

**BEFORE THE
FEDERAL MARITIME COMMISSION**

DOCKET NO. 12-05

NON-VESSEL OPERATING COMMON CARRIER SERVICE ARRANGEMENTS

**COMMENTS OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS
ASSOCIATION OF AMERICA, INC.**

Consistent with the Notice of Inquiry (“NOI”) that was issued in this Docket on April 12, 2012, the National Customs Brokers and Forwarders Association of America, Inc. (“NCBFAA”) respectfully submits its comments.

The NCBFAA is the national trade association representing the interests of freight forwarders, non-vessel operating common carriers (“NVOCCs”) and customs brokers in the ocean shipping industry. The overwhelming majority of the Association’s 773 members, as well as the approximate 1400 members of its 28 regional associations, are actively involved in providing NVOCC services. As such, the Association is intimately familiar with the regulatory issues that affect how the members do business and how the Commission’s regulations affect how that business is done.

As the Commission is well-aware, the NCBFAA has been interested and active in seeking to mitigate what it views as unnecessarily burdensome regulation. Although the Association is supportive of governmental oversight, that are necessary to prevent or curb abuses, it is also cognizant of the need to make the NVOCC industry more competitive, efficient, and responsive to market demands of both the shippers they serve and the vessel operators they utilize.

The NCBFAA greatly appreciates the Commission's recent efforts to reduce unnecessary regulation. The Commission's recent actions to grant an exemption from mandatory NVOCC rate tariff publication through the NVOCC Rate Agreement ("NRA") process¹ and to further eliminate several regulatory requirements that were deemed unnecessary² have been a significant step forward. The Association accordingly, welcomes the opportunity to provide its comments concerning the NSA procedures and how those should be modified to make them more useful to the trade.

COMMENTS

In this NOI, the Commission has raised two separate questions. First, it has inquired whether the NSA exemption should be modified to allow two or more unaffiliated NVOCCs to joint offer such contracts with their shipper customers. Secondly, the Commission has asked whether the NSA rules could be made less burdensome and more effective in achieving the objectives of the Shipping Act.

In preparing to provide the comments of its members, the NCBFAA sent a survey to its membership requesting information on various aspects of these questions. Only 48 members responded to the survey, which perhaps suggests that their views may not necessarily be representative of the views of the entire membership or the NVOCC industry. On the other hand, few NVOCCs have elected to utilize the NSA procedure for a number of reasons, some of which are discussed below. Consequently, it is more likely than not that the survey size does tell an important story and the companies that responded to the survey were particularly motivated to

¹ See Docket No. 10-03, *Non-Vessel Operating Common Carrier Negotiated Rate Arrangements*, 76 Fed. Reg. 11351 (March 2, 2011).

² See decision in Docket No. 11-22, *Non-Vessel Operating Common Carrier Negotiated Arrangements; Tariff Filing Exemption* (decision served June 5, 2012).

address the issues either because they are actively using NSAs or because they at least would consider doing so under more favorable circumstances that exist at present.

A. The Prohibition Against Multiple NVOCCs Using NSAs Should be Eliminated

Twelve of those NVOCCs that responded to the NCBFAA survey (or 26%) indicated that it would be helpful if they had the authority to join with another NVOCC when entering into an NSA with a shipper. Conversely, the remaining 74% indicated that this was not a significant issue for them.

While the NCBFAA believes that this option will not be used often in view of the competitive nature of the NVOCC industry, there is little reason to arbitrarily limit the ability of NVOCCs to act jointly with respect to NSAs. It is now clear that any actions they may engage in will not be immune from the antitrust laws. To the contrary, any collective action by NVOCCs that contravenes either competition laws or the Shipping Act would be subject to redress by governmental authorities or the shippers that may have been the subject of any malpractices. So, while it would probably be somewhat unusual for a shipper to want to deal with multiple NVOCCs, and probably more unusual for multiple NVOCCs to want to work together, the Association does not see a reason why that option should be foreclosed. To the contrary, this would just appear to be a competitive option that need not be foreclosed by government regulation.

