

Date Received: April 16, 1998

Docket No.: TV-971477

Company: Amends WAC 480-12, Relating to Household Goods Movers

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U.S. Department  
of Transportation  
**Federal Highway  
Administration**

JAN 20 1998

400 Seventh St., S.W.  
Washington, D.C. 20590

Refer to: HCC-20

**William A. Mullins, Esq.**  
**Troutman Sanders LLP**  
1300 I Street, NW.  
Suite 500 East  
Washington, D.C. 20005-3314

Dear Mr. Mullins:

This is in response to your November 20 letter to Paul Brennan, requesting an informal opinion regarding the regulatory status of Shurgard Storage to Go, Inc. (SSTG).

According to your letter, SSTG operates self-storage facilities in several states. It provides residential and business customers with movable 320-cubic foot storage containers, which are loaded and secured (and eventually unloaded) by the customer. Upon request, SSTG will transport: (1) empty containers to the customer's residence or business location for loading by the customer; (2) loaded containers from the customer's residence or business to SSTG's storage facility; and (3) loaded containers from the SSTG storage facility to a location designated by the customer at the conclusion of the storage contract. Customers also have the option of transporting their property to and from the SSTG facility. You assert that transportation charges are not billed separately, but are incorporated into the overall price of the storage contract. You estimate that the cost to SSTG of container pickup and delivery approximates 13 to 15 percent of SSTG's overall cost of operation.

Based on the above facts, you contend that SSTG is not providing for-hire transportation because its operations are private carriage, as defined in 49 U.S.C. § 13102(13), and are incidental to a primary business other than transportation under 49 U.S.C. § 13505. Furthermore, you argue that even if SSTG is providing for-hire carriage, it is not engaged in the transportation of household goods. Consequently, you claim that the states are preempted from regulating SSTG's rates, routes and services under 49 U.S.C. § 14501(c)(1).

I concur that the transportation provided by SSTG, as described in your letter, is not for-hire carriage. It meets the definition of private carriage under § 13102(13) because SSTG is acting as a bailee of property being transported for bailment. Since, it also appears to be incidental to, and in furtherance of, SSTG's primary storage business, it would not be considered for-hire transportation under § 13505. Of course, these conclusions only apply to transportation in interstate commerce subject to the Secretary's jurisdiction.

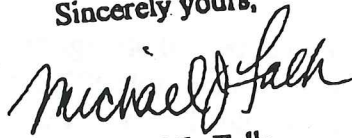
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*TV-971477  
offered at  
Household goods  
stakeholder  
meeting  
regarding  
definition*

I also agree that regardless of whether SSTG is considered to be a for-hire carrier, it is not providing transportation of household goods under Federal law. In determining whether a motor carrier was transporting household goods for the purpose of applying household goods-specific regulatory requirements, the Interstate Commerce Commission focused on the type of service provided rather than the identity of the commodities transported. See Practices of Motor Common Carriers of Household Goods, 17 MCC 467 (1939), and American Red Ball Transit Co. v. McLean Trucking Co., Inc., 67 MCC 305 (1956). Since SSTG is not providing the specialized services which household goods carriers typically provide, it would not be considered subject to the FHWA's regulations governing household goods transportation (49 CFR part 375), the dispute resolution requirements of 49 U.S.C. § 14708, or the tariff requirements of 49 U.S.C. § 13702. Because SSTG is not providing transportation of household goods within the meaning of the ICC Termination Act, states cannot regulate its rates, routes and services under the § 14501(c)(2) exception to Federal preemption.

I hope I have been of assistance to you.

