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**Before the  
Federal Maritime Commission  
Washington, D.C**

**Docket No. 11-22**

**NEGOTIATED RATE ARRANGEMENTS – RESPONSE TO NOI**

**Comments Submitted by**

**NEW YORK NEW JERSEY FOREIGN FREIGHT FORWARDERS &  
BROKERS ASSOCIATION, INC.**

I am David Schlenger, President of the New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. ("NYNJFFF&BA"), writing on behalf of our members.

The NYNJFFF&BA would like to commend the Federal Maritime Commission ("Commission") for allowing the usage of Negotiated Rate Arrangements (NRAs) as an alternative to tariff rate publication and for its interest in making this option more useful to NVOCCs. All issues related to tariff filing are at the heart of the day-to-day business of nearly sixty (60%) of our full time membership. Those NVOCCs range from high-volume global companies to small-size operations. The entire customer base of the NYNJFFF&BA, one of the oldest trade associations for freight forwarders, NVOCCs, and customs brokers in the United States, is made up of exporters and importers, who comprise the shipping public.

By granting the exemption to rate tariff publication, the Commission took an important step in recognizing that NVOCCs operate in a very competitive and quick-moving market with rates determined by agreements with customers and not pulled from a static tariff. This exemption is exceedingly important in bringing the regulations a step closer to business practice.

**Suggestions to Improve the Usability of NRAs**

The NYNJFFF&BA submits the following comments for your consideration. We understand that many of our NVOCC members have not chosen to exercise the NRA option to filing tariffs largely because of conditions imposed on its use. Despite the well-documented expense of maintaining tariffs, many NVOCCs have found that the benefits of offering NRAs to their customers are not sufficient to overcome the costs and compliance risks due to the following limitations. Even among our members who have partially opted to use NRAs, they have found that there is a big personnel, time, and system cost associated with compliance and administration.

- The record keeping requirement to match the customer's acceptance of each rate and its corresponding shipment is very time consuming. In periods like the present, when rates and surcharges are fluctuating on a daily basis, NRAs must be constantly updated. The customer

acceptance has to be received in writing and linked to the shipments it covers. Whether this is filed electronically or manually, it involves setting up a new system with associated costs. To do so will absorb additional company's resources. Higher volume NVOCCs may continue to maintain their standardized rate or tariff filing system as it avoids the extra burden of proving customer rate acceptance. NRAs, as currently structured, may be more suited to very small NVOCCs that quote customers for a limited number of shipments at any one time.

We suggest that the Commission allow the option of the shipper's tendering of cargo or payment of its invoice as proof of rate acceptance. It is in the business interests of NVOCCs to be clear in presenting the costs of freight movement to their customers and to obtain their acceptance. The NVOCC should not be at risk of non-compliance if the documentary evidence of rate acceptance for any particular shipment may be missing.

The Commission has expressed confidence that each NVOCC appears best able to determine how to ensure compliance with the documentation requirements of the regulations, this should be extended to include the form of acceptance of its NRA offer. It is not in the interest of the NVOCC to move freight without the customer's authorization.

- NVOCCs should not be at risk of non-compliance if the legal name and address of the parties and affiliates is not fully stated or exact. The rate negotiated with shippers takes many forms. Often it is accomplished in quick email exchanges where full corporate identification is not written but the NVOCC offers a valid rate and the shipper representative accepts with all apparent authority to do so. This should be sufficient and the requirement in 532.5 (b) should be removed.
- While NRAs represent a welcome positive step, companies hesitating to implement their usage are finding that they are not sufficiently flexible, particularly in accommodating the constantly changing VOCC surcharges. If an NRA is not stated as an "ALL – IN" rate then it must specify which surcharges and accessorial in the rules tariff apply. Surcharges and accessorial cannot be adjusted as pass throughs from the VOCC's. The actual amount of the surcharge referred to in their rules tariff must be identified as a fixed amount in the NRA. Since this amount cannot be altered for the shipments to which the rate applies and NRAs are binding arrangements with a specific shipper, tariff filing becomes a relatively easier tool for NVOCCs to manage changes in surcharges. With tariff filing, a reduction in rates, surcharges, and accessorial can immediately take effect upon publication. With NRAs no change is allowed. This places the NVOCC using NRAs at a competitive disadvantage to NVOCCs using tariff rates and also to VOCCs. In declining rate environments, the shipping public will pay higher rates than it would if NRA's could be subject to change or amendment by mutual agreement of the parties, even after the receipt of the cargo.

