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BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET No. 04-12
NON-VESSEL-OPERATING COMMON CARRIER SERVICE ARRANGEMENTS

46 CFR PART 531

NOTICE OF PROPOSED RULEMAKING

COMMENTS OF PACIFIC COAST TARIFF BUREAU (P.C.T.B.)

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INTRODUCTION

Pacific Coast Tariff Bureau (P.C.T.B.) has operated as a tariff publishing agent for over sixty years. We file contracts for vessel operating common carriers with the Federal Maritime Commission (F.M.C.), file tariffs for carriers with the Surface Transportation Board (S.T.B.) and state regulatory agencies, and publish tariffs on the internet pursuant to F.M.C. regulations.

We have approximately 600 ocean carrier clients regulated by the Commission, including Conferences, Vessel Operating Common Carriers (VOCC) and Ocean Transportation Intermediaries (Non-Vessel Operating Common Carrier - NVOCC). We publish over 650 tariffs for these carriers.

Since the passage of the Shipping Act 1984, which first introduced confidential contracts, we have been filing VOCC service contracts with the Commission and publishing their Essential Terms. Since May 1, 1999 we have filed thousands of service contracts and amendments thereto into the SERVCON system via the internet.

We participated in the last Commission rulemaking on Service Contracts in Docket No. 03-03 in April 2003.

COMMENTS

In the Notice of Proposed Rulemaking, the Commission stated that it "... has determined to issue a notice of proposed rulemaking ("NPR") providing NVOCCs with the ability to enter into NSAs in lieu of moving all cargo under tariff rates. This determination, based on the Joint Proposal, would grant NVOCCs parity with VOCCs by permitting NVOCCs, in their capacity as carriers, to provide transportation to their shipper customers on a confidential basis." Furthermore, they added "The proposed rule is modeled after the current service contract rules at 46 C.F.R. part 530." [See part IV. DISCUSSION]

SHIPPER AFFILIATES

In part IV DISCUSSION, section B-2-b, the Commission requested "... comment on issues surrounding the potential activities of NVOCC affiliates under NSAs." We do not have any comments on NVOCC affiliates, but we are concerned about Shipper affiliates. The ability to have Shipper affiliates and the requirements for them in part 530 have been omitted in the proposed part 531. We expect that Shippers' will have affiliates (subsidiary companies), who would also like to participate in their parent company's NSA, just as they are now able to participate in their parent company's current VOCC service contract. The proposed section in 530 reads:

"Proposed 531.6 NVOCC service arrangements

(b) Every NSA filed with the Commission shall include the complete terms of the NSA including, but not limited to, the following:

9) The legal names and business addresses of the NSA parties; the names, titles and addresses of the representatives signing the NSA for the parties; and the

date upon which the NSA was signed. Subsequent references in the NSA to the signatory parties shall be consistent with the first reference.”

We quote the relevant section in 530 with underline added to highlight the matter for affiliates not included in section 531:

“§ 530.8 Service Contracts.

(b) Every service contract filed with the Commission shall include the complete terms of the service contract including, but not limited to, the following:

9) the legal names and business addresses of the contract parties; the legal names of affiliates entitled to access the contract; the names, titles and addresses of the representatives signing the contract for the parties; and the date upon which the service contract was signed, except that in the case of a contract entered under the authority of an agreement or by a shippers' association, individual members need not be named unless the contract includes or excludes specific members. Subsequent references in the contract to the contract parties shall be consistent with the first reference (e.g., (exact name), "carrier," "shipper," or "association," etc.). Carrier parties which enter into contracts that include affiliates must either:

(i) list the affiliates' business addresses; or

(ii) certify that this information will be provided to the Commission upon request within ten (10) business days of such request. However, the requirements of this section do not apply to amendments to contracts that have been filed in accordance with the requirements of this section unless the amendment adds new parties or affiliates;”

GOVERNING TARIFFS

Almost all VOCC service contracts are governed by one or more of the VOCC’s own tariffs (or tariffs in which they participate). There is no service contract regulation specific to this issue except for the following:

“§ 530.8 Service Contracts (c) *Certainty of terms*. The terms described in paragraph (b) of this section may not:

(2) Make reference to terms not explicitly contained in the service contract itself

unless those terms are contained in a publication widely available to the public and well known within the industry.”

This allows a governing tariff because tariffs are required to be publicly available and are definitely well known to Shippers. This same language is repeated in the proposed 531.6(c)(2).

For the sake of clarity, can a NVOCC have another carrier’s (e.g. VOCC) tariff act as a governing tariff in their NSA, which of course, is available to the public and should be well known?

There is a prohibition in the regulations on tariffs referencing another carrier’s tariff but we are unsure if it can be applied to NSAs:

“520.7 Tariff limitations.

(a) General. Tariffs published pursuant to this part shall:

(3) Not contain cross-references to any other rate tariffs, except:

(i) A tariff of general applicability maintained by that same carrier or conference,”

For example, NVO Transport Company, a NVOCC, has a service contract with XYZ Line, a VOCC. NVO Transport Company has an NSA with DEF Import Company. In this NSA, the governing tariff for all charges and surcharges is XYZ Line’s Tariff No. 001. NVO Transport Company prefers to assess the same charges to DEF Import Company’s shipments as it will be charged because all of DEF Import Company shipments will move on XYZ Line’s vessels under NVO Transport Company’s service contract with XYZ Line. This is a simple method for NVO Transport Company to assess charges and surcharges in an NSA rather than publish the charges in its own tariff. While it may be simple and easy for the NVOCC, it could be confusing for the Shipper.

OTHER QUESTIONS

By allowing NVOCCs to enter into NSAs, there will probably be a whole new series of questions and concerns, not previously considered under VOCC service contracts and their regulations. For VOCCs, they are just a seller of their services under service contracts. However, under the proposed regulations, the NVOCC will now also become a seller using NSAs, in addition to their previous role only as a buyer of service contracts.

Moreover, in this proposed rulemaking, NVOCCs will be subject to a whole new, unfamiliar regulatory scheme. VOCCs, on the other hand, for many years have been signing and filing service contracts and have been subject to review by the Bureau of Trade Analysis and of Enforcement. For example, all NSA records must be maintained for five years and be furnished to the FMC within 30 days of a request [see Sec. 531.12 Recordkeeping and audit.] It would be helpful for NVOCCs if you could furnish them relevant service contract information and notices which have developed over the past twenty years. Of particular interest would be any insight on the following terms used in the regulations but not well defined by the regulations: affiliates (who qualifies), minimum volume commitment (what is meaningful), duration (what is meaningful), and liquidated damages (what is meaningful).

CONCLUSION

We request that the Commission clarify the application of an NSA to affiliates of a Shipper, who has signed an NSA.

Also, we request that the Commission clarify the use of governing tariffs in an NSA.

Finally, in the interest of educating NVOCCs about their new NSAs, we request that the Commission discuss issues which have previously arisen for VOCC service contracts, especially those issues mentioned above. In this regard, we highly recommend that the Commission create a new section of their website to be called "FAQs – Service Arrangements" similar to the current section "FAQs – Service Contract".

Respectively Submitted,

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