Sincerely yours,



Michael J. Falk  
Trial Attorney  
Motor Carrier Law Division

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# TROUTMAN SANDERS LLP

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A T T O R N E Y S A T L A W  
A LIMITED LIABILITY PARTNERSHIP

1300 I STREET, N.W.  
SUITE 500 EAST  
WASHINGTON, D.C. 20005-3314  
TELEPHONE: 202-274-2950  
FACSIMILE: 202-274-2917  
INTERNET: [william.mullins@troutmansanders.com](mailto:william.mullins@troutmansanders.com)

William A. Mullins

202-274-2953

November 20, 1997

Mr. Paul L. Brennan  
Director, Office of Motor Carrier  
Research and Standards (HCS-1)  
Federal Highway Administration  
400 7<sup>th</sup> Street, S.W.  
Room 3107  
Washington, DC 20590

RE: Shurgard Storage To Go, Inc.  
Request for Informal Opinion on Transportation Operations

Dear Mr. Brennan:

At the suggestion of Thomas Vining and Suzanne O'Malley, both former colleagues of mine at the Interstate Commerce Commission and now employees of the Federal Highway Administration, I am submitting herein a request for an informal opinion of the Federal Highway Administration ("FHWA") concerning the nature and regulatory requirements applicable to the motor carriage component of the self-storage operations of our client, Shurgard Storage to Go, Inc. ("SSTG"). SSTG is beginning the nationwide roll out of its specialized self-storage operations. Those operations utilize large self-storage containers that are loaded and unloaded by SSTG's customers. SSTG transports the containers to and from SSTG's warehouse on flatbed trucks operated by SSTG.

It has been SSTG's position that its transportation of self-storage containers is private carriage. Furthermore, SSTG believes that even if its operations were or became for-hire service, they would not constitute transportation of household goods, which states can regulate under 49 U.S.C. Section 14501(c)(2)(B). Several states have already agreed with SSTG's analysis. See Exhibit A, Informal Opinion Letter from Gary Schechter, Chief Counsel of the Transportation Division of the Illinois Commerce Commission. However, some states have claimed that SSTG's operations constitute for-hire carriage of household goods and have threatened to force

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SSTG to cease its operations until the state regulatory permits appropriate to for-hire, household goods transportation are obtained.

To avoid repetition of this type of disruption of its business development, SSTG is seeking this informal opinion from FHWA to confirm that SSTG's operations as described herein are private carriage, and are not transportation of household goods subject to economic regulation by the states. Given the inconsistent application of state law regarding whether or not SSTG's operations qualify as private carriage, as for-hire carriage, or as for-hire household goods carriage, SSTG finds it necessary to seek this informal opinion to provide guidance to the states and to allow SSTG's operations to be implemented in a uniform manner. Your quick attention to this issue would be greatly appreciated.

#### Factual Background

SSTG is establishing what is to be a nationwide system of self-storage centers which will provide businesses and individuals a unique opportunity to take advantage of containerized self-storage service. SSTG, like its parent company, Shurgard Storage Centers, Inc. ("SSC"), is in the self-storage business. While SSC rents its customers individual self-storage units in specially-designed warehouses where each customer may store and secure items in the customer's own individual storage space, SSTG takes this concept a step further. SSTG provides its customers with a movable 320-cubic foot self-storage container, optional pickup and/or delivery of the container to the customer's residence or place of business, and warehouse space in which to store the loaded container. SSTG presently is providing such service in Washington, Oregon and California, and is looking to expand soon to Illinois, Georgia and other states.

When SSTG's customers sign a storage contract with SSTG, they have two options about where to load their storage container. They may choose to bring the items for storage to the SSTG warehouse to load them into the container there, or they may choose to have the container brought for loading to a location they designate. If the customer chooses the latter option, a flatbed truck operated by SSTG brings the container to the customer-designated location. The empty container is unloaded from the truck, using a mounting moffett forklift that is carried on the truck, and is placed according to the customer's instruction. The customer is given a lock and key and a seal with which to secure the container after it is loaded and is instructed to telephone SSTG for a pickup when the container is loaded, locked and ready for storage.

