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FEDERAL MARITIME COMMISSION

Ms. Karen V. Gregory
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001

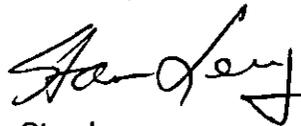
Re: Docket No. 10-03 Notice of Proposed Rulemaking
NVOCC Negotiated Rate Arrangements

Dear Ms. Gregory,

Enclosed are an original and 15 copies of my comments in the above referenced rulemaking.

Please send any issuances to me via email at stanlevyconsult@gmail.com.

Sincerely,



Stan Levy

President

Stan Levy Consulting, LLC

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INTRODUCTION

I am president of Stan Levy Consulting, LLC, which provides consultation, commercial and regulatory advice to international maritime and domestic transportation companies and their service providers. I am a Federal Maritime Commission licensed practitioner.

For 18 years I was vice president of a tariff publishing company that issued tariffs on behalf of Vessel Operating Common Carriers (VOCCs) with the Federal Maritime Commission (FMC) and the Surface Transportation Board (STB) and on behalf of Non Vessel Operating Common Carriers (NVOCCs) with the FMC. Additionally I testified as an expert witness during the FMC hearings for the Automated Tariff Filing and Information (ATFI) system implementation (first automated tariffs) in the early 1990s. I also participated in those rulemakings as well as the rulemakings implementing the new tariff regulations for Ocean Shipping Reform Act (OSRA) 1998 (Dockets 98-10 and 98-29).

Previously, for seven years, I was the tariff publishing officer for a transpacific VOCC. Additionally, I was the pricing representative to several ratemaking conferences.

Lastly, I was a traffic manager for eight years with an import/export company utilizing the services of both conference and non-conference ocean carriers in the Transpacific and Caribbean trades.

Since I have used transportation tariffs for over 35 years in my daily business as a shipper, carrier, tariff publisher, FMC practitioner and consultant, I have an interest in this proceeding. I had submitted comments in Petition P1-08 by the National Customs Brokers and Forwarders Association of America, which called for this rulemaking, and appeared at the public hearing in Washington, D.C. on May 24, 2010.

BACKGROUND

On December 15, 2004 in the FMC Rulemaking Docket 04-12 Non-Vessel-Operating Common Carrier Service Arrangements, the Federal Maritime Commission (Commission) exempted Non-Vessel-Operating Common Carriers from the tariff publication requirements of the Shipping Act of 1984 provided that they file with the Commission a new document called a “NVOCC Service Arrangement” (NSA) and publish the Essential Terms of the NSA. Similar to the current proceeding, this rulemaking was a result of a Petition by a NVOCC¹ for an exemption from the Shipping Act, but unlike this case, it was broadly supported by 190 members of the House of Representatives, 18 Senators, and 31 individual shippers. There is an extensive record of the Commissioners meeting with various interested parties in that proceeding.²

On August 5, 2008, in Petition P1-08 the National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA) requested a voluntary exemption for non-vessel common carriers (NVOCCs), who are licensed or registered with the FMC, from the requirements of the Shipping Act 1984 (SA1984), as amended, to publish and adhere to “rate” tariffs. Additionally, any disputes arising from the common carriage of such cargo with NVOCCs would be resolved in a Court of law instead of with the Federal Maritime Commission (FMC). These rates would be “memorialized in writing” with FMC access to them.

I opposed granting the Petition for exemption because there were not sufficient facts that the requested exemption would not result in a substantial reduction in competition or be detrimental to commerce. Further I argued that it is more appropriate for Congress to revise the Act instead of the FMC using its exemption authority for an important matter (i.e. tariffs) covering such a large number of carriers impacting all shippers in their relationships with those carriers.

Additionally, the NCBFAA did not offer any new information or facts since its last petition on the same subject, just a few years ago, which was denied by the FMC.

¹ P3-03 – Petition of United Parcel Service, Inc. for Exemption Pursuant to Section 16 of the Shipping Act of 1984 to Permit Negotiation, Entry and Performance of Service Contracts. July 25, 2003.

² Activity Log P3-03 – Petition of United Parcel Service, Inc. for Exemption Pursuant to Section 16 of the Shipping Act of 1984 to Permit Negotiation, Entry and Performance of Service Contracts

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However, in light of the NCBFAA's claims of the cost and difficulty of compliance with the tariff regulations and the usefulness of tariffs, I recommended having the FMC initiate a proceeding to review and reform tariff regulations for both NVOCCs and VOCCs, to make tariff compliance less burdensome, tariffs more accessible and tariff information more useful.

