

**Before the
FEDERAL MARITIME COMMISSION**

In the matter of

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

FMC Docket No. 12-07

**COMMENTS OF
WESTBOUND TRANSPACIFIC STABILIZATION AGREEMENT**

The Westbound Transpacific Stabilization Agreement (“WTSA”) hereby submits the following comments in the above Notice of Inquiry (“NOI”). WTSA is a rate discussion agreement with 10 ocean common carrier members. Its geographic scope is the export trade from the United States to Asia. Accordingly, its members have an interest in the issue of a possible FMC rate index in U.S. export trades.

WTSA does not object to the use of indices *per se*. Its members use indices for various purposes in a variety of trade lanes, and they can be useful in the right context. However, that said, WTSA has serious concerns with the Commission establishing and administering a commodity rate index in U.S. export trades as suggested in the NOI. No statutory authority has been cited in support of the index, and WTSA is not aware of any similar indices being published by other federal agencies based on data filed confidentially with the agency. WTSA also has concerns about protection of confidentiality of service contract rates, whether there is a demand

for an index as proposed, and the effects on market rate volatility. If there is sufficient interest and support, the private marketplace can develop such an index.

Not every question in the NOI pertains to WTSA, and several questions seem related to each other. Accordingly, the below comments provide general input on the subjects requested, with cites to the general questions being addressed.

**AN INDEX USING FILED RATES WOULD
COMPROMISE THE CONFIDENTIALITY GUARANTEED
SUCH FILINGS UNDER THE SHIPPING ACT (Qs 1, 3, 6, 7)**

WTSA has a fundamental concern about an index that would be based on service contract rates filed confidentially with the Commission, especially in the U.S. export trades (Question 3). Those rates are negotiated by the parties and filed with the Commission on the understanding that the Commission will keep them confidential. The Shipping Act provides that “Each service contract . . . shall be filed confidentially with the Federal Maritime Commission.” 46 U.S.C. § 40502(b)(1). *See also*, 46 CFR 530.4. While rates are an essential term of any service contract, they were intentionally excluded from the list of terms that would be published in a carrier’s essential terms publication. 46 U.S.C. § 40502(c) and (d); *see also*, 46 CFR 530.8(b); 530.12(a). Carrier agreements are prohibited from requiring their members to disclose “the terms of a service contract, other than those terms required to be published under section 40502(d) of this title [which does not include rates].”

The legislative history of the Ocean Shipping Reform Act of 1998 (“OSRA”), which eliminated prior Shipping Act provisions making contract rates public, emphasized the importance of contract rate confidentiality. In fact, its main purpose was to protect export

shippers. The Senate Commerce Report summary of major provisions included the following policy:

Protect U.S. exporters from disclosure to their foreign competitors of their contractual relationships with common carriers and proprietary business information, including targeted markets. Report of the Committee on Commerce, Science, and Transportation on S. 414 (July 31, 1997) at 6.

The Committee stated the reason for this policy as follows:

Many shippers, especially large volume shippers, expressed concern that the transparency of the U.S. system disadvantages U.S. shippers with respect to their foreign competitors in third markets. In general, foreign nations have not required transparency of rates or services, and their shippers' rates are not publicly accessible. *Id.* at 4.

The House Committee echoed the Senate's concern about public contract rates:

. . . American exporters are currently at a disadvantage because their transportation costs are public, where their foreign competitors' costs are not made public. Report of Committee on Transportation and Infrastructure to accompany H.R. 2149 (November 1, 1995) at 3.

Of course, the confidentiality of service contract rate filing is important to both parties to the contract, including carriers. Carriers compete with other carriers for cargo, so they too file contract rates in reliance on the assurance of confidentiality.¹

The NOI suggests that service contract rate data might be aggregated "at an appropriate level" before an index is published, to protect confidentiality. There is serious question whether aggregation would effectively protect confidentiality in U.S. export trades. For one thing, the U.S. export markets tend to be fairly concentrated, with a relatively small number of shippers. For example, for Cotton, one of the commodities mentioned for possible inclusion in the index, the top 20 shippers in the export market to the Far East (i.e., the WTSA scope) represent 92.6%

¹ It would be ironic indeed if the Commission compromised confidentiality at the same time as it is examining concerns about keeping U.S. shippers competitive as against their competitors in Canada and Mexico. See Notice of Inquiry 11-19. The proposed rate index would provide Canadian and Mexican shippers transparency as to the rates of U.S. shippers, but not vice versa.

of the market. [Source: PIERS report for February 2011 to January 2012] A single Cotton shipper accounts for 30.4% of the market. Aggregation of indexed rates would not be likely to mask the rates given to that shipper, which dominates the market, or to other shippers in the market. The index would represent in large part the rates for the one shipper, and secondarily to the top 20 shippers.

