

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Docket No. 13-05

**AMENDMENTS TO REGULATIONS
GOVERNING OCEAN TRANSPORTATION INTERMEDIARY
LICENSING AND FINANCIAL RESPONSIBILITY REQUIREMENTS,
AND GENERAL DUTIES**

**COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

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Dated: August 30, 2013

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The National Industrial Transportation League (“NITL” or “League”) submits these comments in response to the Advance Notice of Proposed Rulemaking (“ANPRM” or “Notice”) published by the Federal Maritime Commission (“FMC” or “Commission”) on May 31, 2013.¹ In the ANPRM, the FMC proposes significant amendments to its rules governing ocean transportation intermediaries (“OTIs”) that operate as ocean freight forwarders or non-vessel operating common carriers. The proposed rules concern OTI licensing and financial responsibility requirements, OTI duties, and other matters.

According to the ANPRM, the proposed rules are intended to address changes in the OTI industry, as well as to improve and streamline the OTI regulations. ANPRM at 3. The proposed rules also are designed to improve the effectiveness of the agency’s enforcement actions and to increase protections of the shipping public. In this respect, some of the proposals would reflect the commercial OTI industry recommendations adopted by the Commission in its Fact Finding

¹ Amendments to Regulations Governing Ocean Transportation Intermediary Licensing and Financial Responsibility Requirements, and General Duties, 78 Fed. Reg. 32946 (May 31, 2013).

Investigation No. 27, which addressed problematic OTI practices related to the movement of household goods in the U.S. foreign trades. ANPRM at 3, 29-30.

The League appreciates the Commission's efforts to streamline and update its OTI regulations, and it supports those proposals that would eliminate obsolete regulations and better correlate the Commission's rules to existing OTI practices. However, the League is concerned that other proposals introduced in this ANPRM will impose unnecessary regulatory costs and burdens on OTIs; will erect new barriers to obtaining and maintaining an OTI license; and are not warranted because they are intended to rectify improper OTI practices that have been determined to exist with respect to the movement of household goods but not as to shipments of general cargo. Accordingly, if adopted, the proposals could reduce the number of OTIs operating in the US-foreign trades and, thereby, result in fewer transportation alternatives for shippers.

I. IDENTITY AND INTEREST OF THE LEAGUE

The League was founded in 1907 to represent the interest of shippers in domestic rail transportation matters. Today, the League has approximately 500 company members engaged in the transportation of goods using all modes of transportation in both domestic and international commerce. These company members range from some of the largest users of the nation's and the world's transportation systems, to smaller companies engaged in the shipment and receipt of goods. Although the League's membership has broadened over the years to include transportation intermediaries, carriers, and consultants, a substantial majority of the League's members are classic "shippers," that is, beneficial owners of goods, and many of these members ship their goods via ocean transportation in the U.S. foreign commerce.

II. COMMENTS

At the outset the League would note that OTIs serve a critical role in facilitating the international transportation of goods for tens of thousands of U.S. importers and exporters who engage their services. Many OTIs perform a multitude of transportation and logistics services for their customers which reach beyond the ocean transportation activities subject to the Commission's jurisdiction, such as warehousing, customs brokerage, security filings, and arranging air and inland transportation, among other services. The integrated service offerings performed by many OTIs can provide their customers with substantial supply chain efficiencies and cost reductions.

OTIs also serve an important role for smaller less sophisticated shippers who may lack sufficient leverage to negotiate competitive transportation rates directly with the steamship lines. These smaller companies can engage an NVOCC to consolidate their loads with other shippers in order to achieve lower freight rates; or can use an ocean freight forwarder to assist with vessel bookings and shipping documentation if they lack adequate experience or resources to effectively perform such activities.

In light of the growing and increasingly important role served by OTIs operating in the U.S. foreign trades, the League believes that the Commission should carefully consider the impact that its proposals may have on the OTI industry and its customers, and should avoid adopting regulations that will unnecessarily saddle OTIs with regulatory costs and burdens which will undermine their ability to perform efficient, competitive, and cost-effective shipping services.

As noted above, the League appreciates the Commission's efforts to update certain OTI regulations in order better define and reflect the services and operations provided by OTIs. For example, the League supports the elimination of certain obsolete terms that are no longer

relevant to the Commission's activities, such as "ocean freight brokers", as well as proposed changes to the definitions for freight forwarding and non-vessel-operating common carrier services, which update those definitions to include the preparation of certain shipping and export documentation. ANPRM at 4-5; Proposed 46 C.F.R. § 515.2. It also supports the clarification that any separately incorporated OTI maintain its own license, as well as elimination of the requirement that an OTI carry increased financial responsibility for unlicensed, unincorporated branch offices. Proposed 46 CFR §515.3 and §515.4(b). These proposed changes appear to appropriately modernize and clarify the OTI regulations, and would benefit the OTI industry by reducing unnecessary costs related to the existing increased financial responsibility requirements.