B. The NSA Process Should be Simplified

With respect to the second question – namely, how to make the NSA process less burdensome – the NCBFAA has long believed that the rigid regulatory filing and essential terms publication requirements in 46 C.F.R. Part 531 have been an impediment to any wide-spread utilization of this mechanism by the trade. Of the parties that responded to the survey, 36 (82%)

indicated that they had not entered into NSAs with customers because the process is too complex. Breaking that down further, 71% felt that the filing requirement was too burdensome, while 61% said that the need to memorialize the essential terms of the NSA in a tariff publication was also unnecessarily burdensome. Regardless of the sample size, those results are compelling.

Ever since this issue was first raised in 2003, the NCBFAA has contended that the requirements that the filing and publication requirements were unnecessary. Those regulatory obligations were designed by Congress, when considering the Ocean Shipping Reform Act (“OSRA”) and the ability for carriers to enter into confidential service contracts, to facilitate the Commission’s oversight of vessel operators in order to prevent collusive abuse of their anti-trust immunity. For example, former Chairman Harold Creel, when testifying concerning one of the bills that ultimately became enacted as OSRA, discussed at some length the concerns that both Congress and the Commission had about inappropriate collusive behavior of the ocean carriers in in this area. As particularly relevant here, Chairman Creel stated:

To protect shippers against this kind of maneuvering, we recommend this bill be revised to require at minimum that all contracts be filed in their entirety with the FMC or its successor. The idea is not to subject the agency into the legitimate contracting process, but rather to ensure that filed contracts are truly individual carrier undertakings, and not the product of collusive activity enjoying antitrust immunity.³

Obviously, NVOCCs do not have antitrust immunity under the Shipping Act and operate in a highly competitive, diverse and unconcentrated environment in which there no realistic likelihood that concerted action would be possible or effective in constraining capacity, controlling prices or otherwise depriving shippers of competitive transportation services.⁴ That point is particularly underscored by the fact that the Department of Justice had repeatedly

³ Statement of the Honorable Harold J. Creel, Jr., Chairman, Federal Maritime Commission, before the Committee on Commerce, Science and Transportation, Subcommittee on Surface Transportation and Merchant Marine, United States Senate (March 20, 1997) at 5.

⁴ In the event that such collusive behavior occurred, it would not be immunized from the antitrust laws.

endorsed the NCBFAA's request to totally exempt NVOCCs from mandatory rate tariff publication. Under the circumstances, the requirement to file service contracts with the Commission and publish essential terms continues to have little or no practical value.

It is similarly clear from this survey, however, that the burden and costs of filing service contracts and publishing essential terms is a substantial impediment to a broader utilization by the NVOCC industry. While NVOCCs do often enter into separately negotiated contracts concerning rates, volumes, service and various commercial terms, those tend to be broad based logistical arrangements that cover more than just port-to-port or intermodal rates. Hence, they do not fit into the type of form or format that is associated with the ocean service contracts of the vessel operators. Moreover, unlike the vessel operators that must file their service contracts as part of their normal business (and as one of the costs associated with their antitrust immunity), NVOCCs are not set up administratively to do the filing of contracts and amendments required by Part 531.

Notwithstanding this, in issuing its final rule implementing the NSA exemption, the Commission concluded that NVOCCs should have the same filing and publication obligations for NSAs as vessel operators have for service contracts. The Commission's reasoning at that time was not based on the notion that those requirements were somehow necessary for it to police and oversee the industry in order to prevent inappropriate collusive behavior. Rather, this requirement was viewed by the agency at that time as a "leveling of the playing field," in that this might somehow provide NVOCCs with a competitive advantage over vessel operators.

The sole support for this regulatory requirement is found in the following statement:

Either eliminating the tariff publication requirement completely and/or eliminating the condition of the exemption that all NSAs be filed with the Commission and their essential terms be published could substantially impact the competition between large NVOCCs and VOCCs (who continue to be required to publish their tariffs, file service contracts and

publish service contract essential terms) by continuing to impose costs on one while relieving costs for the other.

