to transport traffic from the host country to another host country on a flight that originated in the carriers' homeland.

In recent times, two more freedoms have been added which are: (6) the privilege to carry traffic from one host country to another host country via the carriers' homeland; and (7) the privilege to carry traffic from one host country to another host country without transiting the carriers' homeland.

In traditional bilateral agreements, the first four freedoms are always present. The last three are negotiable. In 1970, the U.S. adopted a policy of "Open Skies" meaning that it will provide all seven freedoms to air carriers of any country willing to reciprocate with all the countries of Central America as well as with Peru and Argentina in South America.⁶ A number of such agreements are now in place. All include the first six freedoms. Some, but not all, include the seventh as well. Open skies agreements have been signed with all the countries of Central America as well as with Peru and Argentina in South America.

Historically, the U.S./Mexico Bilateral Agreement has been rather restrictive with respect to issues concerning cargo and remains so today. It allows the first four freedoms but grants no fifth freedom, i.e. the right to transport local cargo to points beyond Mexico. Each country may designate only five carriers. The designation is issued for named pairs of points and only one carrier is allowed between any two pairs of points unless a double designation is requested and granted. Designated carriers file schedules from which specific permission is required for deviation.

Unlike passenger carriers, who operate on rigid schedules, the inability to vary operations without special permission seriously restricts the operations of cargo carriers. This is true because traffic considerations often require variation from the filed schedule. Last year, Mexico agreed to institute a "notice only" policy with respect to these schedule changes. To this point, however, no implementing regulations have been put in place.

Restricting the market to five carriers is a serious inhibition as is the requirement that only one carrier may serve two given points. Refusing to grant fifth freedom rights, i.e. the ability to serve countries beyond Mexico transporting traffic

4. The International Civil Aviation Organization (ICAO) produces "rules" that are the United Nation's recognized "rules" and also, is the U.S. Department of Transportation's recognized body for international air shipments.

5. The International Air Transport Association (IATA) was founded in Havana, Cuba, in April 1945. At its foundation IATA had 57 Members from 31 nations, mostly in Europe and North America. Today it has over 230 Members from more than 130 nations. The modern IATA is the successor to the International Air Traffic Association founded in the Hague in 1919- the year of the world's first international scheduled services.

6. An "open skies" agreement must include provisions for unlimited market access, liberal fare setting subject only to antitrust or competition laws, and unrestricted capacity.

originating in Mexico, is the most serious inhibition of all. This is a serious inhibition because by not allowing the transfer of goods to run smoothly between the two countries a number of problems originate such as costly delays.

Additional problems involving air transportation arise on the ground. Every air shipment requires that the goods in question be transported by ground both prior to and subsequent to the air shipment. That constitutes a problem for the integrated air express industry represented by carriers such as Federal Express (FedEx) and United Parcel Service (UPS). These carriers hold out a door-to-door service whereby each shipment is picked up at the premises of the shipper and delivered to the premises of the consignee. That is to be done on a time certain basis with a money back guarantee. The carriers involved need to perform the ground service themselves in order to control the transportation from end to end. The bilateral agreement allows air carriers to offer a joint air-ground service, charging a through rate, provided that a local Mexican carrier, operating pursuant to Mexican regulations, performs the ground portion. That fails to provide the express industry with the flexibility and control it needs.

With the advent of NAFTA, it appeared that the ground problem had been solved, because transportation between the countries was organized and procedures were agreed upon. Mexico now prohibits U.S. carriers from transporting cargo in cabotage movements (shipments having both an origin and destination in Mexico) and also prohibits cabotage transportation of items covered by the postal monopoly. However, Mexico agreed to allow "couriers" to perform cabotage operations and granted them national treatment.

In Mexico, as in most countries of the world, once a shipment is unloaded off an aircraft it is deemed to have concluded its international journey by air. The ongoing ground movement from an airport for delivery to the consignee is considered to be a new intra-Mexico shipment and therefore constitutes cabotage. Under NAFTA, a courier can provide that ongoing transportation, at least in theory.

Nonetheless, a dispute immediately arose between the two governments about the definition of a "courier." The air express industry wants Mexico to adopt courier regulations based on the features of service rendered by the industry rather than the size and weight of that which is being transported. An illustration of this point is evident in the following example.

A manufacturing plant has been shut down because it needs a one-ounce computer chip. The owner is willing to obtain that chip from any available source, no matter where located, and thereafter pays what is required to get that chip delivered. Mexico agrees that transportation of a one-ounce computer chip constitutes an appropriate courier activity. Now suppose that the same plant is shut down because a 5000-pound generator has ceased to function. There is absolutely no difference in the emergency created or the need to get a new generator from where ever it can be obtained in the world, and as quickly as possible, especially where cost is no object.