However, the breadth and scope of the ANPRM is daunting and goes well beyond modernization and clarifications of the existing OTI regulations. The League is concerned that there does not appear to be sufficient evidence of systemic problematic OTI practices involving general cargo to warrant the dramatic overhaul of the OTI regulations delineated in this ANPRM. Indeed, the ANPRM indicates that the proposed rules at least partially "reflect recommendations adopted by the Commission in the *Final Report for Fact Finding Investigation No. 27, Potentially Unlawful, Unfair or Deceptive Ocean Transportation Practices Related to the Movement of Household Goods or Personal Property in U.S.-Foreign Oceanborne Trades* ("Fact Finding 27"). ANPRM at 28-30. However, the League is unaware of rampant misconduct by OTI's who handle general cargo (and no such evidence is identified in the ANPRM) which would warrant the major overhaul of the OTI regulations proposed in the ANPRM. While Fact Finding 27 uncovered real concerns regarding OTI practices for the movement of household goods, those concerns cannot and should not be used to justify sweeping reforms of OTIs that do not operate primarily in that trade. The proposed new rules regarding

OTI advertisements and agency relationships appear in particular to have been developed based on concerns with operations in the household goods industry. While the customer involved in many household goods movements may be unsophisticated and in need of increased consumer protections, there does not appear to be justification for increased regulation over shipping documentation, agency agreements, and websites for general cargo OTIs.

Additionally, while the Commission's apparent objectives in proposing increased regulation in order to increase its enforcement effectiveness and protect the shipping public are laudable, those objectives must be balanced against the costs, burdens and potential adverse consequences that may result from implementation of the ANPRM proposals. The League does not seek to identify in these comments every proposal that is too burdensome or costly but would note, for example, that the proposed OTI licensing renewal requirement raises substantial concerns.² Based on the ANPRM, renewal of OTI licenses would occur every two years and would require submission of a renewal "application" and payment of an unspecified fee. Proposed 46 C.F.R. § 515.14. Although the apparent reason for this requirement is to periodically verify OTI information related to Commission oversight (ANPRM at 12), the League does not believe that the paperwork burdens, costs, or risks of processing delays and service interruptions associated with this requirement are necessary, particularly since the Commission already has a process in place to obtain information regarding key changes to a licensed OTI's business operations and structure. *See* 46 C.F.R. § 515.18.

The proposed creation of license expiration dates is also troubling. The ANPRM suggests that the agency might randomly assign expiration dates to existing licenses in order to help reduce delays associated with the processing of license renewals. ANPRM at 12. However,

² For a more detailed analysis of the impact of various proposals on the OTI community, the League supports and refers the Commission to the Comments of The National Customs Brokers and Forwarders Association of America, Inc. filed in this docket on August 20, 2013.

this raises concerns as to whether an OTI license may be assigned an unreasonably short expiration period, or whether confusion or insufficient knowledge over the renewal process may result in license expirations, threatening both the OTI's ability to perform services for existing customers as well as the OTI's own livelihood. The ANPRM also states that “[f]ailure to renew a license by providing the required information and fee may result in revocation or suspension of the license....” thus raising additional concerns that disruptions in OTI services could result from the licensing renewal proposal.

The Commission is also proposing a number of changes to its qualifying individual (“QI”) requirements for OTI license applications which appear to “raise the bar” as to who can meet the new QI criteria. The League is concerned that, if adopted, these changes will unnecessarily increase barriers to entry to operate as an OTI and may cause some existing OTIs to fall out of compliance. Under the proposals, a QI must have three years of “relevant and diverse experience in ocean transportation intermediary activities in the United States.” While this requirement sounds reasonable on its face, the ANPRM commentary states that this change is intended to ensure that the QI has experience handling virtually *every aspect* of an OTI's operations. However, the Commission fails to explain why this change is needed and it would seem unreasonable to disqualify the QI and deny a license application if the QI has experience with, for example, 9 out of the 10 activities to be performed by the OTI. The Commission also proposes to shorten to 15 days the timeframe for reporting changes to the designated QI. While it is important to have an experienced QI in place as soon as possible, it is not clear from the ANPRM that the current 30-day period for reporting such changes is problematic or inadequate, and commercial practicalities in locating and replacing a QI would appear to require more flexibility, especially for smaller OTIs.

Again, while the Commission's intentions in increasing effective enforcement and protecting the shipping public are understandable, the League does not support adoption of new rules that increase barriers to operating as an OTI when current problems with the existing rules have not been identified.

Finally, in addition to proposing to increase the financial bonding requirements for OTIs (\$50,000 to \$75,000 for ocean freight forwarders; \$75,000 to \$100,000 for NVOCCs; and \$150,000 to \$200,000 for foreign registered NVOCCs), the Commission proposes to establish priorities for claims made against OTI bonds "whereby claims of shippers and consignees are given precedence over common carriers and commercial creditors." ANPRM at 21. The new proposals would also require a 5 month delay in payments against a bond under certain circumstances. *See* ANPRM at 23. The League takes no position at this time on the proposed new bonding amounts. As to the proposed priority claims system, the League appreciates the Commission's desire to increase the protection afforded to shippers and receivers when cargo claims or other disputes arise regarding OTI services. However, based on the comments of the World Shipping Council submitted in this docket, relegating the claims of common carriers to a lower priority status could result in changes to commercial dealings between ocean carriers and OTIs that could be detrimental to OTIs and their customers, e.g. requiring cash in advance payments or asserting cargo liens until payment is secured. The League suggests that the Commission carefully consider the potential consequences of its priority claims proposal before pursuing it any further, including direct consultation with bonding, carrier, OTI and shipper representatives.

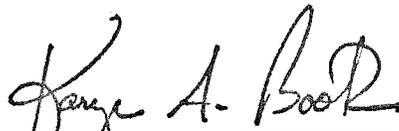
III. CONCLUSION

For the foregoing reasons, the League respectfully requests that the Commission reevaluate the comprehensive overhaul of the OTI regulations put forward in this ANPRM in order to avoid imposing unnecessary costs and burdens on the general cargo OTI industry, and establishing new barriers to operating as an OTI that may reduce the competitive shipping options available to shippers.

Respectfully submitted,

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