



COMMENTS OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
ON FEDERAL MARITIME COMMISSION DOCKET 16-04

46 CFR part 535, Ocean Common Carrier and Marine Terminal Operator Agreements Subject to
the Shipping Act of 1984

Submitted October 17, 2016

The National Industrial Transportation League (NITL or League) respectfully submits these comments in response to the Notice of Proposed Rulemaking (NPRM) served by the Federal Maritime Commission (FMC or Commission) on August 12, 2016 and published in the *Federal Register* on August 15, 2016. The League was founded in 1907 and represents companies engaged in the transportation of goods in both domestic and international commerce. The majority of the League's members include shippers and receivers of goods; however, third party intermediaries, logistics companies, and other entities engaged in the transportation of goods are also members of the League. Competitive ocean transportation is vitally important to League members and their customers, and many League members depend highly upon efficient and effective ocean transportation services for both importing and exporting their goods.

As noted by the Commission in the NPRM, the FMC is seeking public comments on proposed modifications to its rules governing agreements by or among ocean common carriers and/or marine terminal operators subject to the Shipping Act of 1984, and its rules on the delegation of authority to and re-delegation of authority by the Director, Bureau of Trade Analysis. The League's comments are addressed only to the proposed modifications to rules governing agreements. We note that the publication of this proposed rule was preceded by an Advance Notice of Proposed Rulemaking (ANPR) on February 29, 2016. The League did not submit comments on the ANPR.

The definition of capacity rationalization in § 535.104(e), a new exemption for space charter agreements in § 535.308, and the exemption for low market share agreements in § 535.311

The Commission has proposed a new definition of the term "capacity rationalization" in this NPR: "Capacity rationalization means the authority in an agreement by or among ocean common carriers to discuss, or agree on, the amount of vessel capacity supplied by the parties in any service or trade within the geographic scope of the agreement." That new definition would replace the current provision in § 535.104(e): "a concerted reduction, stabilization, withholding, or limitation in any manner whatsoever by ocean common carriers on the size or number of vessels or available space offered collectively or individually to shippers in any trade or service." The League believes the Commission's new definition is appropriate and correctly reflects the dynamics of "capacity rationalization" in today's filed agreements, for example the

very large scale vessel sharing agreements (VSAs) and new carrier alliances that have emerged in recent years. The form and extent of carrier agreements has evolved markedly in recent years and certainly since the current definition was adopted by rulemaking in 2004.

In the detailed discussion of this key provision in the proposed rule, the Commission has addressed all of the arguments offered by the carriers not to update the definition. (Carriers were the only party to comment on this matter in the ANPR). We will not comment on every carrier argument, but we emphatically agree with the Commission's clear language conclusion that the ambiguity of the present definition needs to be removed, and that the form and scope of agreements for which antitrust immunity is sought today necessitates an updating of regulatory definitions.

When competitors agree on the amount of vessel capacity to be supplied to a trade lane covered by a protected agreement, they have engaged in "capacity rationalization." The Commission makes clear its view that an agreement on the amount of vessel capacity supplied in a service or trade is in fact the rationalization of capacity between carriers, and we completely agree. The Commission notes "Carriers are expanding their cooperation of services through larger alliances and using service centers to manage capacity. Such agreements authorize the parties to exchange vessel space and agree on capacity to form and operate collective services and VSAs in the global liner trades." This is, in our view, the correct perspective on the global liner shipping market today. We agree with this observation and believe it fully supports the adoption of this new definition.

We note in particular the carriers' preference for a definition that was rejected by the Commission twelve years ago in its 2004 rulemaking in which the term "capacity management" was updated to "capacity rationalization." The Commission's efforts in the subject rulemaking are reflective of present operational trends in this global industry. If the Commission's mandate to be an effective and efficient regulator of this industry is to be carried out successfully, then its rules and procedures must keep pace with the continuous evolution of industry practices. This industry is not static, and the emergence of a new business model built on very large scale VSA's and alliances necessitates the updating of this foundational definition, whether or not the carrier agreements contain exclusivity provisions. The new forms of cooperation between carriers are sweeping, complex and challenging for regulators. The new proposed definition of capacity rationalization will fairly serve the many requirements of carriers, their cooperative ventures, shippers and American consumers.

As the Commission has fully explained, there are several important consequences that flow from the Commission's new definition of "capacity rationalization." The Commission notes that voluntary discussion agreements in which the parties discuss and/or agree on the amount of vessel capacity to be supplied in a trade will be covered by the new definition. Similarly, VSA's will be covered if the agreement contains provisions for discussion and/or agreement on the number, capacity and/or allocation of vessels or vessel space to be shared in a service. The new definition will apply to any capacity agreement whether or not they contain "exclusivity" provisions. Since any agreement that contains capacity rationalization authority may not be exempted from the standard § 535.311 45-day waiting period before going into force, this new

definition will have the effect of eliminating that 45-day waiting period exemption for many if not most agreements. In addition, the managers of such agreements must file periodic reports with the Commission. Likewise, the new definition will impact the waiting period exemption for “low market share agreements.”

