BEFORE THE

FEDERAL MARITIME COMMISSION

DOCKET NO. 12-07

NOTICE OF INQUIRY

SOLICITATION OF VIEWS ON REQUESTS TO DEVELOP AND RELEASE CONTAINER FREIGHT RATE INDICES FOR U.S. AGRICULTURAL EXPORTS BASED ON A SAMPLING OF SERVICE CONTRACTS FILED WITH THE FMC

COMMENTS OF

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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The National Industrial Transportation League ("NITL" or "League") submits these comments in response to the Notice of Inquiry ("NOI") of the Federal Maritime Commission ("FMC" or "Commission") regarding the development and release by the Commission of container freight rate indices for U.S. agricultural exports.[1] The Commission has opened this proceeding in response to informal requests from certain large agricultural exporters, intermediaries and derivative brokers who are interested in obtaining access to container freight rate indices that pertain specifically to agricultural export commodities. The League applauds the Commission for exploring ways to facilitate exports of agricultural commodities and for recognizing that such indices can be a useful tool for managing transportation risks and gathering market intelligence.

I. IDENTITY AND INTEREST OF THE LEAGUE

The League is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. The League was founded in 1907, and has more than 500 company members. These company

[1] Notice of Inquiry, 77 Fed. Reg. 31,013 (May 24, 2012).

members range from some of the largest users of the nation's transportation system, to smaller companies engaged in the shipment and receipt of goods. A substantial majority of the League's members are classic "shippers," that is, beneficial owners of goods transported using all modes of transportation, including carriage by ocean liners in the U.S. foreign commerce.

II. INTRODUCTION

Freight rate indices track and quantify trends in the freight rates being assessed in a given ocean shipping market. Such indices can provide valuable insight into changes in freight rates that occur over time and can be used to hedge rate risk and adjust contract rates. As noted in the Commission's NOI, a variety of container freight indices exist, but none are particularly useful for U.S. agricultural exports.[2]

Several agricultural interests have apparently asked the Commission to consider filling this index gap, because the Commission has access to all freight rates set forth in service contracts that are filed confidentially with the Commission pursuant to the Ocean Shipping Reform Act of 1998 ("OSRA").[3] These parties desire greater transparency of freight rates for U.S. agricultural exports and may use a new index to hedge the risk of fluctuating rates. The Commission has issued the NOI to evaluate whether it should develop and publish a freight rate index for U.S. agricultural exports that is based on service contract rates. To protect the identity of shippers and ocean carriers, the Commission would aggregate the rate data that it extracts from service contracts before releasing it in an index.[4]

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[2] 77 Fed. Reg. 31014.

[3] Ocean Shipping Reform Act of 1998, Pub. L. No. 105-258, 112 Stat. 1902 (1998).

[4] 77 Fed. Reg. 31014.

III. COMMENTS

In response to the NOI, the League conducted a survey of its members, which forms the basis for the League's comments. The survey sought responses to a number of questions that the Commission posed in the NOI as well as additional questions posed by the League. As a general matter, the survey responses demonstrated that League members are interested in freight rate indices for the market intelligence they offer. However, only a small minority of respondents presently believe that they would use a container freight index to adjust contract rates or address rate volatility. Additionally, the members expressed strong concerns over the use of confidential service contract data in the development and administration of the index.

A. The Commission Should Not Use Confidential Data from Service Contracts.

The League has been a longstanding and strong proponent of the right of shippers and carriers to enter into customized confidential contracts in the U.S. foreign trades. Indeed, the League took a leading role in advocating for passage of OSRA, which first authorized shippers and carriers to negotiate confidential rates and service terms for international ocean liner services.[5] The protection of confidential contract information was a fundamental principle of OSRA that was fervently supported by the League. Accordingly, the League is very concerned that the use of confidential rate and service information to create a new index for export agricultural commodities could inadvertently compromise such data.

Prior to OSRA, carriers published their contract rates and made them available to other similarly-situated shippers. Thus, carriers had visibility of the contract rates offered by their competitors and shippers had the potential to directly access the essential terms of their competitors' service contracts. Carriers, therefore, were reluctant to grant customized contract rates and terms to any particular shipper. Shippers were not able to negotiate contracts based on

[5] *Id.* § 106(b) (codified as amended at 46 U.S.C. § 40502(b)(1)).

their own specific business objectives and service requirements. Accordingly, the transparency of contract terms reduced both the commercial and competitive benefits that can be achieved through confidential service contracts for shippers and carriers alike.

