

**BEFORE THE
FEDERAL MARITIME COMMISSION**

DOCKET NO. 16-04

**OCEAN COMMON CARRIER AND MARINE TERMINAL OPERATOR
AGREEMENTS SUBJECT TO THE SHIPPING ACT OF 1984**

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

The National Customs Brokers and Forwarders Association of America, Inc. (“NCBFAA” or “Association”) submits these comments in response to the Advance Notice of Proposed Rulemaking (“ANPRM”) published in this docket on February 29, 2016 (81 Fed. Reg. 10188).

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 NCBFAA’s 1,000 regular members and 28 affiliated regional associations are direct consumers of the services of the various ocean carriers. As such, they are also directly affected by the subject matter and authority the carriers seek when filing proposed Agreements with the Commission. Accordingly, the members of the NCBFAA have both an interest and right to be heard concerning changes to the regulations that govern the approval of these Agreements. The Association therefore appreciates the opportunity to provide its comments in response to the ANPRM and, in particular, wants to provide its views pertaining to the filings and authorization of Vessel Sharing Agreements (“VSAs”).

In particular, the NCBFAA supports the FMC's proposal to introduce revisions in the data requirements in Subpart E of Part 535 of the Commission's regulations. Under the ANPRM, the parties to VSAs would be required to provide before and after data on the parties' service strings, vessel deployments, port itinerary, annual capacity, vessel space allocation for services pertaining to the agreement, capacity and utilization data for the services pertaining to the agreement for each month of the preceding calendar quarter, along with a narrative statement discussing any significant operational changes and the impact of these changes so that the FMC can assess the effect of these VSAs on competition. While much of this information is already provided by carriers, the list of issues to be considered should be expanded to enable the Commission to fully evaluate the competitive and operational environment in the industry, determine whether the agreement will actually lead to greater efficiency and not reduce competition and whether the Agreements may instead lead to greater costs being passed only to the shipping community. Providing this information should be a prerequisite to the FMC's continuous acceptance of VSAs, particularly where carriers plan to substitute their current vessels with post-Panamax so-called "super-vessels" or "mega-ships" to ensure that the usage of those vessels does not result in negative consequences for shippers, OTIs, and the other parties in the logistics chain that enable cargo to move between the vessels and the shippers/receivers.

As the Commission is aware, over the past few years, severe congestion has been a chronic problem at a number of U.S. ports and, in particular, the ports of Los Angeles-Long Beach and New York-New Jersey. Some of the primary factors contributing to this congestion are the current inadequate infrastructure of the ports as well as a number of operational problems that severely limit the efficient movement of cargo in and out of the ports. The resulting delays frequently translate into significant demurrage and detention charges, which the ports and vessel

operators typically attempt to pass through to the ocean transportation intermediaries (“OTIs”) and beneficial cargo owners.

The introduction of post-Panamax super-vessels will almost certainly exacerbate these problems. The FMC itself acknowledged the issue and noted that “it does not make much economic sense for [mega-ships] to call at ports without the critical support infrastructure being in place that enables them to maximize efficiencies throughout the entire supply chain.” *See U.S. Container Port Congestion & Related International Supply Chain Issues: Causes, Consequences & Challenges*, Bureau of Trade Analysis, Federal Maritime Commission, at p. 13 (July 15, 2015).

In addition to making the industry vulnerable to infrastructure deficiencies, usage of super-vessels exacerbates other pre-existing inadequacies of the supply chain which already contribute to port congestion to a significant degree. Prior to the introduction of super-vessels, it took terminals a day or two to unload the vessel with smaller cargo volumes and another couple of days to “clean up the mess” that was created in the yard.¹ As the number of containers carried on the super-vessels increased, so did the time required for loading these containers off and back on to the vessels. The surge in the number of containers which require handling results in truck volume surges which in turn create long lines at gates and congestion inside terminals.

Moreover, the carriers do not currently vary the free time allowed for pulling containers off the pier depending upon the size of the vessel. So parties have the same free time whether the vessel holds 5,000 TDEUs or 18,000 TEUs even though the vessel operators, NVOCCs and merchant hauler alike are challenged to find adequate trucking capacity to dray double and triple the volume in the same free time.

