

ORIGINAL

cc: ES/OGC
Com 4
PWB
BTA
BCL
BOE
CADRS
MD

FEDERAL MARITIME COMMISSION

46 CFR Parts 520, 532

Docket No. 10-03

RIN 3072-AC38

RECEIVED
JULY 24 PM 4:44
FEDERAL MARITIME COMMISSION

NVOCC Negotiated Rate Arrangements

COMMENTS OF DISTRIBUTION PUBLICATIONS INC.

In accordance with the Federal Maritime Commission's ("FMC") Notice of Proposed Rulemaking issued April 29, 2010, Distribution Publications, Inc. ("DPI") respectfully submits the following comments with respect thereto.

DPI has been engaged since 1975 in the business of publishing rate, rules and other tariffs for both ocean common carriers and non-vessel operating common carriers ("NVOCCs"). With respect to the latter, our clients include both licensed NVOCCs as well as unlicensed, registered, foreign NVOCCs. In the course of our business we are only familiar with the requirements of the Shipping Act of 1984, as amended (the "Act") and FMC regulations issued pursuant thereto, and we have a hands-on working knowledge of all issues surrounding tariff publication and compliance, and the requirements for compliance with the Act.

We understand that the proposed regulation has as its central purpose the exemption of *licensed* NVOCCs¹ from having to publish rate tariffs and that in lieu of such rate tariffs, the licensed NVOCCs would be required to enter into NVOCC Negotiated Rate Arrangements ("NRAs") with their shipper clients as defined in the proposed rule.

In DPI's view there are a number of significant matters in the proposed rule that need to be clarified or amended. Our comments pose several key questions about the proposed new regulations, Part 532, that our NVOCC clients have raised with us. We provide suggestions and recommendations for additional detail and clarification in the proposed rules that we believe the Commission should consider.

¹ The original Petition did not make any distinction between licensed and unlicensed NVOCCs and the NPRM does not have a single word of explanation as to why the exemption would discriminate between licensed NVOCCs and unlicensed but bonded NVOCCs.

1. **Contracts of Affreightment:** The rule does not address the relationship of the NRA and the NVOCCs bill of lading. While the rule suggests that each NRA is a specific contract, the questions exist: can the NRA contain terms that are not just about rates and their application? Is the rate in the NRA incorporated into a bill of lading and thus governed by the bill of lading terms? If there is a conflict between a bill of lading and the NRA, which takes precedence? Is the NRA a separate and distinct transportation contract between a shipper and an NVOCC for a specific cargo movement? In other words, is the NRA simply an unpublished tariff rate, or is it a new unfiled version of an NVOCC Service Arrangement (NSA) that is agreed to in writing by the NVOCC and a Shipper?
2. **Disputes:** What role will the Commission play in settling disputes between shippers and NVOCCs involving NRAs? Are these to be “settled only under contract law,” as requested by Petitioner? Are there FMC issues with respect to NRAs under Sections 10(a)(1) or Section 10(b)?
3. **Single or Multiple Shipments:** The use of plural and singular in reference to quantity or shipment in the proposed regulations is confusing. The answer may be obvious to the Commission, but it is not clear to us when we read the proposed Part 532. Are NRAs limited to single shipments or can they be utilized for multiple shipments?

We note Part 532.2 – Scope and Applicability – of the proposed NRA regulations exempts qualifying NVOCCs from several key part of the Commission’s current tariff regulations, including the Time/Volume Rate (TVR) regulations of Part 520.12. Does this mean NRAs may be used in lieu of TVRs?

If the answer is “Yes”, and an NRA can be used for a TVR, then we note that the current TVR regulations under 520.12(e) explicitly prohibit Carriers from imposing liquidated damages on any shipper. The text reads:

(e) Liquidated damages. Time/volume rates may not impose or attempt to impose liquidated damages on any shipper that moves cargo under the rate. Carriers and agreements shall rerate cargo moved at the applicable tariff rate, if a shipper fails to meet the requirements of the time/volume offer.

If NRAs are exempt from the Time/Volume Rate (TVR) regulations of Part 520.12(e) does this now mean NRAs can include agreement on liquidated damages in a TVR contained in an NRA?