BASIS FOR THE PETITION GRANT AND THE COMMISSION'S RATIONALE FOR IMPLEMENTING THIS RULEMAKING

It is important to review the justifications supporting this exemption for a large number of businesses from U.S. laws.

1. NCBFAA Petition P1-08 July 2008

The NCBFFA Petition made two arguments for granting their exemption request: (a) tariffs are not used by shippers and (b) it costs too much to maintain tariffs.

(a) The first argument is not relevant for the reason to have tariffs. This whole subject of tariff usage has been turned on its head by the NCBFFA arguing that tariffs are not useful and that shippers are not using them. Tariffs were intended for carriers' use because they are legally obligated to adhere to them. It is a common carrier's public price list.

The NCBFFA claimed that "Shippers do not use tariffs when determining how or when to ship"; that "all NVO's freight rates are almost always separately negotiated"; and finally that "Shippers do not parse through tariffs and contact the NVOs for quotes".³

This is not a new revelation or a change in the way shipping is conducted. The laws enacted by Congress require carriers to use tariffs. Shippers assume that the Carriers are using their own tariff for rating and quoting so they always contact carriers for a rate quote. They expect 30 days notice of any increase. When they are making a shipment which already has a tariff rate, then they know that they will be paying the same price as anyone else for that same shipment. Of course, a Shipper can voluntarily opt out of the tariff rate by signing a contract with the Carrier.

³ Petitioner P1-08 July 2008

**BASIS FOR THE PETITION GRANT AND THE COMMISSION'S
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1. NCBFAA Petition P1-08 July 2008

DPI addressed this same false argument in their Supplemental Comments⁴ to the NCBFFA Petition, yet this claim that shippers do not use tariffs as a valid justification to support a tariff exemption is still being used.⁵

The same situation is also true in other industries requiring tariffs, e.g. interstate motor carriers of household goods and telephone companies. These carriers, just like the ocean common carriers, are legally required to adhere to tariffs and to make them available to the public who rarely actually use them. I have never examined a telephone company tariff but they are required by law. Would the Federal Communications Commission exempt telephone companies from having tariffs just because the public does not use them? It is expected that regulated businesses use and adhere to their legally required tariffs.

When I was a tariff publisher, we spent a good deal of time educating the carriers about using their tariffs for rating. In fact, we invested hugely in software systems to integrate the tariff into the business operations of our carriers. The largest users of our on-line automated tariff system were the carriers themselves. From time to time, I was contacted by a shipper's attorney seeking tariff provisions to substantiate claims.

When I worked for a Vessel Operator, every department including documentation, rating, sales, customer service, pricing, marketing and auditing used the tariff every day. No one questioned why we had to comply with tariffs; it was the law. Yes, we paid penalties when we did not totally adhere, usually by accident. Yes, we had additional costs for procedures to fix tariff errors. This so-called burden was part of the cost to have the privilege to operate as a common carrier in US international maritime transportation.

⁴ Comments of Distribution Publications Inc. (DPI) Petition P1-08 September 25, 2008 "While shippers have NEVER reviewed tariffs they have ALWAYS relied on tariffs"

⁵ Chairman Khouri "Not one single shipper raised a hand and said, "Wait. I use the published tariff as a regular reference for current business decisions or for any other matter." Federal Maritime Commission Open Session February 18, 2009

BASIS FOR THE PETITION GRANT AND THE COMMISSION'S
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1. NCBFAA Petition P1-08 July 2008

As a traffic manager, I only consulted the tariff when I had a dispute or claim with the ocean carrier. It quickly resolved over-charge claims without needing the assistance of the FMC.

(b) The NCBFFA complained about a “substantial cost” for “no purpose” which is a “dead weight economic loss”. No one has offered any facts or economic studies on what is a reasonable cost for tariff compliance. Just stating a yearly cost figure without any analysis can be misleading. Not one NVOCC submitting their costs for tariff compliance informed us how much cargo they moved or their yearly revenue.

Congress was aware that there would be a cost for compliance when they re-affirmed the tariff requirement for common carriers in the Ocean Shipping Reform Act 1998. It's not unusual for regulated businesses to complain about the cost of compliance because they would prefer not to spend any resources on compliance.