The Far East Grain market is similarly concentrated, with the top 20 shippers accounting for 88.9% of the trade. The other commodities contemplated are not quite as concentrated as the Cotton and Grain markets, but there is a relatively small number of shippers of those commodities as well. Moreover, since the rates in the Transpacific export market are so low, there is a relatively small range of contract rates for the shippers in that market. The combination of these factors means that someone reviewing an index, while perhaps not being able to determine a particular shipper's rate, would have a good idea of major shippers' rates within a relatively small range.

Indeed, there is an inherent tension between a commodity-specific rate index showing dollar amounts and service contract rate confidentiality. The very purpose of a rate index would be to provide transparency of shippers' rate levels on an ongoing basis. If it did not do that, it would not be helpful to the shippers and carriers using it. However, the more transparent it is, the more it would compromise confidentiality as shown above.

The NOI indicates that certain exporters have urged the Commission to consider publishing an export rate index. Such requests could be construed as an expression by exporters that they are not concerned about the confidentiality protections accorded them by Congress in OSRA. However, the Commission should be very cautious about compromising confidentiality, in contravention of a Congressional finding, based on the input of a handful of exporters. While

the Shipping Act does not prevent individual shippers and carriers from disclosing service contract rates if they choose to do so, the Act does provide that mandatory contract filings will be kept confidential by the Commission. Commission use of confidentially-filed information in a public index is a far different thing from shippers or carriers individually (and voluntarily) waiving confidentiality.

In this regard, Question 1 of the NOI raises an important point. If there is a demand for an index, the private sector is well positioned to develop it, and there is no barrier to them doing so. The Commission should let the market work in this area. As the NOI notes, six indices have been published by private entities in various trades (mostly import). There is obviously an interest in such indices that induced the entities to publish them. If there is sufficient justification or interest in such indices for the export trades, the market will similarly produce them. There is no need for the FMC to administer such an index. Drewry already has an export index, and press reports indicate that other private entities are exploring development of export indices.

Some private companies may say that they cannot develop a meaningful index without having access to the confidential filed service contract rate data. Again, if that were the case, it would indicate that there is insufficient interest to support an FMC index. Multiple indices in other trades, including the SCFI and CCFI indices, successfully rely on the voluntary cooperation of carriers or shippers to provide information. If a significant number of export shippers really believe an index would be beneficial to them, they should be willing to voluntarily disclose rate information to index publishers. If they are not willing to do that, it is an indication that there is not sufficient shipper interest to justify an index by the Commission or anyone else.

In response to Question 7, WTSA believes that if the Commission were to proceed with an index (which WTSA does not concede is advisable), either party to a service contract should have the option of having its rates excluded from the index. Given the concerns about confidentiality discussed above, and the clear Congressional policy on confidentiality of contract rates, no party should be forced to have its rates included. However, the Commission should not place the burden on shippers and carriers to affirmatively opt out. A better solution would be to only use the rates of shippers and carriers that affirmatively agree to participate.

THERE IS NO DEMONSTRATED NEED OR DEMAND FOR AN EXPORT RATE INDEX PUBLISHED BY THE FMC (Qs 2, 4, 9, 10, 11)

WTSA does not believe there is sufficient justification or need for the Commission to publish an export rate index. Two possible uses for the index have been mentioned. The first is to index contract rates for adjustment during the term of the contract. The Commission staff's presentation at the May 16, 2012 meeting shows that there is very little demand for indexing, especially in the U.S. export trades, at the present time. Only 61 out of the approximately 45,000 service contracts (and roughly 350,000 contract amendments) filed with the Commission refer to indexes, and the number of shippers represented may be lower, since some shippers may have multiple indexed contracts with different carriers. Out of those 61, staff indicated that only 2 included any reference to U.S. export trades.

Commission staff also indicated that all but one of the 61 current indexed contracts involve multi-year contracts. There are virtually no multi-year contracts in the export trades, at least the Far East export trade. Accordingly, there is no indication of a meaningful demand for an export index for use in indexing service contract rates.

The second suggested use for an export index is as a basis for investment vehicles to hedge against sudden or unexpected rate increases. Aside from the merits, WTSA is not aware

of any Shipping Act or other authority for the Commission to use its scarce resources to facilitate the development of investment vehicles.