¹ See remarks of Larry Nye, Vice President of Port Planning at Moffatt and Nichol Engineers, available at http://www.joc.com/port-news/us-ports/port-new-york-and-new-jersey/mega-ships-dealing-worst-congestion-hand-la-lb-ny-nj_20150701.html

The noted infrastructure issues related to super-vessels are generally considered to be outweighed by the cost savings attributable to the usage of these vessels. However, while super-vessels *may* save costs for carriers, the utilization of those ships imposes additional costs on other participants of the supply chain. So, in most cases the usage of super-vessels results in the increased equipment costs for terminal operators, dredging costs for port authorities, inland infrastructure improvements costs for governments and congestion costs for transportation companies, including trucking, barge and railway companies and OTIs. *See The Impact of Mega-Ships*, International Transport Forum, Organization for Economic Cooperation and Development, at pp. 63-65 (OECD/ITF 2015) (the “ITF Report”). In that regard, the OECD’s Directorate for Financial and Enterprise Affairs Competition Committee recently voiced a concern that the deployment of super-vessels has given “added relevance to port operations because they can potentially constitute an operational bottleneck undermining total transit times and service reliability and limiting the efficient use of vessels.” *See Executive Summary of the Roundtable of Competition Issues in Liner Shipping*, Directorate for Financial and Enterprise Affairs Competition Committee, Organization for Economic Cooperation and Development, at p. 5 (June 19, 2014). It is therefore unclear whether the usage of super-vessels is necessarily beneficial for the industry as a whole, or if it is really just shifting the cost burden from one class of participants to others.

Furthermore, the ITF Report referred to above suggested that there might be a disequilibrium of costs and benefits of super-vessels even for ocean carriers because cost savings may actually decrease as ships continue to become larger. A significant share of the costs savings peaked at the time vessels were upsized to 5,000 TEU, but the costs savings beyond that size were considerably smaller. *Id.* at p. 26. The ITF Report found that a decreasing cost

savings tendency with the introduction of the newest generations of container ships and concluded that cost savings from the newest generation of container ships were four to six times smaller than the previous rounds of savings. *Id.*

Most cost savings of upsizing container vessels at this point are fuel costs and are therefore realized primarily at sea. Generally, in calculating their projected cost savings, carriers tend to assume that each vessel will for its entire lifespan sail on the same route. However, in practice, this is rarely the case due to the phenomenon referred to as “cascading” which means that smaller ships are constantly substituted with newer, larger ships as soon as those become available, across all ship sizes, with the largest ships being used on the longest voyages. As a result, the carrier projections of cost savings may often be inaccurate. *Id.* at 27.

The ITF Report notes an example under which a carrier projects that certain cost savings will occur if its vessel stays at port for three weeks for each roundtrip of 21,000 nautical miles. If this ship is subsequently cascaded to a different trade lane and the voyage is reduced to approximately two thirds of the nautical miles, to save the projected cost savings, the port time on each trip would likewise need to decrease from three weeks to two weeks. If the vessel is further cascaded to an even shorter voyage of one third of the length of the original voyage for which the cost savings were projected, the port stay would also have to be decreased to one week. Shortening of the length of port stays for purposes of preservation of cost savings may not be realistic and it may well be that each round of cascading erodes the cost savings that were realized with the previous round of upsizing of container ships. *Id.*

By raising questions about the economic rationale for building and upgrading megavessels, the NCBFAA is not seeking to interpose its judgment on whether these activities make economic sense. That decision is the province of the carriers, and they can individually make

whatever judgment on those issues that make sense to them. But, when the carriers elect to enter into multi-carrier agreements to share the economic risks and benefits of vessel operations, the Commission and the shipping public are entitled to be heard as to whether those proposed collective activities are in the public interest or do they instead result in an unreasonable decrease in competition or an unreasonable increase in transportation costs.