After a pickup request is received from the customer, SSTG's truck and forklift return to the customer's location, place the container on the flatbed, and transport the container to an SSTG warehouse. Often that warehouse will be in the same city and state in which the customer resides, although sometimes the warehouse will be in a nearby town. In some instances SSTG transports storage containers across state lines to nearby communities. The container is then stored at the warehouse for the term of the storage contract, during which time the customer may have access to the container. When the storage contract terminates, the customer has the option of going to the warehouse to unload the container there, or of having SSTG deliver the container

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to a local destination designated by the customer, where the container is off-loaded and is made available for the customer to unload. SSTG then retrieves the empty container once the customer has unloaded it.

Businesses and individuals alike utilize SSTG's services. Because SSTG does not participate in the customer's packing or unpacking of their container, SSTG is unaware of the actual contents of the containers, which can include anything from office supplies and furnishings to residential furnishings. Each customer contracts to be responsible for packing and unpacking their own container, as well as for sealing the container with a lock and a numbered seal provided by Shurgard. Only after the container has been packed, locked and sealed by the customer does SSTG accept the loaded container for storage. Likewise, when a customer terminates their storage contract, SSTG makes the container available to the customer, but takes no part in unloading the container. The actual storage provided by SSTG is generally subject to state regulation under state warehousing or consumer protection statutes.

While SSTG offers different pricing programs in different markets, at present SSTG's standard storage contracts with all customers include the cost of pickup and delivery of the container at the beginning and end of the storage term. In some markets, SSTG's storage prices vary with the length of the storage contract, require a minimum storage duration, set minimum charges, or contain an early termination penalty. Nevertheless, customers are not billed for and do not pay separately for SSTG's movement of SSTG's self-storage containers.

Although SSTG keeps account of the costs of providing the trucks and employees necessary to provide the pickup and delivery service, those services are part of SSTG's standard service and do not serve as a profit center separate from the overall storage service. Only about 13 to 15 percent of SSTG's current overall cost of operations results directly from moving SSTG's storage containers to and from customer locations. The majority of SSTG's costs involve obtaining and operating suitable warehouse space. SSTG does not transport any property other than loaded and empty SSTG containers, and transports those items only for SSTG's own customers who have signed storage contracts with SSTG.

### **SSTG's Transportation is Private Carriage**

The transportation component of SSTG's self-storage service is an inseparable part of, and is performed only in furtherance of, SSTG's primary business of providing containerized self-storage service to businesses and individuals. The service is provided only to SSTG's self-storage customers and only for containerized goods for which SSTG, as a warehouseman, is the bailee. Accordingly, SSTG's transportation of SSTG containers that have been loaded by SSTG customers and that are destined to or from storage at SSTG warehouses qualifies as private carriage under 49 U.S.C. Section 13102(13).

Section 14501(c)(1) of Title 49, U.S. Code provides that states may not regulate the price, route or service of "any motor private carrier . . . with respect to the transportation of property."

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Section 13102(13) of Title 49 defines a motor private carrier for purposes of Section 14501(c)(1) and otherwise as:

a person, other than a motor carrier, transporting property by motor vehicle when -  
(A) the transportation is as provided in section 13501 of this title;  
(B) the person is the owner, lessee, or bailee of the property being transported; and  
(C) the property is being transported for sale, lease, rent, or bailment or to further a commercial enterprise.

Section 13501, referenced in Section 13102(13)(A), provides, *inter alia*, that transportation which takes place between a place in a state and a place that is either in another state or in a foreign country, or which occurs between two places in the same state but which passes through another state or foreign country, is subject to federal jurisdiction. However, Section 13505 limits that jurisdiction as follows:

(a) In general. - Neither the Secretary nor the Board has jurisdiction under this part over the transportation of property by motor vehicle when -  
(1) the property is transported by a person engaged in a business other than transportation; and  
(2) the transportation is within the scope of, and furthers a primary business (other than transportation) of the person.