Below are two examples which raise questions as to the validity of the NVOCCs' claims.

DJR Logistics stated that it costs \$3.25 to \$13.00 make a rate filing⁶. Based on my tariff publishing experience, I believe that this is a reasonable fee. Furthermore, it seems to be reflective of the fees charged 10 years ago, showing that the cost of compliance has not been escalating or even kept up with inflation.

In their last Petition P5-03 in August 2003 for a tariff exemption, which was denied by the Commission, the NCBFFA stated: “For example, in the *American Shipper* survey of NCBFAA members conducted in October 2001, 39% of the respondents indicated that 5% or more of administrative resources were spent complying with regulatory obligations under the 1984 Act, such as tariff publishing and compliance. In the same survey, an additional 27% of the respondents estimated that 3%–4% of their administrative resources were spent on such matters.” Remember in the 1984 Act there are separate compliance requirements just for Forwarders so these numbers may include non-tariff costs.

⁶ Motion Of The National Customs Brokers and Forwarders Association Of America Inc to Supplement the Record P1-08

BASIS FOR THE PETITION GRANT AND THE COMMISSION'S
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1. NCBFAA Petition P1-08 July 2008

According to the Drewery Consultant's report published in the JOC of May 3, 2010, the NVOCCs pay about \$2200 for a 40' from Hong Kong to L.A so with a 10% mark-up their sale price (tariff) would be about \$2400 to the shipper. So if 56% of NCBFAA members (39% + 27%) pay at least 3%, the \$72 (= \$2400 x 3%) result seems ridiculously high compared to the DJR's \$13.00. What are the facts? Even this high number \$13.00 per filing is only about ½ of one percent of \$2400, not the 3-5% previously claimed by NCBFAA. I know that it does not cost \$72 to file a rate for one container. In many cases that tariff rate will be used multiple times, reducing the over-all cost.

I doubt that the \$13.00 saved on one tariff filing is going to be passed onto the shipper. It will pass to the NVOCC at the expense of the same importer and exporter who will no longer benefit from his shipment being covered by all the protections of the laws passed by Congress.

Panalpina informed us that for Paintainer tariffs cost them \$180,000 in 2009⁷ which seems like a huge sum. But is it for such a large company? According to Panalpina's 2009 annual report, their Ocean Freight Business was 40% of their total Net Forwarding Revenue of Swiss Franc 1525 Million (@\$0.865986) = \$1.320 Billion. Also, North America operations accounted for 20% of this revenue which equates to \$264 Million. It does not seem un-reasonable to me for a company to spend \$180,000 out of \$264 Million to comply with the legal obligations of a common carrier.

In my 18 years as a tariff publisher with over 400 NVOCC clients, it was rare for a NVOCC, except the large ones, to have tariff costs exceeding \$5,000 per year. \$500-\$1,000 per year is more likely, not the \$20,000 to \$240,000 claimed by the NCBFFA. DPI disputed the cost numbers offered by the NCBFFA.⁸ Yet the NCBFFA stated "no one seriously disputes that the

⁷ "I can report to you today that in 2009 our average monthly cost was \$15,000" Paulette Kolba, Supplemental Statement of Panalpina Inc P1-08 January 18, 2010.

⁸ Supplemental Comments Publications Inc. (DPI) Petition P1-08 January 24, 2010. "We find these estimates high".

**BASIS FOR THE PETITION GRANT AND THE COMMISSION'S
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1. NCBFAA Petition P1-08 July 2008

burden and cost of tariff publication and adherence has always been substantial - particularly for NVOCCs of modest size and resources..."

Both of these arguments by the NCBFFA are insufficient to justify such a broad exemption to the law for so many regulated entities.

2. Commission Statements

At the FMC Meeting in February 2010 where it was decided to initiate this proceeding, two Commissioners mentioned that this would promote "American" jobs.⁹ There are no facts to substantiate that claim.

I do believe that this will not "put cash back into business" as one Commissioner stated. This is not tax money going from the Government back to business. This is just transferring money from one business to another. Will the small amount of \$3.50 or \$13.00 for the rate tariff protection for each shipment really be refunded to Shippers?¹⁰ There is absolutely no evidence that would happen. Rates are already at historically low levels.