Accordingly, OSRA removed the transparency that burdened the service contract process. Specifically, OSRA eliminated the publication in tariffs of line-haul rates and service commitments as essential terms of a service contract.[6] Shippers were no longer entitled to the same rate and service commitments negotiated by other "similarly-situated" shippers. Also, OSRA prohibited carriers from sharing the confidential terms of their service agreements with each other by prohibiting ocean common carrier agreements from "requir[ing] a member of the agreement to disclose a negotiation on a service contract, or the terms of a service contract, other than the [essential terms] required to be published."[7]

The Commission has observed that OSRA's "changes regarding the confidentiality of service contracts have had a significant impact on the way service contracts are developed and negotiated."[8] The Commission also noted that "confidentiality under OSRA has provided shippers and carriers with the privacy they deem necessary to freely transact business"[9] and allowed them to be "more focused on achieving their individual rate and business objectives through contract negotiations."[10] Ultimately, OSRA's confidentiality provisions have fostered a more competitive liner carrier industry in the U.S. trades.[11]

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[6] *Id.* § 106(b) (codified as amended at 46 U.S.C. § 40502(d)).

[7] *Id.* § 104(a)(3) (codified as amended at 46 U.S.C. § 40303(a)(1)(B).

[8] Fed. Mar. Comm'n, *The Impact of the Ocean Shipping Reform Act of 1998* at 21 (2001) [hereinafter *OSRA Study*].

[9] *Id.* at 23

[10] *Id.*

[11] *See* 46 U.S.C. § 40502(d).

Thus, OSRA's confidentiality provisions have directly led to marked improvements for shippers in the service contract process. In fact, shortly after OSRA became law, the Commission noted that despite shippers' disadvantage relative to carriers in terms of market knowledge,[12] "confidentiality clauses and provisions increasingly are being added to contracts to restrict the disclosure of unpublished contract terms."[13] Accordingly, the League was a strong proponent of the reforms brought about by OSRA and firmly believes that confidential contract information should be protected to the maximum extent possible.

The importance to shippers of the confidentiality of their service contract terms was reflected in the responses to the League's survey of its members. Although the members were interested in the market intelligence offered by a freight index, the vast majority of respondents opposed the use of their own confidential service contract data in the development of a freight index. Further, if the Commission were to decide to use service contract data in an index, some League members expressed the desire to "opt-out" of the index in order to prevent the use and potential disclosure of their confidential data.

Thus, while the League commends the Commission for exploring the development of a freight index for agricultural exports, including mechanisms to aggregate service contract data, the League does not believe that any practical failsafe mechanism exists for protecting the identity or data of some contracting parties in all cases. Even the most broadly-based freight indices would require the use of service contract data related to specific commodities and/or trade routes. In some cases, especially where a few large shippers predominate a trade, aggregated data could be readily attributed to particular shippers. This not only could undermine

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[12] Although shippers no longer have access to the contract rates charged by carriers, a carrier can obtain an accurate view of market rates by simply surveying its own service contracts. Moreover, carriers, unlike shippers, can meet and discuss the ocean transportation market based on their antitrust immunity afforded under the law.

[13] *OSRA Study*, *supra* note 8, at 22.

shippers' competitive positions relative to each other, but it also may erode competition among carriers by giving them the ability to negotiate rates with enhanced knowledge about the rates of their competitors.

Reliance on confidential contract data to develop a freight index may present other challenges. There may be wide variation in the rates and terms negotiated by small versus large volume shippers in contracts, which could skew the results of the index depending on the data used by the Commission. Also, contracts of a longer duration that do not include a rate adjustment mechanism have the potential to generate ambiguous data that may not be reflective of changing market conditions. Thus, questions exist over whether contract data or spot rates offer a more reliable indicator of the market conditions underlying the freight index. Indeed, in a recently published white paper on container freight indices, Drewry Supply Chain Advisors expressed a preference for establishment of an index based on the spot market rather than contract data: "It is important that the selected index is based on all-in rates and follows the spot market and not the contract market, or a combination of both. Otherwise the contract will fail to deliver on its primary objective of reducing the differential between the contract and spot market rate and the corresponding risk of contract default."[14]

B. Publishing Freight Indices Is Not the Role of the Commission.

In the NOI, the Commission has also asked whether publishing a container freight index based on contract data is an appropriate role for the agency. In response, the League notes that it greatly appreciates the Commission's efforts to identify how rate indices can be beneficial to shippers and carriers, but does not believe that the Commission's role properly extends to the establishment and administration of freight rate indices. Historically, the Commission's primary duties have been limited to administering the Shipping Act of 1984, as amended by OSRA.