4. **Tariff Rates and NRAs:** It is not clear whether NVOCCs may use NRAs with some shippers and publish tariff rates for others. The NPRM does not address this issue. We recommend the Commission clarify this in its Final Rule.
5. **Definition of Rate:** The definition of "Rate" in the proposed regulations differs from the definition of "Tariff Rate Item (TRI)" in the Commission's current tariff regulations. This is surprising. The current tariff regulations carefully define the elements of a TRI and link these to the tariff rules and assessorial charges. The lack of structure and detail in the proposed definition of "Rate" is not a good thing. If left unchanged it will lead to NRAs that are unclear and indefinite. This will confuse NVOCCs and shippers and cause disputes. We believe it will also result in NRAs with unique service terms and assessorial charges that differ from tariff rules - was this the Commission's intention?

Under the Commission's current tariff regulations, each tariff rate item (TRI) must include the following:

(f) Tariff rate items. A tariff rate item ("TRI") is the single freight rate in effect for the transportation of cargo under a specified set of transportation conditions. TRIs must contain the following:

- (1) Brief commodity description;*
- (2) TRI number (optional);*
- (3) Publication date;*
- (4) Effective date;*
- (5) Origin and destination locations or location groups;*
- (6) Rate and rate basis; and*
- (7) Service code.*

Each of these elements serves a valid and useful purpose. They clearly define the service to be provided by linking the TRI to the tariff rules and its definitions. For example, the rate basis in a TRI may be shown simply as "WM." However, the tariff rules must clearly define the meaning and application the WM rate basis. The service code in a TRI is used for both origin and destination. Origin Service: Y means the rate applies from the container yard (CY) at the origin location stated in the TRI. Destination Service: D means the rate applies to the Consignee's Door at the destination location stated in the TRI.

If this key issue is not clear we recommend the Commission review examples of rate quotations provided by NVOCCs to shippers. The level of detail will range widely.

We suggest that the proposed Part 532 provide detailed regulations that define how rates are to be agreed in NRAs, as the parties to these NRAs, as well as the FMC, other federal agencies, and other related parties will need these elements in order to clearly define the service to be provided and to understand exactly what commodities are moving.

6. **Standard Tariff Terminology:** We note the exemptions in the proposed Part 532.2 do not include Part 520.5, Standard Tariff Terminology or its Appendix A. These standards are critically important to both tariff rules and rates. They provide a standard terminology baseline for port and city names, and provide unit codes for weight, measure, volume, rate basis, container size, container types, packaging, service codes, and transportation modes. These standards should also be used in NRAs. In our view the proposed Part 532.5 should explicitly state this.
7. **English:** We note the exemptions in the proposed Part 532.2 do not include Part 520.7(a), which states: "Tariffs published pursuant to this part shall: (1) Be clear and definite; (2) Use English as the primary textual language." Therefore, NRAs must be written in English. We agree with this requirement. Without it the Commission will be unable to monitor NRAs and shippers will encounter NRAs that are unclear and indefinite. In our view, the proposed Part 532.5 should explicitly state NRAs must: (1) Be clear and definite; (2) Use English as the primary textual language.
8. **Definitions:** We urge the Commission to revise the definitions of "NVOCC Negotiated Rate Arrangement" and "Rate." The words "specific transportation service" and "specified level of transportation service" are not adequate. A more explicit definition is needed to ensure NRAs clearly specify the rates and services to apply. Failure to do this will result in NRAs that are unclear and indefinite, which will lead to disputes between shippers and NVOCCs over commodities eligible for shipment under an NRA, or over the pick-up or delivery services, or other key elements of the transportation service that should be more clearly defined.
9. **Retrieval of Information/ Assessorials:** Under the proposed Part 532.2, Scope and Applicability, NVOCCs who satisfy the requirements of the proposed regulations are exempted from the following tariff regulation:

46 CFR 520.6 Retrieval of information.

e) Basic ocean freight. The minimum rate display for tariffs shall consist of the basic ocean freight rate and a list of all assessorial charges that apply for the retriever-entered shipment parameters. If other rules or charges may be applicable to a shipment under certain circumstances, the tariff shall so indicate.

This retrieval requirement includes both the rate and applicable assessorial charges, which may include fuel surcharges, documentation fees, congestion surcharges, and many other charges. It links these together. This has been a key feature of the Commission's tariff regulations since 1993. It was built into the ATFI system used for all FMC tariffs from 1993 thru April 1999 and is a key requirement of the current regulations in effect since May 1999. Every tariff rate is linked to applicable assessorials with a few mouse clicks.