NITL is not only not troubled by these developments, we believe they are wholly appropriate in the context of the agreements now coming to the fore. The FMC’s task of reviewing agreements for their potential to reduce competition or unreasonably affect transportation services and costs is central to the agency’s role and function. If agreements contain provisions, in any form, to rationalize capacity, then those agreements should be subject to the 45-day waiting period to give the agency sufficient time to assess the potential competitive impacts of the agreements, pose questions to the agreement participants, evaluate their responses and otherwise seek to moderate any negative consequences from such agreements.

Turning now to the proposed 45-day waiting period exemption for space charters in § 535.308, we believe the Commission’s proposal is correct. However, that support is conditioned on our assumption that the agency is alert to any indication that simple space charters contain provisions to discuss and/or agree on capacity to be allocated in the trade, a provision which should automatically disqualify such an agreement from the waiting period exemption.

With regard to carrier concerns that the new definition will result in more agreements being required to submit periodic reporting to the FMC, we are wholly unsympathetic. Global liner shipping enterprises are surely as data-driven as any modern business; capturing and reporting relevant subsets of that data to the FMC cannot be a great burden. Parties to these agreements have the benefit of operating collectively with antitrust immunity; providing reports on those operations to the FMC so that it may perform its mandated oversight functions seems a small inconvenience.

Also flowing from this new definition of capacity rationalization is a proposed change for the threshold for the “low market share” exemption to the 45-day waiting period. At present, § 535.311 provides a waiting period exemption for low market share agreements that do not contain authorities such as rate discussion or capacity rationalization. In order to qualify for the exemption, the combined market shares of the parties in any of the affected sub-trades must be less than 30 percent (if all of the parties are members of another agreement in the same trade or sub-trade with one of the excluded authorities) or 35 percent (if at least one party is not a member of such an agreement in the same trade or sub-trade.)

Since only simple operational agreements/space charters will now be eligible for the exemption generally, the Commission has proposed to change the two-tiered threshold for the “low market share” exemption. The current 30 percent threshold would be eliminated. In its place would be the single 35 percent threshold regardless of whether the parties to the agreement participate in any other agreements in the same trade or sub-trade. In most instances the League would not look favorably on such a proposal, but in this case we believe the change is a fair tradeoff. That view is based largely on the Commission’s insistence on maintaining the sub-trade level of analysis rather than the agreement-wide trade favored by carriers. Carrier data

collection and analysis for any trade lane in which they participate is a given; reporting elements of such data to the FMC will not be a burden and is most likely trivial.

Marine terminal services agreements in § 535.309

Agreements between marine terminal operators (MTOs) and ocean carriers are not required to be filed at the Commission and are exempted from waiting period requirements, if the agreement's rates, charges, rules and regulations were not agreed upon collectively. Parties to these agreements may file them at their option; however, if they choose not to file, they do not benefit from any antitrust immunity.

We agree with the Commission's observations on the more prominent role of agreements among MTOs in recent years, agreements which cover a variety of functions and operational matters. Their greater prominence is no doubt a consequence of the rapidly changing organization of carrier alliances and VSAs, and the introduction of so-called "mega-vessels". The impact of these developments has altered the operational demands on virtually all elements of the landside supply chain environment. Of particular interest to the League and many other shipper organizations is the emergence of issues like demurrage, detention, free time, dray carrier access and congestion as prominent—even daily—concerns for our member companies.

We strongly support the Commission's observation that given the agreement filing exemption, the agency does not have a regular and consistent source of MTO operational and market data with which to assess terminal market conditions and the competitive impact of MTO agreements. We are in no way suggesting or inferring that MTOs are using this exemption to mislead their carrier customers, shippers, intermodal partners, regulators or any other party. Nor are the MTOs using the exemption to hide the very obvious and prominent problems in that industry segment today. The League believes that the FMC has a legitimate requirement for essential MTO operational and market data if it is to perform its basic regulatory functions in this arena.

The Commission proposed a standard "Monitoring Report" in its Advance Notice for all MTOs participating in any conference or discussion agreement on file and in effect with the FMC, and the submission of their terminal services agreements and agreement amendments. The proposal did not strike us as unreasonable or burdensome, but we note that no commenters on the ANPR supported the proposal for a host of reasons, mostly revolving around cost and burden issues. Commenters also relied heavily on arguments of the unique features of individual MTOs, the businesses that they serve, local practices, and etc. We believe their concerns about the potential for careless treatment of confidential business data and information in their terminal services agreements are misplaced; the FMC certainly has sufficient experience with the proper and careful handling of confidential information from any source.