Yes, we are just emerging from the Great Recession so eliminating any un-necessary expenses and promoting jobs are great goals. But will jobs be gained and shippers save any money, and at what true cost to international maritime commerce?

One Commissioner was impressed by the lack of individual shipper participation in the Petition.¹¹ This same comment was made at the May 24th hearing. Perhaps, there will be

⁹ Commissioner Dye "we should grant reasonable exemptions to simplify the business practices of American companies, put cash back into businesses, and generate additional American jobs." Chairman Lidinsky "I believe this petition gives the Commission an opportunity to advance one of the Obama administration's key policy goals, and that is creating jobs." Federal Maritime Commission Open Session February 18, 2009

¹⁰ Statement of The Honorable Chairman, Richard A. Lidinsky, Jr. before the Committee On Transportation And Infrastructure Subcommittee On Coast Guard And Maritime Transportation United States House Of Representatives February 25, 2010. "many of those cost savings will also be passed along to the hundreds of thousands of exporting and importing businesses the NVOCCs serve."

¹¹ "The collective silence from any individual shipper together with the collective support of the organized shipper community speaks volumes to me." Commissioner Khouri Federal Maritime Commission Open Session February 18, 2009.

**BASIS FOR THE PETITION GRANT AND THE COMMISSION'S
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2. Commission Statements

comments from individual shippers in this proceeding. Of note is the fact that the previous petition exemption given to the NVOCCs was widely supported by Congress and individual shippers¹² which is lacking here.

The actions of the shippers in the market speak louder than any comments: Why have shippers not opted for using NSAs to keep their rates confidential and to voluntarily opt of the legal common carriage protection? According to the NCBFAA, "for a variety of reasons"¹³ and in particular "shippers balk at the contractual commitments required by NSAs".¹⁴ It seems that shippers do not want to be bound by written agreements; and that they want common carriage.

There are no economic studies or analysis in the record on the issues of whether this proposed exemption for almost 3200 licensed NVOCCs (out of almost 4300 NVOCCs) will have a Substantial Reduction in Competition or be Detrimental to Commerce. It will have an enormous impact on the 250,000 importers and exporters, who now have a choice using common carriage or using a NSA when shipping with an NVOCC. There are claims and statements by the U.S. Department of Justice¹⁵ and the U.S. Department of Transportation¹⁶ but no facts to prove it.

There is no evidence from the experts, just statements in the record.¹⁷

At the May 24th meeting, I requested the Chairman to enter into the record any FMC memos or reports on this issue as one Commissioner disagreed that the two part standard had been met.¹⁸

¹² Activity Log P3-03 – Petition of United Parcel Service, Inc. for Exemption Pursuant to Section 16 of the Shipping Act of 1984 to Permit Negotiation, Entry and Performance of Service Contracts

¹³ Petitioner P1-08 July 2008

¹⁴ Docket No. 10-03 American International Forwarding at 2; DJR Logistics, Inc. at 2). April 29, 2010.

¹⁵ DOJ Comments in P3-03 at 1-2 (about NSAs) and repeated in Petition P1-08

¹⁶ USDOT Comments in P1-08 "The exemption standard is clearly met in the context of this petition."

¹⁷ "The Bureau believes that approving the petition, inclusive of the principles set out by the NCBFAA, would not result in a substantial reduction in competition in any of the four areas that we examined." Mr. Roy J. Pearson, Deputy Director of the Bureau of Trade Analysis. Mr. Ronald D. Murphy, FMC Managing Director.: "The staff does not foresee that an exemption merely from the rate publication requirements under these circumstances would be detrimental to commerce as long as appropriate requirements accompany that exemption." Federal Maritime Commission Open Session February 18, 2009

**BASIS FOR THE PETITION GRANT AND THE COMMISSION'S
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2. Commission Statements

One Commissioner was impressed that tariff publishers, who obviously may have a self economic interest in the outcome, were the only opponents to the Petition.¹⁹ They disagreed with and disputed the claims made by the NCBFAA supporting the exemption. After all, who is in a better position to furnish the Commission with some facts about tariff usage and tariff costs? Actually, the NCBFAA, who requested this rulemaking in their petition, are doing this for their own benefit, not for the shippers who will lose their choice and protections under the law.