However, Mexico would say that the generator is classified as cargo and cannot be transported by a courier due to its size and weight. It does not appear that there is any resolution to this dispute in sight. The above constitutes a serious restriction in the ability of the integrated air express business to grow and expand.

III. TRANSPORTATION BY TRUCK

Frankly, there is only one way to describe truck transportation between the U.S. and Mexico: *convoluted*. Truck transportation between the two countries is presently a hassle because Mexico has never allowed U.S. truckers to operate across the border. For that reason, a Presidential Order was signed more than 25 years ago stating that the Interstate Commerce Commission ("ICC") could not grant U.S. authority for the operation of trucks to a citizen of Mexico or any company owned by citizens of Mexico, except as noted below.⁷ The ICC was abolished at the end of 1995 and what was left of its jurisdiction was given to the Federal Highway Administration ("FHWA").⁸

As a practical matter, however, there had to be some mechanism through which truck shipments could be transported across the border. Therefore the ICC, and later FHWA, has historically granted limited authority for Mexican carriers to physically cross the border and then to operate no further than points in the first tier of counties in California, Arizona and Texas that are immediately adjacent to the border. At the border, there has evolved a group of Mexican carriers that can literally be referred to as "bridge carriers."

Bridge carriers move loaded trailers across the border in both directions and through Customs on both sides. Once cleared, they hand the trailers off to the Mexican or U.S. carriers who will provide ongoing transportation. Although it is a difficult situation, it is one that has existed for decades.

NAFTA was supposed to cure that situation, as well. The Agreement stated that in December of 1995, the border would be opened so vehicles operated by U.S. truckers could pass freely into Mexico and be licensed to operate into and out of the first tier of Mexican states immediately adjacent to the border.⁹ By the same token, Mexican carriers were to pass freely into the U.S. and be licensed to operate into and out of the first tier of states immediately adjacent to the border. In successive years, carriers were to penetrate deeper into the territory of each country until both countries were completely open. Only international traffic is to be involved because neither country agreed to allow cabotage operations except for "couriers" mentioned earlier.

Almost five years later, the border is still closed because U.S. President Bill Clinton refused to allow it to open as specified in NAFTA.¹⁰ Depending on who you are, there are various explanations for his action. The reason stated by the Administration was that Mexican trucks are not safe and will not be allowed across the border until they are. However, many people feel that his decision was

7. The Interstate Commerce Commission (ICC) was the first independent agency of the United States government, established in 1887 by the Act to Regulate Commerce, now known as the *Interstate Commerce Act*. The ICC was an administrative and legal body that regulated commercial activity crossing state lines. The commission heard complaints and issued judgments in cases that involved surface transportation carriers such as railroads, trucks, and buses.

8. The federal government through the U.S. Department of Transportation's Federal Highway Administration (FHWA) provides guidance to the states in developing their highway facilities. States initiate the projects but the FHWA is responsible for review and approval at key stages of all federal aid highway projects.

9. The North American Free Trade Agreement (NAFTA) - 1992 (ratified by United States in 1993 and implemented January 1, 1994). Members: United States, Mexico, and Canada.

10. *Id.*

politically motivated. Clinton had just angered organized labor, and in particular the Teamsters Union, by securing ratification of NAFTA with the help of Republicans since his own party rejected that ratification. Some posit that Clinton's crucial need for labor support necessary for re-election in 1996, induced him to close the border in order to garner Teamster support. I make no judgment in this respect except to say that truck transportation across the border is still a complicated issue.

For the past five years, the U.S. and Mexican governments have met regularly to discuss opening the border. A variety of issues are on the table. For one, 53-foot trailers have become standard in U.S. fleets. Conversely, the standard for Mexican fleets has been the 48-foot trailer. Mexico believes that its highways will not properly accommodate 53-foot trailers. Generally, Mexican carriers have felt that to allow these trailers into Mexico would put them at a competitive disadvantage. In another area, some U.S. carriers have devised a way to own non-voting interests in Mexican carriers on the premise that does not violate Mexican investment laws. Mexico had not agreed with that premise, of course. However, the courier problem, earlier described, is no closer to being solved that it was five years ago.

Thus, the border should be opened immediately since that would provide for a substantial improvement in trade between the U.S. and Mexico under NAFTA. However, the practicality behind when the border will be opened and under what circumstances has yet to be made known. In the meantime, it appears that the current complicated state of trucking affairs between the two countries has not been significantly abated through recent measures and this seems likely to continue for some unidentified time in the future.