VSAs – and similar forms of collective operational agreements – have historically been regarded as arrangements that do not inhibit competition that achieve cost reductions through their supposed enhanced efficiencies. Perhaps it is time to re-examine that conclusion and not automatically assume that all VSAs necessarily meet those goals. As noted above, there are ample grounds to at least now consider the mega-ships’ likely contribution to increasing port congestion, the current inability of the infrastructure to handle the flow of the containers off and onto those super-vessels in an efficient and effective manner, increased costs for the non-ocean carrier participants of the supply chain, and the questionability of the cost savings related to the utilization of those vessels.

To enable the Commission to conduct this analysis, the NCBFAA believes that the narrative requirements specified in existing Section III of the Information Form in Subpart E of Part 535 should be further broadened (*i.e.*, in addition to the elements suggested in the ANPRM) in order to have the carriers provide data that would show whether the proposed VSA might result in increased costs to shippers. While this is not intended to be an exhaustive list of the information relevant to this issue, the Association believes that the carriers should at least explain:

- How they would coordinate their operations with other carriers so as not to cause delays in loading/unloading vessels already in port;

- Whether there are sufficient chassis available at the various ports of call to accommodate the number of containers being off-loaded;
- Whether the chassis pools at the various ports of call are able to efficiently handle cargo being off-loaded or whether the use of chassis within a port is restricted by contractual arrangements;
- Whether there is sufficient drayage availability at the various ports of call to accommodate the number of containers being off-loaded and loaded;
- Whether the members of the proposed VSA will be able to coordinate their activities to avoid duplicative handling of containers;
- What affect the proposed VSA would have on the projected dwell times for containers at the various ports of call once off-loaded;
- Whether the free time allotted for the movement and return of containers will take into consideration the size of vessels and the supply of trucking capacity at the port; and
- What steps the carriers will take to ensure that any delays that are not within the control of the shipper interests are not passed on to their customers in unfounded/unfair demurrage or detention costs.

In addition, it would be unrealistic to assume that there will not be significant congestion at various ports in the future. The inadequate infrastructure to meet contemporary traffic demands, coupled with less than efficient operating practices in the terminals and the lack of chassis and drayage capacity indicates, unfortunately, that the recent histories of LA/Long Beach and the Port of New York will not be isolated, non-recurring events. Whether the cause of the congestion is the bunching of mega-vessels, labor unrest, inadequate port infrastructure, severe

weather, it would be imprudent to believe that this will not be an issue in the future. The Association assumes that the carriers have considered these possibilities and have made their own internal plans concerning what to do with their vessels when they cannot get into a port as scheduled due to congestion.

Unfortunately, the carriers have not shared their contingency plans with either their customers or the Commission. In view of the obvious importance to the OTIs that must ultimately move the cargo when it is unloaded or the BCOs who make their own arrangements to have the cargo cleared through Customs and delivered, the Association believes that this gap in communication is both problematic and preventable. As part of the data request to such Agreements, the FMC should consider requiring the members of the Agreement to at least provide the agency with their contingency plans for handling the cargo on those occasions when they cannot access the port of destination that is in the various contracts of transportation with their customers. In that way, rather than attempting to chase down sources within the carriers who might have relevant information, when severe congestion upsets normal vessel operations, concerned parties would be able to access relevant information from the Commission.

The NCBFAA wants to make it clear that the Association is not opposing the general idea that VSAs can yield considerable efficiencies and increase the competitive options available to shippers and OTIs. At the same time, in view of the recent episodes of significant congestion at several major ports and the enormous costs that have been passed on – often improperly in the view of the Association – to shippers, receivers and OTIs, the NCBFAA believes that the Commission has both the right and need to know that the march toward ever larger vessels and ever larger alliances will not result in an inappropriate transfer of risks and costs to the shipping public.

The NCBFAA believes that with the adoption of the proposed revisions, the FMC would be better positioned to conduct a thorough review of VSAs for purposes of compliance with all applicable provisions of the Shipping Act and to hopefully ensure that the intended efficiencies and benefits of proposed Agreements are realized for all of the participants in the shipping industry.

Respectfully submitted,



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