Non-Vessel-Operating Common Carrier Service Arrangements, Final Rule, 69 Fed. Reg. 75850, 75852 (December 20, 2004).

Much has been learned in the intervening eight years since the Commission expressed those concerns. The law is now clear that NVOCCs would not be accorded antitrust immunity if they were providing services pursuant to some exemption issued by the Commission. And, of course, the Commission has now granted the NRA exemption, correctly finding that the exemption would not result in any substantial reduction in competition or otherwise be detrimental to commerce. Moreover, since NVOCCs must necessarily use the services of vessel operators, there is no rational basis for concluding that freeing NVOCCs of unnecessary costs somehow adversely affects the vessel operators.

In the course of the Commission's normal oversight of the activities of the various carrier Agreements, the FMC has routinely reviewed the carrier service contracts to determine whether their actions have raised any issues under the Act. The NCBFAA is not aware that the Commission has had similar occasion to investigate the activities to investigate the activities of NVOCCs due to their NSA contracting practices. If the Association's understanding is correct, it would appear that the only reason NSAs are filed and that their essential terms are published is that the vessel operators are required to do so. That is scarcely a reasonable justification for imposing unnecessary regulatory burdens on NVOCCs that ultimately, drive up their cost of operation, reduce the benefit of the exemption that the Commission issued in 2004, and run afoul of the Congressional and Presidential directive to reduce or eliminate unnecessary and wasteful regulations.

The Commission has properly concluded on several occasions now – first with respect to issuance of the NSA exemption in 2004 and more recently with the NRA exemption in 2011 – that rates and service issues between NVOCCs and their customers are privately negotiated, that the continued publication of rate tariffs serves no useful public purpose,⁵ and that the elimination of rate tariffs will both foster competition and not be detrimental to commerce. The NCBFAA believes that these findings, and the experience in the post-OSRA environment, warrant moving forward to completely eliminate all regulatory filing and publication requirements of NSAs.

In the Association's view, contracts between NVOCCs and their shipper customers are not different than the commercial arrangements between vendors and customers in other areas of transportation or commerce in general. As is the case with NVOCCs, the shipper community has consistently testified in these proceedings that continued regulation of these issues is not necessary and serves no useful purpose. As long as shippers and NVOCCs are willing to enter into arm's length contractual relationships, which is possible without regulatory constraints in every other mode of transportation (including ocean transportation moving in the domestic trades), there is no apparent reason why the international ocean trades should be subject to the formalities, burdens and costs associated with continued regulation in this area.

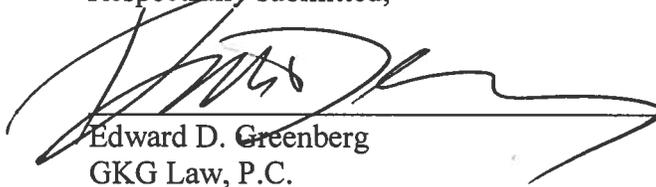
As such, the NCBFAA requests that the Commission initiate a rulemaking with a view toward significantly amending the existing regulations in part 531. More specifically, while the Association agrees that NSAs should continue to remain confidential and that the record keeping requirements of §531.12 could remain applicable, the Commission should consider eliminating

⁵ An exception to this may be applicable to the movement of household goods for non-commercial shipper accounts. The NCBFAA is aware of and sympathetic to the problem that currently exists in many cases with respect to the movement of household goods and personal effects for individual, non-commercial shippers and believes that this is an area where continued FMC regulation may be useful in curbing abuses. Hence, the comments submitted here do not pertain to the movement of household goods for private, non-commercial shippers.

all of the remaining regulations in this part except for the sentence in §531.1 which grants the exemption.

Accordingly, the NCBFAA suggests (1) that the NSA regulation be expanded to permit multiple NVOCCs to jointly enter into such contracts with their customers; and (2) that the Commission initiate a rulemaking to eliminate: the requirement that NSAs be filed with the agency, the need to publish essential terms in tariffs, and the other unnecessary provisions in 46 C.F.R. Part 531.

Respectfully submitted,



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