Section 13505 is the current codification of former 49 U.S.C. Section 303(c), enacted in 1958 to codify the "primary business test" that was enunciated by the Interstate Commerce Commission ("ICC"). The ICC used the "primary business test" for determining whether or not particular transportation services qualified as private carriage. See *Lenoir Chair Company Contract Carrier Application*, 51 M.C.C. 65 (1949), *aff'd sub nom. Brooks Transportation Co. v. United States*, 93 F. Supp. 517 (E.D. Va. 1950), *aff'd mem.* 340 U.S. 925 (1951) [*"Lenoir Chair"*]; *Red Ball Motor Freight v. Shannon*, 377 U.S. 311, 316 (1964). *Lenoir Chair* dealt with a furniture manufacturer and a liquor distributor, each of which transported goods that they or their subsidiaries manufactured. *Lenoir Chair*, 51 M.C.C. at 67. Both companies increased the prices of their delivered goods to cover their costs of transporting the goods, leading some to contend that they were acting as for-hire carriers. The ICC found otherwise. Concluding that neither company sought to profit from the transportation as a separate enterprise, but that each merely conducted limited transportation of company-owned goods to foster its manufacturing business, while seeking to cover the costs of those operations by the additional charges, the ICC held that the transportation in question was private carriage in furtherance of the manufacturers' primary, non-transportation businesses. *Lenoir Chair*, 51 M.C.C. at 74. See also *L.A. Woitishek Common Carrier Application*, 42 M.C.C. 193, 201, 206 (Div. 5, 1943) [*"Woitishek"*], cited with approval in *Lenoir Chair*, 51 M.C.C. at 73-4.

Whether the transportation is carried on as a separate for-profit enterprise is the focus of the primary business test, as codified at 49 U.S.C. Section 13505. For example, in defining

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“private carrier,” the ICC said in *Woitishek* -

[T]ransportation “for compensation” contemplated by both the common and contract definitions as distinguished from the transportation “for the purpose of sale, lease, rent, bailment, or in the furtherance of any commercial enterprise” . . . is transportation which is supplied with a *purpose to profit* from the effort as distinguished from a purpose merely to make good or recover the cost of transportation furnished in the furtherance of some other primary business or transaction.

(Emphasis in original.) *Woitishek*, 42 M.C.C. at 201.

SSTG’s transportation of its self-storage containers to and from its customers meets these definitions of private carriage. SSTG transports only its self-storage containers and only for its self-storage customers. The transportation service is an integral part of SSTG’s service, and is a primary distinction between SSTG’s service and that of SSTG’s parent company, SSC. SSTG does not attempt to profit from the transportation, but rather uses the transportation to provide a unique package of services.<sup>1</sup> SSTG’s trucking operation is limited to serving SSTG’s relatively unique needs and only those needs. SSTG does not carry goods for other companies or operate its trucks in order to profit by their use apart from the overall profitability of SSTG’s self-storage business. The trucking operations of SSTG are essential to the company’s provision of its self-storage service, and are limited to meeting those needs. Accordingly, SSTG’s motor carriage operations meet the 49 U.S.C. Section 13102(13) definition of private carriage, are exempt from federal regulation under the primary business test codified in 49 U.S.C. Section 13505, and are excluded from state regulation by 49 U.S.C. Section 14501(c)(1).<sup>2</sup>

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<sup>1</sup> In fact, opponents of the *Lenoir Chair* decision contended that if the two manufacturers whose activities were under scrutiny merely built the cost of operating their trucks into their overhead and charged all of their customers a portion of those costs, the manufacturers’ trucking operations clearly would be private carriage. See *Lenoir Chair*, 51 M.C.C. at 72-3. This is exactly the sort of pricing practice in which SSTG engages. Thus, even under the opponents’ approach in *Lenoir Chair*, SSTG’s transportation would have been found to be private carriage.

