

**BEFORE THE
FEDERAL MARITIME COMMISSION**

DOCKET NO 16-05

SERVICE CONTRACTS AND NVOCC SERVICE ARRANGEMENTS

**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. 10198).

As the Commission is aware, 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 previously submitted comments in this docket and are directly affected by the proposed changes to the existing regulations that are set forth in the ANPRM.

A. The Commission Should Liberalize the Service Contract and NSA Filing Requirements

The NCBFAA strongly supports the Commission’s ongoing efforts to review and streamline its regulations pertaining to service contracts and NVOCC Service Arrangements (“NSAs”). The ANPRM proposes several changes to the regulations pertaining to the timing within which amendments or corrections to service contracts and NSAs may be filed, and alerts the industry participants to a more convenient way of filing NSAs and amendments or corrections via a web-based process. The NCBFAA supports the proposed amendments as they

reduce unnecessary regulatory burdens and ease the process of complying with filing and publication requirements by affording a bit more time for processing amendments to service contracts NSAs and correcting the technical or substantive errors made in filings. The note in the APNPRM about ocean carriers believing that the existing requirement – namely, that filing these amendments in advance of shipment is unduly burdensome in light of current commercial practice – is accurate. While the Association disagrees with the carriers' view that rate and trade lane adjustments are only "minor revisions," it is nonetheless clear that the current regulatory filing requirements have not kept pace with the dynamic nature of the ocean shipping marketplace in this post-OSRA environment.

Just as it is appropriate for the Commission to adopt the proposed changes in the service contract regulations, the agency should at least provide that same relief to NVOCCs with respect to NSAs. Indeed, the justification for doing so is even more compelling for the NVOCC industry, since NVOCCs are necessarily reacting to the daily rate and surcharges adjustments that all of the underlying vessel operators serving their trade are making. So, rather than being concerned about just *one* carrier's costs, NVOCCs have to consider the charges being made daily by *all* of the carriers. Although NVOCCs enter into far fewer NSAs, as discussed further below, the pressure and burden of getting NSA amendments timely filed is even more pressing and ultimately unnecessary for NVOCCs than it is for VOCCs. Accordingly, the NCBFAA supports the Commission's initiative to ease these requirements.

Nonetheless, the NCBFAA does not believe that the amendments proposed in the ANPRM are sufficiently far reaching to provide needed meaningful relief for the NVOCC industry from costly, ultimately unnecessary regulatory burdens associated with the NSAs filing and reporting requirements. To the contrary, the Association again requests the Commission to consider a fundamental change to the regulation of NSAs by completely removing these

unnecessary filing and essential terms publication requirements instead of trying to make compliance with those requirements less cumbersome.

The NCBFAA has been urging the Commission to eliminate the NSA publication and filing requirements since their inception. It seems that these NSA filing requirements have only been introduced to maintain the superficial parity in the way VOCCs and NVOCCs are regulated, as no other reason has yet been advanced for including this requirement as part of the NSA process. The Association pointed out when the NSA regulations were first promulgated that this purported parity is not warranted because VOCCs and NVOCCs are not similarly situated and their activities in the shipping industry are quite different.

Although both NVOCCs and VOCCs are treated as carriers under the Shipping Act, the competitive relationships between NVOCCS and VOCCs are fundamentally different from the competition between VOCCs. In any competition for business, the winner of two competing VOCCs gets to transport the cargo and collect freight charges while the losing VOCC just loses. However, if the shipper awards its business to an NVOCC, a VOCC would still carry the cargo and collect its freight charges. In that sense, there really is no competitive relationship between NVOCCs and VOCCs. And, unlike VOCCs, NVOCCs do not enjoy antitrust immunity. Accordingly, the terms of NSAs, unlike service contracts entered into by VOCCs, do not include collectively established boilerplate terms and conditions. Neither do NSAs follow or even have "voluntary guidelines" pertaining to pricing or service conditions. While FMC staff may need easy access to VOCC service contracts to determine whether the carriers are abusing their antitrust immunity or to otherwise review longer-term carrier pricing and its effect on the market, that issue is not relevant to the NVOCC industry. The Association accordingly suspects that NSAs and their amendments are filed but rarely reviewed.

Moreover, each agreement between an NVOCC and its customer is individually negotiated and covers rates and service arrangements that may relate to either spot market traffic or pertain to traffic and logistical services over an extended period of time, while VOCC service contracts are almost always long term in nature. Just as is the case with NRAs, shippers do not need to have NSAs filed with the agency. They know what they have negotiated and the marketplace encourages both parties to honor the results of their negotiation without regard to whether it was filed. And, of course, the shipper is also protected by the Shipping Act provision that now precludes a carrier or NVOCC from attempting to collect more than the negotiated rate as long as the negotiated arrangement is in writing. (46 U S C §41109(d))

It is simply a fact that NSAs remain significantly underutilized by NVOCCs. Over the most recent 5-year period, a total of only 82 NVOCCs (or 1.6% of the NVOCC industry) filed an average of 1,445 NSAs per year (or, approximately 17 NSAs per NVOCC that filed such agreements). In 2015, that number further decreased to only 835 filed NSAs. Those numbers are practically insignificant when compared to the number of service contracts filed by the VOCCs each year. For example, in 2015 the far fewer number of VOCCs filed 52,959 service contracts. The difference when considering amendments is even starker. In 2015, NVOCCs filed only 1,773 amendments to existing NSAs. That number is dwarfed by the 684,485 amendments to existing service contracts filed by VOCCs that same year.