The League agrees with the Commission's conclusions that arguments opposing the submission of terminal service agreements are not convincing. The FMC needs to be able to assess the competitive impact and costs of actions by MTOs in conference and discussion agreements. To

do so necessitates having the source documentation being addressed by the FMC in this proposed rule. In particular the League, like the FMC, is very aware of the increased activity of MTOs under discussion agreements; the minutes of agreement meetings are no substitute for actual market data.

The “burden” of submitting terminal service agreements and amendments has been overstated by other commenters, in our view. Likewise we are confident that any confidential information in those agreements can and will be protected from disclosure by the agency. The Commission appears to have come to the same conclusions but somewhat surprisingly has proposed a “tentative agreement” to stand down on a requirement for a blanket Monitoring Report, presumably on the basis of its existing authority to target specific MTO conference and discussion agreements to require submission of terminal services agreement information.

In light of the very substantial problems in landside operations noted previously, we are troubled by this decision, and we much prefer that this proposed rule adopt the information collection procedures as introduced in the advance notice.

We understand and fully appreciate that the FMC does not target any agreement party in any trade or activity without cause. When the Commission has any reason to believe or even suspect that certain decisions, actions or activities may have an adverse impact on competition, the agency must have access to relevant data and information. Without periodic reporting of agreement activities, we question how the Commission will accumulate the data and information it needs to make that decision to examine an agreement more closely.

Apparently the Commission believes that it has sufficient authority today to act. The agency’s implicit message in the NPR is that it will indeed intervene as conditions warrant. We support the Commission’s proposal to strengthen § 535.301(d) by adding a provision requiring exempted agreements to be submitted to the FMC within 15 days of a written request from the Director, Bureau of Trade Analysis.

Complete and definite agreements in § 535.402, and Activities that may be conducted without further filings in § 535.408.

The League offers no comments on the matters raised in this section of the proposed rule.

The Information Form requirements in subpart E of part 535

The League is firmly aligned with the Commission in rejecting calls to reduce the requirements for service and capacity reporting. The reporting requirements are not burdensome and indeed most or all elements may be presumed to be part of the information dashboard requirements for the reporting parties themselves. However, we just as firmly oppose the elimination of reporting on the sub-trade level of analysis in favor of agreement-wide reporting. Operations and market conditions are not uniform across the vast trading network territories captured in carrier agreements. The carriers are routinely focused on the composite sub-trades; they make critically important decisions on an ongoing basis on which ports to call, which ports to drop,

the best port rotations, and so on. Their decisions on such matters have a profound impact on shippers and receivers. The FMC should retain this requirement for more granular reporting.

The League is especially sympathetic to the issues raised in comments from the NCBFAA on the advance notice; those issues are completely in line with our members' concerns as noted above in the section on marine terminal operator agreements. Carriers made decisions to build and operate vessels that were entirely unsuited to the landside infrastructure of U.S. ports, and many other ports around the world. Their decisions were unilateral with no consultation with any other parties other than shipyards. Faced with filling extremely large vessels, the carriers then turned to realigning their operations into the now four huge alliances (soon to be only three.) The impacts of those decisions were the creation of huge negative externalities which NCBFAA has described very well.

The FMC is tentatively declining to adopt the NCBFAA's recommendation to add reporting requirements for VSAs and alliances to give the FMC—and by extension all elements in the supply chains impacted by the VSAs and alliances—their plans to ameliorate the problems created by these VSAs and alliances. We interpret the Commission's comments to be quite sympathetic to the issues raised by NCBFAA, but the indicated resolution that the agency *may* seek additional information on such matters when VSAs and alliances submit their agreements strikes us as falling a bit short. We would prefer a more forward leaning posture, perhaps substituting "will" for "may", given the magnitude of the problems that have followed the introduction of huge ships, huge VSAs and huge alliances. At a minimum the VSA and alliance agreement parties should be required at least to acknowledge their role as the key source of the array of problems described by NCBFAA, and offer meaningful and constructive plans for mitigating those problems as part of their required filings.

Comments in § 535.603, and Requests for additional information in § 535.606

The League offers no comments on the matters raised in this section of the proposed rule.

Agreement reporting requirements in subpart G of part 535

The League supports the modifications being proposed for the cited reporting requirements. As with other changes proposed in this proceeding, the resultant reporting will not be a burden on parties already collecting and analyzing the same data being sought by the Commission.

Non-substantive modifications to update and clarify the regulations in parts 501 and 535

The League offers no comments on the matters raised in this section of the proposed rule.

The League appreciates the opportunity to comment on the issues addressed in this Notice of Proposed Rulemaking.