In a rising rate environment the shipper also stands a good chance to benefit by paying freight costs that would be less if the NRA could be amended after the initial agreement is in place. When VOCCs are attempting to implement General Rate Increases or Rate Recovery Initiatives, they file proposed surcharges in their tariffs in order to protect their ability 30 days later to charge the higher amount. Often the amount filed is greater than the level that supply and demand can support. Since the regulations require 30 day notice for an increase in rates but allow for immediate reduction, VOCCs preserve their flexibility by filing higher rate levels. If the market does not accept the new rates or surcharges, the VOCCs will delay the effective date or file a lower amount. This strategy is a rationale response to the requirements of tariff regulations. It is also a destabilizing factor contributing to ocean freight rate uncertainty. NRAs established in this environment will have to be quoted at the highest levels reflecting the announced future surcharges in place at the time of the agreement. If those

surcharges are reduced when the shipment actually takes place, the shipper will not have any benefit because NRAs cannot be amended.

We propose that NRAs be allowed to be changed or amended by mutual agreement of the parties. This should apply even after the receipt of the cargo if mutually agreed. What is most important is that the shipper, who agrees to the NRA, accepts to have the shipment moved at the identified rate with an effective date. Furthermore, amendments to NRAs should not need to restate the agreement in its entirety. We suggest that surcharges imposed by the VOCCs can be added to an existing NRA as a pass through from the VOCC. The shipper can agree to this as an essential term of the NRA. When surcharges first came in to use, they represented costs considered outside the control of the carrier. As such, they were separate from ocean freight rates and passed on to cover temporary circumstances. The surcharges announced by the VOCCs are out of the control of the NVOCCs. Requiring surcharges to be identified as a fixed amount without subject to change limits the usefulness of the NRA. The NVOCC is caught between guaranteeing a fixed price to the shipper while facing a rapidly shifting cost basis. At present, surcharges filed in NVOCC tariffs provide a better and easier protection from rapid cost fluctuations than NRAs. This would not be the case if NRAs could be amended. NRAs should be able to pass through carrier surcharges or refer to published surcharges similar to the way carrier service contracts can refer to accessorial charges published in their tariffs or to charges published in terminal tariffs.

- The requirement to place a prominent notice on an NVOCC bill of lading that the cargo is moving under a Negotiated Rate Arrangement is not necessary and serves no purpose. The party paying the freight is already well aware of the terms of the freight offer. There is no need to indicate that it is an NRA and not a tariffed bill of lading. This requirement should be removed.
- The final rule for NRAs states: “While NRAs are defined as “written and binding” arrangements, they function more like tariff rates.” Thus the NRAs have a built in rigidity. To be more relevant and widely used they need to be a more flexible alternative to tariff filing.

#### Support for Extending the NRA to Foreign Unlicensed NVOCCs

The NYNJFFF&BA supports granting the exemption to foreign-based NVOCCs who are unlicensed, but bonded and registered.

- NRAs are an attempt to make the rate setting process more reflective of business practices and market reality. Allowing the unlicensed foreign NVOCCs to offer NRAs will further this goal while not harming U.S. licensed NVOCCs or the shipping public. In fact, U.S. licensed NVOCCs could benefit if foreign unlicensed NVOCCs can also be considered NRA shippers and can extend NRAs to U.S. licensed NVOCCs if they chose. This could also improve compliance.
- The main reason cited for not extending the exemption to foreign-based NVOCCs involved the Commission’s potential reduced ability to obtain shipping records from unlicensed NVOCCs due to their location outside the U.S. The Commission stated that their ability to protect the shipping public would be hampered. We would argue that the shipping public does not consider themselves at greater risk because it has chosen the services of unlicensed foreign NVOCCs over U.S. licensed NVOCCs. By its very decision to buy or sell internationally, the shipping public is incurring far greater risks associated with performance and payment for the goods themselves. If the shipping public is willing to take that risk, often unsecured and unprotected, they do not need protection for the much smaller risk that the

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rate they are charged for the movement may not be consistent with a rate that they agreed to pay or was tariffed. Thus, there should be no need for extra rate protection of the shipping public because the NVOCC providing the services is foreign and unlicensed. The additional bonding requirements already in place should compensate for the additional general risk.