<sup>2</sup> A little-followed and poorly-reasoned line of cases which has sometimes been cited as stating that a warehouse company could not provide private carriage service for its customers is inapplicable to SSTG’s service. The principal case in this small group is *Interstate Commerce Commission v. V.S.C. Wholesale-Warehouse Co.*, 312 F. Supp. 542 (D. Ida. 1969) [“VSC”]; *Accord, Interpretation - Intercorporate Hauling*, 132 M.C.C. 736, 1981 MCC LEXIS 2, (I.C.C. 1981). The facts of VSC are easily distinguished from SSTG’s operations. Half of the trucking operations at issue in VSC involved exempt for-hire transportation of agricultural commodities, even though V.S.C. Wholesale’s primary business as a mobile home parts distributor was totally unrelated to agricultural commodities. By contrast, SSTG provides only



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### SSTG's Service Is Not Household Goods Transportation

Even if SSTG's service were, or were to become, for-hire carriage, it still would not be for-hire transportation of household goods. This conclusion stems from two basic facts. First, because SSTG neither loads nor unloads the containers, it does not know the exact contents of the goods stored with SSTG. However, because approximately 10% of SSTG's customers are businesses,<sup>3</sup> rather than individuals, SSTG has reason to believe that a substantial portion of the goods stored with SSTG are not "household goods" at all but rather are office equipment, furnishings and supplies, items which were removed from the definition of "household goods" by the ICCTA. See H.R. Conf. Rep. No. 104-422, at 199 (1995).

More importantly, the ICC repeatedly held that transportation of containers holding household goods, like the locked and sealed containers SSTG moves between its customers' locations and its warehouses, was not "transportation of household goods." See *Wrightway Auto Carriers, Inc. - Nationwide Contract Carrier Service*, 1986 M.C.C LEXIS 255 at 4; *Tri-State Motor Transport, Inc., Extension - Nationwide Service*, 1985 M.C.C LEXIS 630 at 7; *Alaska Marine Lines, Inc., Contract Carrier Application*, 1985 MCC LEXIS 142 at 14; *Lynden Transport, Inc. - Purchase - Alaska Transfer, Inc.*, 122 M.C.C. 217, 218 (I.C.C. 1975); *Glosson Motor Lines, Inc. - Purchase - C.L. Helderman*, 101 M.C.C. 151, 159 (I.C.C. 1966); and *American Red Ball Transit Co., Inc. v. McLean Trucking Co., Inc.* 67 M.C.C. 305, 313-14 (I.C.C. 1956) ["Red Ball"]. In *Red Ball*, the ICC said -

To conclude otherwise would mean that a general-commodity (except household goods) carrier could not accept the property of an individual who desires to ship his personal household property by other than a household-goods carrier and has himself prepared them for shipment. Or another situation that occurs frequently is the packing of all of an individual's household goods in a huge wooden container or lift van used for long distance or foreign shipment. Can it be argued that the movement of these lift vans packed with household goods is strictly within the province of the household-goods carrier because the articles transported, in the non-definition sense, are household goods? To state the proposition reveals the answer.

*Red Ball*, 67 M.C.C. at 313-14. This - "the packing of . . . an individual's household goods in a huge wooden container" and its transport - is exactly what SSTG does and is exactly what the

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transportation that is directly connected with SSTG's warehouse operations. Particularly in light of changes since 1969 in the policies and provisions underlying interstate motor carrier regulation, VSC and related cases are not controlling precedent for this matter.

<sup>3</sup> SSTG's initial marketing campaigns have not to this point specifically targeted business customers. SSTG expects that as SSTG's self-storage business grows, storage by business customers will become a larger proportion of SSTG's overall storage volume.

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ICC repeatedly found was not "transportation of household goods." Because only "transportation of household goods" is subject to state economic regulation under 49 U.S.C. Section 14501(c)(2)(B) and SSTG is not engaged in the movement of household goods, states cannot regulate SSTG's pickup and delivery of its customer-loaded self-storage containers.