Moreover, there is no demonstrated need for hedging. As the Commission can readily see from the monitoring reports filed with it by WTSA carriers, as well as from numerous recent news and consultant reports, rates in the Transpacific export trades have been at very low levels for many years. Most recently, according to WTSA member data, Transpacific westbound rates have dropped roughly 18% since March of 2010. The vast majority of changes in rate levels during contract terms are down, not up. Sudden or unexpected rate increases have not proved to be a problem, at least in the Transpacific export trade.

Service contracts are ultimately the most effective hedge against rate increases. By definition, a service contract that provides the shipper with a fixed rate for a specified period of time protects the shipper from unexpected increases. Service contracts are the method contemplated by the Shipping Act to permit shippers and carriers to hedge against future changes in rates and other terms of service.

Some exporters have apparently alleged that “ocean carriers generally are reluctant to offer them service contract rates that are valid for more than 30 to 60 days.” NOI at 4-5. No evidence or support is cited for this allegation, and it is factually incorrect in the Transpacific trade. The Commission can verify in its contract records that at least two of the commodities mentioned in the NOI, Cotton and Frozen Meat, are generally contracted for on an annual basis. It is true that contracts for Hay and Grains tend to be of shorter duration, often quarterly. However, there is no evidence that that is because carriers are reluctant to contract for longer periods. The contract durations are the product of negotiations between both parties. Moreover, there are other factors, such as the duration of growing seasons, that may affect the contract

periods agreed to by the parties. It is not the case, however, that carriers are unwilling to enter into longer term contracts for these commodities.

For the above reasons, WTSA carriers have not generally sought to index contracts in the WTSA trade. While questions 2, 10, and 11 appear to be aimed primarily at shippers, carriers have not sought to trade in freight derivatives and would not if they were offered.

**AN FMC FREIGHT INDEX WOULD PLACE U.S. EXPORTERS
AT A COMPETITIVE DISADVANTAGE (Qs 5, 8, 12)**

By publishing an index, the FMC would be injecting itself into a commercial marketplace and undoubtedly affecting that marketplace. WTSA does not believe that is an appropriate function of a regulatory agency. Public disclosure of confidential contract rate levels through an index could affect the export market. As found by Congress, it would place U.S. exporters at a competitive disadvantage as against shippers in other countries where rates are not transparent.

**THERE ARE NUMEROUS PRACTICAL PROBLEMS
WITH DEVELOPING AN ACCURATE EXPORT RATE INDEX**

There are a number of factors that would make it very difficult for the Commission to establish an accurate and useful rate index for export commodities. Moreover, as discussed above, the more accurate a commodity-based index is, the greater the concerns that it would compromise confidentiality. Among the practical problems are the following.

1. It would be very difficult to develop an accurate database of rates from which to produce the index. It would also be difficult to determine what carriers and shippers would provide the most accurate basis for a representative index. For example, if the Commission included Carrier A, that carrier may be a major carrier in the trade as a whole, but a minor carrier of Hay. Thus, Carrier A's rates may be representative of some commodities, but not of Hay. Moreover, even for the same carrier, different customers may have different rates based on the

volume involved. For example, a large Grain shipper may not ship significant volumes with an otherwise large carrier.

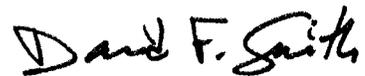
2. Of the suggested commodities, Cotton, Grain, and Meat move largely from inland locations, many of which are unique to particular large shippers. Only Hay shipments tend to be more port to port. Thus, if inland shipments were not included in the index, it would not be very representative of actual moving rates. However, the more specific the inland locations that were included, the more likely they would be to effectively identify individual shippers and their rates.

3. Meaningfully comparing rates would also be an issue. Different carriers often have different rating methodologies. One carrier may provide all-in rates for a commodity, while other carriers may break out bunker or other surcharges on those rates. In this regard, it may be difficult to determine whether rates are all-in or not, since surcharges are often incorporated by general reference to the tariff. It may also be difficult to determine if a GRI clause triggered an increase in a service contract rate through a tariff GRI filing. This is another reason an index based on voluntary participation and cooperation by carriers and shippers would be preferable to the FMC seeking to impose a rate index on the industry.

4. A service contract typically includes hundreds of rates for various commodities and port pairs. Many of those rates are provisional, and do not actually move cargo. Thus, an index might use “paper” contract rates that do not provide an accurate picture of the actual rate situation for a commodity. It would be very hard for the Commission to determine what rates actually move cargo.

For all the foregoing reasons, WTSA does not support an export commodity rate index published by the FMC. If any indices are to be developed, they should be developed by the free marketplace, based on industry demand and interest.

Respectfully submitted,

A handwritten signature in black ink that reads "David F. Smith". The signature is written in a cursive, slightly slanted style.

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