IV. CUSTOMS CLEARANCE

Today's global citizen inhabits a "just-in-time-world." Automobiles are literally being built using parts taken off a truck that arrived minutes before. Carriers such as FedEx and UPS can span the globe in record time and provide an unprecedented opportunity for every businessman to compete on a level playing field irrespective of their physical location or the physical positioning of their competition. Trucks can transport large quantities of merchandise over the ground for delivery within one to three days from any point in the U.S. to any point in Mexico. But, what good does it do for FedEx to bring a badly needed part from Asia in 36 hours when it then requires several days to clear customs in Mexico?

Mexican officials state that the Customs Service has undergone a thorough reorganization in terms of personnel, training and procedures. In actual practice, it requires several days to clear a shipment into Mexico. That is because all shipments are required to be cleared by a licensed broker. Such licenses are difficult to procure. As a matter of practice, the broker is not allowed to make a mistake. The broker has to be absolutely sure that the shipment is correctly described and that the count is correct, he has to be sure that the value of that shipment, as stated on the documents, is correct. If not, the broker is subject to serious fines and/or penalties as well as a possible loss of license.

For those reasons, the broker physically opens every package in order to verify all of the information described above. So, it typically requires three days for the broker to get a shipment ready for clearance and three minutes for Customs to clear it. Even with all that preparation, Mexican Customs still physically inspects 13%

of all these same shipments that have already been opened by the brokers. After inquiring about possible solutions to rectify this scenario, I have discovered that certain consignees, who receive a million dollars or more a year in merchandise, can obtain a bond pursuant to which their goods are cleared, without being opened, with a later accounting being made to the government. As a practical matter, however, this opportunity carries with it the possibility of ongoing audits for years into the future. For that reason, almost no Mexican customers have elected to use this procedure.

Concerning clearance at an airport after the arrival of merchandise, one important thing to remember about that scenario is the aircraft can depart after being unloaded leaving local people to clear shipments through Customs. The situation at the border is entirely different. Most trucks arrive at the border and then wait. The lines are long. Not only does U.S. Customs have to clear the merchandise but they must inspect it for contraband as well. U.S. Customs has been known to drill holes through the chassis of trailers looking for drugs. Some truckers unload into warehouses where clearance can take place without detaining the equipment. The lading is then reloaded into Mexican equipment, which entails double handling, of course. It is fairly evident that on both sides of the border, the activities of Customs seriously impacts the transit time of all shipments involved.

The Customs authorities of most Latin American countries have committed themselves to the implementation of what has become known as the Cancun Accords.¹¹ That agreement represents a set of model rules for the clearance of cargo on an expedited basis. They are modeled on the Express Clearance Guidelines developed and approved by the World Customs Organization ("WCO").¹² Representatives of the Customs Services of seventeen Latin American and Caribbean countries signed the original Cancun Accord in June of 1966.

The Cancun Accords are now being advanced in the venue of the Free Trade Agreement of the Americas ("FTAA").¹³ At the last ministerial meeting in Santiago, Chile in July of 1998, thirteen Latin American and Caribbean countries signed a ratification of the Cancun Accord and in those countries they are supposed to come into force by the end of 1999. However, those Accords must still be implemented by the passage of enabling legislation and corresponding regulations. That will require an undetermined amount of time.

V. INFRASTRUCTURE DEVELOPMENT

Concerning infrastructure problems, the technical people of both the U.S. and Mexico are doing a lot of work. Language is a problem on both sides of the border. There are not enough qualified bilingual drivers to operate the vehicles that will be involved in transporting cross traffic once the border is actually opened. In order to

11. There were twenty-two heads of state representing both developed countries and non-industrialized nations who gathered in Cancun, Mexico for the Cancun Accords.

12. The World Customs Organization (WCO) was established in 1952 as the Customs Co-operation Council, the WCO is an independent intergovernmental body whose mission is to enhance the effectiveness and efficiency of Customs administrations. The intergovernmental worldwide organization includes 151 Member Governments.

13. The Free Trade Agreement of the Americas (FTAA) was launched by thirty-four nations in December of 1994.

ameliorate that problem, an effort is being made to create signage that can be understood by all drivers no matter what language they speak. Drivers' licenses need to be made uniform. Safety rules also need to be uniform. Each country needs to have an identical database with respect to drivers, license number, any infractions of safety regulations, etc. However, these are practical problems, which can and will, be worked out over time.