Transporting *containerized* household goods was always treated by the ICC as a distinct service from "transportation of household goods" because transportation of household goods always involved characteristic special services.<sup>4</sup> SSTG does not provide those special services to its self-storage clients. *Red Ball* listed the special services of "packing, crating, pickup within the building, or placement of furniture at destination" as "part of the distinctiveness of household-goods service." *Red Ball*, 67 M.C.C. at 313-14. Household goods transportation also traditionally has involved something other than "ordinary over-the-road vehicles" to accomplish the movement. *Id.* Under this test, even if SSTG's operations did not qualify, or ceased to qualify, as motor private carriage,<sup>5</sup> and even if a significant portion of the goods that SSTG's customers containerize for storage were traditional "household goods," SSTG's transportation of containerized household goods still would not be "transportation of household goods" which is subject to state regulation because SSTG does not provide special services such as packing and crating or removal of articles from a household. SSTG's contracts with its customers require those customers to perform all such services for themselves, to lock and seal the storage container, and then to request SSTG's service to move the container. Because SSTG's customers, not SSTG, perform all of the specialized services by which the ICC historically distinguished household goods carriers from general commodity carriers, SSTG is not, under any current circumstance, providing "transportation of household goods."

Because the trucking component of SSTG's self-storage service is not within the definition of household goods transportation under 49 U.S.C. Section 13102(10) and SSTG's operations constitute private carriage, states are prohibited by 49 U.S.C. Section 14501(c)(1)

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<sup>4</sup> See generally *Practices of Motor Common Carriers of Household Goods*, 53 M.C.C. 177, 186 (I.C.C. 1951), *modified on other grounds* 89 M.C.C. 293 ("[T]his conference asks that it be made clear that the distinction between the transportation performed by household-goods carriers and general-commodity carriers is predicated on their different types of service rather than on the kind of article transported. This was made abundantly clear in the original report herein."). SSTG's service does not encompass the specialized services that comprise regulated household goods moving service.

<sup>5</sup> Because federal economic regulation of household goods transportation extends only to "motor carriers," see, e.g., 49 U.S.C. Sections 13501 and 13701(a), and SSTG's current trucking operations are private carriage, those operations would not be subject to federal jurisdiction because, even if household goods are involved, "motor carrier" and "motor private carrier" are mutually exclusive terms. Compare 49 U.S.C. § 13102(12) [defining "motor carrier" as providing transportation "for compensation"] with 49 U.S.C. § 13102(13) [defining a "motor private carrier" as "a person, other than a motor carrier . . ."].

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from regulating SSTG's prices, routes or services. Section 14501(c) provides that "a State, . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . or any motor private carrier . . . with respect to the transportation of property," but that limitation "does not apply to the transportation of household goods." Thus, unless SSTG's service constitutes both for-hire service and transportation of household goods, as defined following the ICC Termination Act of 1995, Pub. L. 104-88, 109 Stat. 803 (Dec. 29, 1995) ["ICCTA"], states may not regulate SSTG's prices, routes or services.

### Conclusion

The transportation component of SSTG's current self-storage service is an integral part of, and is performed solely to further, that business. Accordingly, for the reasons set forth herein, SSTG believes that service is private carriage. In addition, because SSTG's service requires it only to transport self-storage containers that its customers pack, lock and seal before tendering them to SSTG for short distance moves to SSTG warehouses, SSTG believes that its transportation operations would not be, even if they were or became for-hire carriage, transportation of household goods subject to economic regulation by the states. SSTG seeks an informal opinion from FHWA confirming both that SSTG's operations as described herein are private carriage and that, in any event, SSTG's mere transportation of containers that may contain household goods is not "transportation of household goods" that is subject to economic regulation by the states.

I look forward to FHWA's prompt response to this request. If further information is needed to process SSTG's request and to render the informal opinion SSTG seeks, please contact me at your earliest opportunity. Copies of cited cases and statutes are attached hereto as Exhibit B.

Sincerely,

William A. Mullins

### Attachments

cc: Suzanne O'Malley, Esquire (HCC-10)  
Mr. Thomas Vining (HIA-30)  
Christine Mullaney McKay, Esquire  
Leslie Fuller Secrest, Esquire