Besides myself, there was also the opposition to the Petition by the Florida Shipowners, a group of Vessel Operating Common Carriers. They feel that it is unfair to treat one class of common carriers, namely the licensed NVOCCs, differently than themselves. These NVOCCs' competitors are obviously concerned that this exemption would give a "competitive edge" to the NVOCCs over the VOCCs.²⁰

I know for a fact that Vessel Operators publish many tariff rates on a daily basis. Not all cargo in all trades moves under service contracts. The NCBFAA's statement: "NVOCCs are the only competitive segment of the ocean shipping industry still obligated to adhere to rate tariffs" is false and misleading.

The NCBFAA previously claimed that exempting them from the tariff requirement "would place NVOCCs on an equal competitive footing with other carriers"²¹ is not substantiated by any facts. In this new petition, they explain that their business model is different than the vessel operators so they need different regulatory treatment. The World Shipping Council representing 25 ocean common carriers, the NVOCC's competitors, disputed this claim.²²

¹⁸ "The petitions have not met the two-part standard. I think the staff memos make that clear." Commissioner Brennan Federal Maritime Commission Open Session February 18, 2009

¹⁹ Chairman Khouri "The only record comments supporting a continuation of the NVO tariff filing process came from the tariff publishers." Federal Maritime Commission Open Session February 18, 2009

²⁰ Comments of the Florida Shipowners Group Petition P1-08 September 30, 2008

²¹ Petition P5-03 by NCBFAA August 2003.

²² Comments of the World Shipping Council: "... it is important that the Commission proceed on a factually accurate record, and that the Commission not incorporate into its ultimate decision assumptions that are unproven and that could lead to less than fully informed decision making ..." Petition P1-08 September 26, 2008.

**BASIS FOR THE PETITION GRANT AND THE COMMISSION'S
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3. Section 16 Authority

According to Commissioner Brennan's previous report, the World Shipping Council believes that "Exempting 3,000 NVOs from tariff publication would have a significant impact on the industry and on the Commission."²³

There are very few facts in the record to justify this exemption for thousands of carriers from current law. The economic benefit to the NVOCCs does not mean that jobs will be created or that lower rates will result for shippers.

It is really questionable that the exemption will not result in a Substantial Reduction in Competition or be Detrimental to Commerce, the two legal standards imposed by Congress.

Certainly the Commission has exemption authority. It was used widely in Docket 04-12 by granting privileges, not covered in the Shipping Act, to all the NVOCCs. It leveled the playing field for all common carriers. In this proceeding, the proposed regulatory change is huge because it will change the whole concept of common carriage and divide the tariff regulations amongst different common carriers. The current regulations reflect the law passed by the 535 members of Congress and signed by Presidents. It went through extensive hearings and review before becoming the law of the land whereas here we only have some written submittals and one open hearing. The proposed change involves thousands of businesses impacting on a large segment of our economy.

I do not believe that the Commission should be re-writing the law for the entities which it is charged with regulating. Yes, you do need to be cognizant of their expense for compliance but your responsibility to protect the Shippers should be paramount.

Just because Shippers did not participate in the petition does not mean that you should strip them of their rights under the law, just to save the NVOCCs some money. The Commission

²³ Received Summary of Oral Presentation from Commissioner Joseph E. Brennan (Chris Koch & Stan Sher). January 16, 2004. P3-03.

BASIS FOR THE PETITION GRANT AND THE COMMISSION'S RATIONALE FOR IMPLEMENTING THIS RULEMAKING

3. Section 16 Authority

twice before had declined this same petition. There are no new facts. Why should their petition be valid now?

While the SA1984, as amended, furnished a broad exemption authority, I believe that the FMC as a regulatory agency should be cautious when considering this rulemaking to essentially revise a US law, just reviewed and revised ten years ago by Congress itself. I believe that NCBFAA should go to Congress to revise the law rather than to the regulatory agency responsible for implementing the law. History has shown that government regulations are often removed, ignored or abandoned as outdated or un-necessary because they were so successful at curing and/or preventing the problems and abuses which they were addressing in the first place.

During the last year, President Obama has signed legislation to regulate the health insurance industry and supports new regulations for the financial services industry. Now steps are being taken to strictly enforce Interior Department regulations where we know that exemptions were furnished to regulated businesses.²⁴ Now is not the time to exempt the NVOCCs from the laws enacted by Congress.