[14] *Index-Linked Container Contracts,* Drewry Supply Chain Advisors, June 2012 at 13.

Thus, the Commission serves as a regulator and enforcer of the statute and rules promulgated thereunder. Moreover, Congress has limited the Commission's authority by assigning it specific duties and powers.[15] Publishing a freight index would be a significant departure from the Commission's historical and statutory roles.

As a justification to depart from its role as a regulator and to engage in the commercial dealings between shippers and carriers by developing a freight index, the Commission emphasizes a purpose of the Shipping Act of 1984 and the President's National Export Initiative. Specifically, in the NOI, the Commission notes that one of the purposes of the Shipping Act is to "promote the growth and development of the United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace."[16] The Commission also noted that the President has directed the Commission to direct every available resource toward the President's goal of doubling U.S. exports by 2015.[17] While the League believes that these are important goals, they should merely guide the Commission in carrying out the duties and powers that Congress assigned to it, rather than justify a departure from the role that Congress circumscribed.

The Commission's duties and powers do not involve the creation of freight indices that define the market using rate data that has been provided in confidence to the Commission. Through these indices the Commission could influence one of the most intimate aspects of service contract negotiation—rate setting. This is far removed from the traditional role of the Commission to prevent the assessment of charges other than the contract rate,[18] discrimination

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[15] *See* 46 U.S.C. § 305 (authorizing the Commission to prescribe regulations to carry out its duties and powers). The Commissions duties and powers are enumerated at 46 U.S.C. §§ 40101-44106.

[16] 46 U.S.C. § 40101(4).

[17] 77 Fed. Reg. 31014.

[18] 46 U.S.C. § 41104(1) and (2).

against a port,[19] unreasonable refusals to deal or negotiate,[20] unjustly discriminatory or unfair assessments or charges in assessment agreements[21] and unjust and unreasonable rates of controlled carriers,[22] which are the limits that Congress set for the Commission's role concerning freight rates in service contracts.

The development of rate indices that define the ocean shipping market falls more appropriately within the purview of private enterprise, which has shown that it has the capability to develop and publish freight rate indices. In fact, the Commission referenced in its NOI multiple rate indices that are published by private entities—the Drewry Freight Insight Index; Container Trade Statistics Index; Transpacific Stabilization Agreement Index; Drewry-Cleartrade World Container Index; and Baltic Dry Indices.[23] Importantly, however, the League does not support the Commission providing filed confidential contract data to a private third party for the purpose of constructing and publishing freight rate indices. The release of private confidential contract data should not be authorized without the express written permission of the contracting parties.

Instead of occupying a field that private enterprise has occupied competently, the Commission should use its resources to monitor and enforce violations of the statutes and regulations it administers. Publishing a reliable freight index requires the long-term dedication of substantial resources. The League is concerned that this will ultimately require the Commission to divert its attention and resources from the fulfillment of its statutory duties.

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[19] 46 U.S.C. § 41104(5) and (9).

[20] 46 U.S.C. § 41104(10).

[21] 46 U.S.C. § 40305(c).

[22] 46 U.S.C. § 40701(b).

[23] 77 Fed. Reg. 31014.

IV. CONCLUSION

For the foregoing reasons, the Commission should refrain from using confidential data from service contracts to develop and publish freight rate indices. Although freight rate indices can provide valuable market insight and be used to manage transaction risks, these benefits do not warrant the use of confidential data from service contracts. Not only would this breach the confidentiality afforded to this information, but it also would undermine the OSRA reforms that have led to a more competitive liner carrier industry in the U.S. trades. In addition, the development and publication of freight rate indices falls outside the role of the Commission and would divert valuable resources from the fulfillment of the Commission's statutory duties.

Respectfully submitted,

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