A conclusion that NSAs, as currently configured, have not been commercially accepted seems rather clear. Eliminating the archaic filing requirements for NSAs would inject more efficient interactions in the commercial relationship between NVOCCs and their customers. At the same time, any liberalization of the NSA filing regulations would not adversely affect the VOCCs. At the end of the day, no NVOCC cargo can move without being contracted with a VOCC.

Accordingly, the NCBFAA urges the Commission to determine that given the inherent differences between NVOCCs and VOCCs, the identical regulation of agreements entered into by those two different classes of industry participants and their customers is not required. Instead, the agency should initiate the rulemaking proposed in the ANPRM, but expand it to seek comments relating to a possible elimination of the filing and essential terms publication requirements for NSAs in their entirety

B. The Commission Should Move Forward to Liberalize the NRA Rules

Despite its success, the NRA exemption contains one significant limitation, in that the Commission forbade the inclusion into NRAs of non-rate economic terms, including credit and payment terms, rate methodology, minimum quantities, forum selection and arbitration clauses. These artificial restrictions make it more difficult for NVOCCs and their customers to actually negotiate and memorialize a complete transaction in a rational way that is clear and transparent to the parties. Instead, NVOCCs are compelled to either incorporate those additional “non-rate economic” terms into their rules tariffs or enter into NSAs. Incorporating those terms in a rules tariff is a complicated task, particularly given the ever-changing nature of surcharges, bunkers, GRIs, etc. Moreover, once those terms are incorporated in a rules tariff, they have to be made available to all shippers, not just the particular customer with whom the NRA was negotiated. And, of course, since the rules tariff is not literally embodied in the four corners of the NRA quote, the shipper often does not really see or perhaps even know what those terms are or what affect they will have on it business. Finally, given the nature of the NVOCC industry, there is simply little if any need for the formality of service contract-type arrangements.

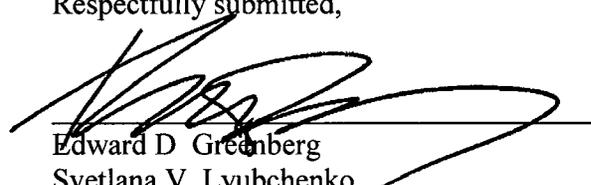
As the NCBFAA understands it, the reason for the Commission’s decision not to allow NVOCCS to include these terms into NRAs stemmed from a concern that including those terms “could cause overlap and confusion between NRAs and NSAs ” In reality, however, any

confusion is attributable only due to the Commission's initial decision not to grant the broader rate tariff exemption sought by the NCBFAA's initial petition in 2003. Instead, the Commission elected to grant the more limited NSA exemption requested by several NVOCCs, who felt that the agency might not be ready to issue the broader relief that the industry actually sought. Now that it is clear that rate tariffs no longer serve any useful purpose, at least in the NVOCC industry, the artificial distinction between NSAs and NRAs has little meaning. In both cases, the rates and service arrangements are negotiated by willing, competent and knowledgeable parties. In both cases, the resulting arrangement is memorialized in writing so there can be no later disagreement as to what the parties intended. And, in both cases, eliminating the artificial restrictions created by existing regulations would neither result in any reduction competition nor be detrimental to commerce. Accordingly, there is no sound policy reason for refusing to expand an NRA exemption that apparently works for many NVOCCs for the sole purpose of preserving an archaic regulatory framework that is severely underutilized due to its formality, burden and cost. The Commission previously indicated that it would consider possible expansion of the terms that could be included the NRAs in the future proceedings and the NCBFAA believes that now is that time.

Accordingly, the NCBFAA greatly appreciates the Commission's efforts to streamline its regulations so that they are more in line with contemporary commercial practice, and urge that the agency give further consideration to the issue for NSAs and NRAs. The Association believes that the amendments proposed in the ANPRM would merely serve as a band-aid solution in making the NSAs publication and filing requirements slightly easier even though there is no rational basis for maintaining these requirements in the first place. The NCBFAA therefore requests that the Commission eliminate these publication and filing requirements in their entirety. Furthermore, for the reasons stated above, the NCBFAA requests that the Commission

go further and now broaden any rulemaking so as to consider allowing the inclusion of the economic terms into NRAs to make the NRA exemption even more meaningful and useful. This would ultimately enable NVOCCS to better serve their customers, which is consistent with the Shipping Act policies enunciated in 46 U S C §40101

Respectfully submitted,



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