COMMENTS on the PROPOSED REGULATIONS

1. NVOCC Service Arrangement (NSA) versus NVOCC Negotiated Rate Arrangements (NRA)

The NCBFAA claims that the novel introduction of NSAs by the FMC in 2005 under this same exemption authority requested by other NVOCCs (which does eliminate tariff filing) does not work in their market. It certainly works well for the Vessel Operators which the NCBFAA readily admits and with whom they are competing.

²⁴ "Petrochemical giant BP didn't file a plan to specifically handle a major oil spill from an uncontrolled blowout at its Deepwater Horizon project because the federal agency that regulates offshore rigs changed its rules two years ago to exempt certain projects in the central Gulf region, according to an Associated Press review of official records." Michael Kunzleman and Richard T. Pienciak Associated Press Writers May 6, 5:18 PM EDT

COMMENTS on the PROPOSED REGULATIONS

1. NVOCC Service Arrangement (NSA) versus NVOCC Negotiated Rate Arrangements (NRA)

Section § 531.3 states that a NSA “means a written contract”.

The proposed definition of a NRA under §532.3 “means a written and binding arrangement” which under §532.5 “must: (a) be in writing; (b) be agreed to by both shipper and NVOCC.”

According to a dictionary the definition²⁵ of a contract is a “legally enforceable (binding) agreement between two or more competent parties. A contractual relationship is evidenced by (1) an offer, (2) acceptance of the offer, and a (3) valid (legal and valuable) consideration”.

Hence, it appears to me that a NSA and NRA are exactly the same.

If both of these documents are legally the same, then why create NRAs, which will be forced onto Shippers by the NVOCCs, with all the potential confusion and complications of a new regulatory document? The establishment of NSAs had strong shipper and Congressional support but NRAs are only mainly supported by NVOCCs.

In so far as the burden and administrative cost of using a NSA, the CFR content requirements for a NSA mirror the content of a NRA except a NSA requires a minimum volume. When a shipment is being made, the shipper is obviously committing a volume of cargo to be shipped, which eliminates one of the main differences between the two regulations.

Anything beyond the CFR requirements for a NSA is solely at the discretion of the carrier and their legal counsel so it does not need to be overly complicated and could easily fit onto one page for small shipments.

NSAs need to be filed with the FMC. It is quite easy to use the Commission’s Servcon System. I have been involved in thousands of these filings. Any document can easily be uploaded, and the process can be automated. This is not a costly or burdensome procedure. Servcon is a reliable and easy place to store documents which are readily available to the Commission.

²⁵ <http://www.businessdictionary.com/definition/contract.html>

COMMENTS on the PROPOSED REGULATIONS

1. NVOCC Service Arrangement (NSA) versus NVOCC Negotiated Rate Arrangements (NRA)

The Commission could examine if § 531.9 Publication of Essential Terms is really necessary. Any modification or elimination would certainly reduce the cost of compliance.

The NCBFAA wants to eliminate tariff rate publishing and reduce their members' costs. The Commission handed them that opportunity with the creation of NSAs, upon an NVOCC request, so the Commission should investigate why the shippers by and large have not used them with the NVOCCs. Is it the carriers' terms and conditions? Do the shippers really prefer common carriage?

The FMC has already provided a tariff exemption to all NVOCCs, not just licensed ones. Perhaps a review of the NSA regulations, as previously suggested by GMTS²⁶, would cure the NVOCC problem.

Before implementing a new regulation and documentation procedure for NRAs, with the possibilities of un-intended consequences, I highly recommend that the Commission try to fix what it already started for the NVOCCs.

2. VI. Statutory Reviews And Request For Comment

Regarding the Regulatory Flexibility Act, when the rulemaking mentions small business entities, it is unclear to me whether you mean the importers and exporters, the companies who use the NVOCCs, or the NVOCCs themselves?²⁷ I assume that you do mean the NVOCCs. The rulemaking seems to contradict the NCBFAA petition claiming the regulatory cost is huge

²⁶ Comments of Global Maritime Transportation Services Inc (GMTS). Petition P1-08 September 24, 2008

²⁷ VI. STATUTORY REVIEWS AND REQUEST FOR COMMENT In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Chairman of the Federal Maritime Commission certifies that the proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. The Commission recognizes that the majority of businesses affected by this rule qualify as small entities under the guidelines of the Small Business Administration. The rule, however, would establish an optional method for NVOCCs to carry cargo for their customers to be used at their discretion. The rule would pose no economic detriment to small business entities. Rather, it exempts NVOCCs from the otherwise applicable requirements of the Act when such entities comply with the rules set forth herein."