By exempting NVOCCs who utilize NRAs from Part 520.6 the proposed rulemaking is not consistent with the Motion Directing Staff to Prepare Proposed Rule adopted by the Commission on 18Feb2010 which clearly states "the exemption is limited to rates."

The proposed rulemaking defines a "rules tariff" as including everything in the tariff except the rate. It requires NVOCCs utilizing NRAs to provide shippers with their rules tariffs, or provide electronic access free of charge. However, the proposed rule making does not require the NRA clearly to link a rate for a specific shipment provided in the NRA to a specific list of applicable assessorial charges in the rules tariff. It should.

If the Commission's intent is to ensure shippers are provided with clearly understandable information about assessorial charges that apply on top of NRA rates the proposed Part 532 needs additional detail. Free on-line access to rules tariffs alone is not sufficient because there will be no required linkage between NRA rates and applicable assessorials. This will lead to confusion and complaints from shippers who will not understand all of the costs related to their shipments.

As tariff publishers since 1975, DPI has handled hundreds of thousands of tariff rate publication requests from ocean carriers and NVOCCs. Many of these included notes specifying exceptions to assessorial charges. For example, NOT SUBJECT TO BUNKER SURCHARGE, or for example, a note specifying an assessorial charge amount that is different than the amount in the tariff rules. If the NRA is limited to the rate alone, are such exceptions to assessorial charges prohibited in NRAs?

We should also point out we see many tariff rate publication requests with notes specifying assessorial charges that are not filed in tariff rules. For example, SUBJECT TO PEAK SEASON SURCHARGE - without a dollar amount. These requests followed rate quotations with the same deficiencies, and we have seen copies of many of those as well. A key part of the professional service we provide at DPI includes clarifying the applicable assessorial charges for each rate filed, and then publishing rules and freight rates with linkage to assessorial charges that comply with the Commission's tariff regulations (Part 520)

Without further detail in Part 532 and required linkage between NRA rates and applicable assessorials in rules tariffs we believe the Commission can expect NRAs will be utilized by along these lines:

- a. Some NVOCCs will offer NRAs with rates that are subject to assessorial charges only as published their tariffs in compliance with Commission regulations. In other words, full compliance.
- b. Some NVOCCs will offer NRAs with rates and many applicable assessorial charges listed in the NRAs. These assessorials will sometimes duplicate their rules tariffs, but will often differ. When they differ which assessorial applies? Those in the rules tariffs or those in the NRA?
- c. Some NVOCCs will offer NRAs with rates that are noted as "all inclusive." However, the term "all inclusive" will not be defined in the NRAs or in their rules tariffs. They will collect additional assessorial charges which may or may not be filed in their rules tariffs.
- d. Some NVOCCs will offer NRAs with rates that are noted "subject to any surcharge incurred." These NVOCCs will collect or attempt to collect various assessorial charges not filed in their rules tariffs or NRAs.

The point is without the linkage between rates in NRAs and assessorials in rules tariffs we predict significant non-compliance by NVOCCs and their shippers. We suggest the Commission request and review actual examples of rate quotations provided by NVOCCs to shippers.

We urge the Commission to revise the proposed Part 532 to clarify how assessorial charge may or may not be expressed in NRAs. Furthermore, we recommend the Commission require NRA's provide linkage to assessorials in rules tariffs in a manner that enables shippers to clearly understand all of the costs related to their shipments.

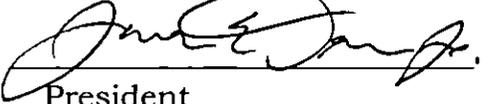
- 10. Prohibited Acts:** The Commission asks for comments on whether NVOCCs should also be exempted from Sections 10(b)(4) and 10(b)(8) of the Shipping Act. We note that these two provisions are at the heart of what constitutes common carriage which is that carriers not engage in unjustly or unreasonably discriminatory conduct with their customers. DPI sees no reason why a rate tariff exemption should necessitate exemption from these provisions; if anything they make them more important.

•
•
•

CONCLUSION

The NRPM appears to have some significant issues that need to be resolved. DPI is sure that others will have comments equally important. We respectfully request that our comments be given careful and favorable consideration by the Commission. We thank you for your consideration.

Distribution Publications Inc.

By:  5-21-10
President

James E. Devine, Jr.

180 Grand Ave, Ste 430, Oakland, CA 94612

Email: jdevine@dpiusa.com

Tel: 1-510-273-8933, Fax: 1-510-273-8959