BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 12-07

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

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

In response to the Notice of Inquiry ("NOI") that was issued in this Docket on May 21, 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 familiar with the commercial and regulatory issues that affect how the members do business and how the Commission's regulations and policies affect how that business is done.

The NCBFAA recognizes that the container shipping industry has experienced considerable rate volatility, but believes that this is not a particularly new phenomenon. It was rate volatility that in large part led to the conference system. It is not surprising, then, that the diminished role and power of the antitrust immunized agreements since the enactment of the Ocean Shipping Reform Act ("OSRA"), coupled with changes in the supply of and demand for vessel capacity has led to a dynamic ocean shipping marketplace. While the NCBFAA applauds the Commission's efforts to help shippers with their freight rate risk management, The Association is uncertain that the Commission's development and release of container freight indices for U.S. agricultural exports is appropriate or necessary.

COMMENTS

In this NOI, the Commission's inquiry presented for consideration a few separate issues, including the following: whether the shipping pubic would find targeted U.S. export rate indices beneficial; whether the Commission should extract rate information from service contracts or whether suitable alternatives were available; and what would be the positive and negative influences on the export commodities and ocean transportation marketplaces of greater transparency such indices might provide.

Before preparing these comments, the NCBFAA asked that its members respond to a survey requesting information on various aspects of the questions presented in the NOI. Generally, most respondents found it difficult to evaluate the Commission's proposal as they felt that they did not have sufficient information with respect to how the indices would be created and what would be the actual impact of the indices on the industry. Still, many respondents indicated that they were concerned that the indices might have a detrimental effect on various participants of the industry.

First, the parties that responded to the survey unanimously stated that none of their agricultural shippers expressed a desire to have an agricultural freight rate index for ocean shipping, and that they have never used a freight rate index when negotiating contracts with the vessel operators for the movement of agricultural commodities. The majority of respondents were skeptical that that existence of an agricultural rate index for ocean shipping would have a positive effect on exports. Indeed, some indicated that the indices might put larger agricultural businesses at an unfair advantage compared to smaller niche businesses, as larger businesses would have sophisticated financial analysts on staff and would be better able to process the available information. Similarly, some respondents opined that while the indices might make more information equally available to both large and small NVOCCs and freight forwarders ("FFs"), the indices would likely benefit only the larger NVOCCs and FFs. In their view, smaller NVOCCs and FFs would still be in a weaker position as compared to their larger competitors, so that having access to such information would not improve their leverage to obtain lower or more predictable rates that eliminate unanticipated surcharges and GRIs.

A number of commenters also expressed the concern that the freight rate indices may be inaccurate due to the numerous surcharges that are constantly being adjusted and which tend to be significantly more volatile than the base rates. Due to the large number and general unpredictability of various surcharges, it is not clear how those charges, which are often a larger component of total charges than the base freight rate, could be included in any index. Yet, an index that does not take into consideration the surcharges would appear to be of little to no value.

With respect to the issue of whether this is a task that is appropriate for the Commission, most commenters answered in the negative. Completely aside from whether this is a proper role for the government to play, NCBFAA members believed that shippers, which include NVOCCs, would most likely feel uncomfortable with their confidential service contracts being used for this purpose. To a great extent, they felt that the use of the service contracts would infringe upon their confidentiality, even if done in an aggregated form, yet that confidentiality was both assured and mandated by OSRA. As such, the increase in transparency might undermine the current process of private contracting on a one-on-one basis.

One of the concerns that was repeatedly enunciated was that a public freight index might result in a weakening of competition among the vessel operators. To the extent they have more visibility to their competitors' actions, the carriers may adjust their market behavior. Given the desire in OSRA to enhance competition among the steamship lines by, in part, reducing transparency to the contract offerings of those competitors, it is not clear how publishing information relating to those contracts is consistent with the policies underlying the Shipping Act.

In a related vein, some concern was expressed that this transparency of U.S. shipping rates could be misused by foreign governments to give improper advantages to their national NVOCCs. More specifically, armed with this information a foreign government could provide subsidies to their constituents, who could then undercut the rates offered by U.S. NVOCCs. However, it would be difficult for the U.S. NVOCC to know that any such inappropriate subsidy was provided. It would only know that it lost the business, but would have no redress.

Those commenters who opposed the initiative suggested by the NOI also suggested other bases for their concerns. First, even assuming the FMC has the authority to create such indices, it does not appear that the federal government has been involved in similar ventures with respect to any other mode of transportation engaged in the carriage of the nation's agricultural exports or other commodities. So, the question goes, why is it important to do so here? Secondly, in view of its limited budget, this may not be the best time for the FMC to expand its regulatory activities into an area that appears to fall more closely into the realm of private, not public, concern. And, of course, while the advantages of the indices appear to be somewhat vague and uncertain, the members uniformly expressed concern about whether the indices would imperil the confidentiality of service contract rate information.

In light of the responses of the NCBFAA's members, the Association cannot support the Commission's initiative to develop and release container freight indices, and suggest that the project not go forward. NCBFAA very much appreciates the opportunity to provide comments on this issue, and would be happy to respond to any questions the Commission might have.

Respectfully submitted,

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Date: August 8, 2012