COMMENTS on the PROPOSED REGULATIONS

2. VI. Statutory Reviews And Request For Comment

yet the rulemaking states that the economic impact will be small, and 75% of all the NVOCCs is quite a substantial number.

By eliminating common carriage, it will have an economic impact. Since there are no economic studies in the record, it is difficult to know to what degree. A clearer explanation would be appreciated.

However, it is quite clear that the option to use NRAs will be at the discretion of the NVOCC which reverses the current situation where it is at the option of the shipper to use an NSA or not.

3. § 532.1 – Purpose § 532.2 – Scope and Applicability

The proposed regulations would only apply to licensed and bonded NVOCCs. After listening to the comments of the Commissioners at the FMC Open Hearing on May 24th, I understand the concerns of the Commissioners. Also, the concern of several presenters about excluding a class of NVOCCs is also understandable.

The NCBFAA “represents and supports members of the United States freight forwarding industry providing education and publications.”²⁸ Yes, they may have members who are not Forwarders. Ocean Freight Forwarders by definition operate in the U.S. Export trades.²⁹

One purpose of The Shipping Act 1984 is to “promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace”.³⁰

The Chairman recently testified about FMC support for President Obama’s export goals.³¹

²⁸ http://www.google.com/search?q=NCBFAA&rls=com.microsoft:*:IE-SearchBox&ie=UTF-8&oe=UTF-8&sourceid=ie7&rlz=117GFRD_en. May 31, 2010

²⁹ § 515.2 Definitions

³⁰ 46 USC § 40101. Purposes

³¹ “the Administration begins to implement the National Export Initiative to double exports over the next five years, the ocean transportation system we regulate will play a critical supporting role” Statement Of The Honorable Chairman, Richard A. Lidinsky, Jr.

COMMENTS on the PROPOSED REGULATIONS

3. § 532.1 – Purpose

§ 532.2 – Scope and Applicability

In light of the above, if the Commission does decide to go forward with this rulemaking, I suggest that this tariff rate exemption be limited for exports only from the U.S. This would also be consistent with the current tariff exemption for export commodities such as forest products and recyclables.³² If we later learn from experience that the exemption works for exports, then the Commission could consider also extending it to import tariff rates.

If the proposed rulemaking is limited to export rates, then it would seem appropriate to allow all NVOCCs to use this exemption. In the case of non-licensed NVOCCs, you could then introduce a requirement that the NRAs for export rates be stored at office of their licensed OTI agent in the U.S.

In any event, I do not believe that rates covering shipments of Household Goods and Personal Effects should be exempted from tariff rate publication. Motor carriers in the interstate transportation of Household Goods and Personal Effects still must have tariffs open for public inspection under the Surface Transportation Board's regulations. In the "Household Goods Mover Oversight Enforcement and Reform Act of 2005" Congress re-affirmed tariffs for these carriers and added more tariff requirements.³³

4. §532.4–Duties of the NVOCC

Tariff rules are dynamic and change over time. Real time access of automated tariff systems is the only way to acquire accurate information. I do not believe that "(a) for each NRA, provide the prospective shipper all the applicable terms as set forth in its rules tariff;" is sufficient unless it includes all subsequent tariff revisions.

Before The Committee On Transportation And Infrastructure Subcommittee On Coast Guard And Maritime Transportation United States House Of Representatives February 25, 2010.

³² § 40501. General rate and tariff requirements (a)(2)Exceptions.

³³ Part 375: Transportation of household goods in interstate commerce; consumer protection regulations.

COMMENTS on the PROPOSED REGULATIONS

5. §532.5-Requirements for NVOCC Negotiated Rate Arrangements

After listening to the comments of CargoSphere, DPI and RateWave Tariff Services at the May 24th meeting, it seems that this new document has created a lot of confusion and endless questions. No one has offered a sample NRA for review and discussion. There was no answer about “safe harbor” questions. If the NRA was filed with the FMC Servcon system, the FMC would have the opportunity to review and provide feed-back. When Service Contracts were first introduced after the SA1984, there was a lot of communications between the FMC, tariff publishers, and the carriers so that everyone would be compliant.

What does “(a) be in writing” strictly mean? Can it be an e-mail or other virtual document? Does it need to be on paper in a hard copy format? Please clarify.