- By treating foreign unlicensed NVOCCs differently than U.S. licensed NVOCCs, there is a definite risk that overseas countries will have a greater rationale to apply separate regulations to U.S. companies. This could put U.S. companies at a competitive disadvantage. Extending the exemption to foreign unlicensed NVOCCs is one step the Commission can take to minimizing this potential threat to U.S. companies.
- The effect on the shipping public by including foreign unlicensed NVOCCs should be neutral or positive. We believe shippers do not care if the rate is extended because of a tariff filing or a negotiated rate arrangement. Shippers decide to give freight to NVOCCs based on a variety of factors. The rate level is one of the most important factors but not the only one. If the internal processes of all NVOCCs, foreign unlicensed or U.S. licensed, allow them to take advantage of the NRAs, the shipping public will have more options and competition will be enhanced.
- As previously stated in our comments to the Notice of Proposed Rulemaking Docket No. 10-03, we believe that all entities operating as NVOCCs should be subject to the same regulations.

### Regulatory Relief

The NYNJFFF&BA believes that the time has come to review the justification for US Government regulation of ocean freight rates. Does the shipping public benefit more from NVOCCs filing ocean freight rates in tariffs or memorializing them in private Negotiated Rate Arrangements than they would if the requirement did not exist? If that were true, why don't other countries require this and why aren't shippers in other countries insisting on such a protection? We suggest that there is no longer a need. The market providing ocean freight services is so extremely diverse and competitive and can offer such an extensive variety of rate and service options that the shipping public is well served and not subject to unfair rate treatment. Technology has made information easily available to shippers enabling informed decision-making and removing the need for additional regulatory rate protection. If the shipper disagrees that a rate applied to a freight movement is not correct, the NVOCC and the customer will either find a satisfactory commercial agreement based on their business relationship or seek alternatives with FMC options for dispute resolution or the application of contract law.

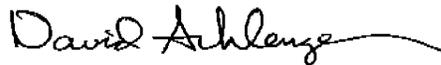
The maritime world was a very different place when tariffs first came in to being to protect the shipping public from unfair and discriminatory practices and provide an equal rate to all similarly situated shippers. Shippers tendered cargo for common carriage. This was true for movements by ocean, air, and overland trucking. Today, rates are negotiated individually with customers. This is true for movements by ocean, air, and overland trucking. The deregulation of the airline and trucking industries allowed shippers to move freight quickly at competitive market rates without the legal requirement of filing publically available tariffs or retaining written agreements. Notwithstanding the risks of rate volatility, shippers are not seeking a return to the regulated rate environment in those industries. Why is the U.S. maritime industry and in particular NVOCCs still subject to rate filing requirements? Why will a carton tendered for air freight or over the road carriage be moved without a government mandated rate recording burden but the same carton if shipped by ocean could not?

We believe that the rate requirements being placed on NVOCCs are no longer necessary and use both private sector and government resources that could be better spent in adding value to our economy. The industry is looking for an explanation as to why rate regulation, which serves no useful purpose, could not be removed. Regulation and enforcement of transactions that are agreed to by both parties are a waste of resources at all levels. Most commercial transactions operate very well without this type of government administrative burden. In liner shipping, transactions take place all over the world every hour of every day without FMC oversight and without problem or disadvantaging the shipping public. We ask the Commission to consider the removal of both requirements: the rate tariff filing and the Negotiated Rate Arrangements

We support the FMC's top priority as expressed by Chairman Lidinsky in his recent Congressional testimony as "assisting our economic recovery for job growth" through "(1) working to ensure our maritime transportation system efficiently supports growing exports; and (2) providing maritime businesses regulatory relief so they and their customers can hire American workers." Without this regulatory burden, NVOCCS could better afford to expand their businesses, hire more employees, and increase their productivity. The resources of the FMC should not be wasted on regulating how consenting parties memorialize their freight arrangements.

I declare under penalty of perjury that I have read the foregoing and it is true and correct to the best of my knowledge, information and belief.

Executed on March 26, 2012



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