What does “(b) be agreed” mean? Are signatures required? Is an e-mail auto-reply acknowledging receipt of the quote sufficient? Please clarify.

I suggest that each NRA be required to have a unique identifier like an account number or quote number.

Also, I suggest that each NRA be required to contain a notice warning the Shipper that the rates stated herein are not tariff rates and that it is an NRA per 46 CFR 532.5 .

6. §532.7 – Recordkeeping and Audit

If these “NVOCC Negotiated Rate Arrangements” must be “be in writing”, can’t they just be uploaded to Servcon instead of stored at the NVOCC’s office? Having them stored at the FMC would eliminate any concerns about acquiring the NRAs from non-licensed NVOCCs.

Now NVOs will need to implement systems to ensure safe storage and proper dating. And at what cost? And why can’t they be made available to the public in some “tariff” system, as previously suggested by the Florida Shipowners?³⁴

³⁴ Comments of the Florida Shipowners Group Petition P1-08 September 30, 2008

COMMENTS on the PROPOSED REGULATIONS

6. §532.7 – Recordkeeping and Audit

I recommend changing the proposed part (b) to be consistent with the NSA regulations at 531.12(b):

“Production for audit within 30 days of request. Every NVOCC shall, upon written request of the FMC's Director, Bureau of Enforcement, any Area Representative or the Director, Bureau of Trade Analysis, submit copies of requested original NRAs or their associated records within thirty (30) days of the date of the request.”

7. Dispute Resolution and FMC Jurisdiction on NRA

Finally, SA1984, as amended, maintained the FMC to hear complaints and to issue penalties and/or reparations. The FMC is the expert regulatory agency. Any shipper can make a tariff complaint against a domestic or non-domestic situated carrier without having the burden and cost of going to a Court of law, wherever that may be. Sometimes issues can be resolved with phone calls and perhaps an informal proceeding. The NVOCCs' shippers, most of whom apparently use tariffs, may lose the ability to use the FMC as a forum for their complaints, contrary to the intent of SA1984, as amended. This would appear to be detrimental to commerce as it could deter complaints and raise shippers' legal costs.

It is clear under the Shipping Act that contract disputes are to be resolved in Court.³⁵ The NCBFAA clearly wants NRA disputes in Court and not at the FMC.

It is unclear how a complaint on a NRA shipment would be handled, so I request that the FMC issue a legal explanation on this matter.

Can a shipper still use the FMC to resolve issues on a NRA shipment?

Does § 520.7 Tariff limitations (g) *Overcharge claims* still apply?

Does it matter if the dispute is over the charges stated in the rules?

Does it matter if the dispute is over the charges stated in the NRA which are different than the charges stated in the rules?

³⁵ § 40502. Service contracts. (f) Remedy For Breach.—Unless the parties agree otherwise, the exclusive remedy for a breach of a service contract is an action in an appropriate court.

CONCLUSION

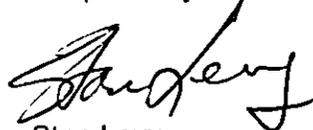
There is no real need to create a whole new species of document with new administration requirements for one class of Common Carriers and exempt them from many of their obligations under the current law at the expense of shippers. Anyway, who knows how much, if any, this will really save the NVOCCs. There are no facts.

Once you open the door for one class of common carriers to be exempted from tariff regulations, you may need to open it for all common carriers. The Commission should be regulating, not legislating.

Do not adopt the proposed regulations. Try to fix NSAs and make them a workable solution to the NCBFAA's tariff problem.

Also start a Fact Finding or Notice of Inquiry or a Government-Industry group to review the current tariff regulations and make recommendations how they could be improved. When I started in this business, there were paper tariffs mailed or couriered to the FMC. With the advent of new technology, the Commission allowed "electronic filing" in the early 1980s. Then the Commission implemented a "working group" to study and recommend on an "automated" tariffs which resulted in ATFI in the early 1990s. When Congress changed from tariff filing at the FMC to making tariffs publically available on the Web, the current regulations were imposed in 1999. Well, it's more than 10 years later, time for another review. This should be done with input from the Commission Staff, the Common Carriers, both vessel and non-vessel, and interested Shippers.

Respectively submitted,

A handwritten signature in black ink, appearing to read "Stan Levy", written in a cursive style.

Stan Levy

President

Stan Levy Consulting, LLC