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BEFORE THE
FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.

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**COMMENTS OF UTi, UNITED STATES, INC.
ON THE PROPOSED RULES FOR NVOCC NEGOTIATED RATE
ARRANGEMENTS ("NRAs")**

**FMC Docket No. 10-03
June 4, 2010**

UTi, United States, Inc. (hereinafter "UTi") is an Ocean Transportation Intermediary, as both a licensed non-vessel operating common carrier and ocean freight forwarder as defined at 46 USC § 40102 (19).

COMMENTS SOUGHT BY THE COMMISSION.

The Commission voted at its meeting of February 18, 2010, exercising its discretion under Section 16 of the Act, codified at 46 U.S.C. § 40103, to propose exemption of licensed NVOCCs by regulation from the following requirements of the Act, and sought public comments on these proposed exemptions::

- a) Section 8(a), the NVOCC would not have to maintain a public automated tariff system tariffs showing its rates;
- b) Section 8(b), the NVOCC would not be bound by the rules that require that tariff rate increases only be effective upon 30 days' notice;
- c) Section 8(e), the strict refund procedures currently in the statute and rules would not be applicable to NVOCCs; and
- d) Section 10(b)(2)(A), the NVOCC would not be subject to the regulation, and corresponding penalty sections, that requires it to charge only its filed rates.

First, we wish to state that UTi is in full agreement with the majority of Proposed Rules in that they generally reflect the reality of the marketplace for the NVOCC community. In view of the reality that NVOCCs negotiate rates on a transaction by transaction basis, tariff publication for an NVOCC of any size has developed into a costly exercise without any corresponding commercial or regulatory benefits. However, the greatest burden of the current tariff publication system is that the NVOCC cannot meaningfully and promptly respond to a dynamic marketplace with competitive pricing and services.

I. THE NRA SHOULD BE ABLE TO ADDRESS SURCHARGES IN AN NRA IN A DYNAMIC MARKETPLACE

The reality is that the ocean carriers and their customers, including NVOCCs in today's marketplace are struggling with equipment shortages. Certain ocean carriers are evaluating their capacity. One major ocean carrier has cancelled its shipbuilding program altogether. This Rule-making Proposal is being considered in an environment wherein the shipper side, including NVOCCS, are all being hit with a barrage of constantly changing rate increases and surcharges. Certain areas in China are specially troublesome areas and a major concern to shippers. There continues to be a serious shortage of equipment and corresponding container slots. Certain large shippers, anticipating lower inventory levels, are even offering increases over their service contract rates to ensure that their cargo is loaded. Certain carriers have commenced implementing \$400 surcharges effective June 1st. Certain Chinese ports, as noted, do not have containers available, which has resulted on an Emergency Equipment Surcharge being imposed on some routes by various carriers.

The point of the above is that the current marketplace is a dynamic one with rapidly fluctuating rates and emerging surcharges. NVOCCs need the flexibility to compete in the NRA structure in order to respond quickly and competitively in this rapidly changing market environment. As noted, a timely response sometimes means that a container gets on a vessel or an untimely one means that cargo gets left behind. This is the marketplace that is expected to continue for sometime in the future. The NRA must be a vehicle in which prompt and timely responses are made to both rate and surcharge pressures. Therefore, UTi makes the following suggestions in terms of structuring the proposed NRA

The Commission in its Proposed Rule-making has invited comments "on additional terms to be required in the NRA documentation", and on which "elements should be required to qualify the NRA for a "safe harbor" status that affords a presumption that the corresponding shipment is not subject to the tariff rate publication requirement." It has been UTi's experience that when negotiating with its customers, all cost factors pertaining to the contemplated shipping transactions, including those relating to surcharges, are on the table. Surcharges inevitably will become part of the NRA "document". These written exchanges will inevitably contain surcharge references since shippers will want to know the total pricing structure of the intended transport.

UTi submits that the NRA, in order to provide a meaningful exchange between an NVOCC and its shipper customers, must allow all the components of the transportation costs as part of the NRA, including some reference to the applicability of charges which are necessary to define the rate(s) themselves. For example, if the parties understand that the offered and accepted rates are "All inclusive", this should be a term that forms part of the NRA. The NRA should be a mechanism that provides flexibility in including references to charges which may assist in defining the rate(s) which have been negotiated. Rate-defining provisions should be permitted in NRAs such as those that identify which surcharges are included in the rate(s) and which are not. The NRA should include information as to which surcharges are to be added to the rates either as would be provided in the NRA itself, or by reference to the Rules Tariff where they may be included with specificity. The NRA would

also indicate if the parties opt to “passing on” all surcharges imposed by the underlying ocean carrier. Finally, the parties should have the flexibility to amend the NRA terms as needed. For example, in the above discussion, UTi noted that in the current Asia to U.S. trade lanes, some carriers are requiring and some shippers are agreeing to pay increased rates and/or surcharges to insure that cargo obtains equipment and is loaded on a vessel. The NRA must have this flexibility to allow timely responses for pricing changes (up or down) as the marketplace dictates. As noted, this may dictate whether a container is loaded or not.

UTi, therefore, respectfully requests that the following be added to the definition of an NRA in the Proposed Rules at 46 C.F. R. §532.5 (see the bolded underscored provision below):

§532.5-Requirements for NVOCC Negotiated Rate Arrangements

In order to qualify for the exemptions to the general rate publication requirement as set forth in section 532.2, an NRA must:

- (a) be in writing;
- (b) be agreed to by both shipper and NVOCC prior to the date on which the cargo is received by the common carrier or its agent (including originating carriers in the case of through transportation);
- (c) clearly specify the rate and to which shipment or shipments such rate will apply;
- (d) clearly identify the specific surcharges, including, the dollar amounts which are applicable to the rate(s), and if these are contained in the Rules Tariff, the web-site location where these rates may be contained; and**
- (e) may not be modified after the time the shipment is received by the carrier or its agent (including originating carriers in the case of through transportation).

The above suggested language relating to surcharges is the language now generally found in service contracts, Non-vessel Operating Common Carrier Service Arrangements (“NSAs”), and/or tariff line items of current published rates, which assist the parties in defining the applicable rates and costs associated with those rates. This provision (**§532.5 (d)**) would tremendously assist in the negotiating/NRA process. Therefore, UTi respectfully submits that the Commission address this item so that it provides a clear indication that references to surcharges such as those noted above are permissible, and, in fact mandatory, in the NRA context. This helps to clear potential ambiguities in the exchanges between NVOCCs and their shipper customers which result in a binding agreement---i.e., an NRA.

The requested relief is in fact anticipated by the Commission in the Proposed Regulation at §532.2 (g). That Proposed Rule states that the current 46 C.F.R. § 520.4 (a) (4) would no longer apply to exempt NVOCCs. § 520.4 (a) (4) provides as follows:

§ 520.4 Tariff contents.

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

(4) **State separately each terminal or other charge,** privilege, or facility under the control of the carrier or conference and any rules or regulations that in any way change, affect, or determine any part of the aggregate of the rates or charges; (Emphasis Supplied).

From the above, since the exempt NVOCC would no longer be required to state “each terminal or other charge” in its published tariffs, it is then clear that it is the Commission’s intent to allow language in an NRA relating to charges similar to that illustrated in the discussion above. UTi respectfully requests that the Commission address and clarify this understanding by adding the language proposed above in §532.5 (d), or by otherwise stating that reference to surcharges are properly included in an NRA.

II. UTI REQUESTS CLARIFICATION OF §532.5 (d) TO ALLOW FOR NRA AMENDMENTS.

UTi also respectfully requests clarification of the following provision in the Proposed Regulation:

§532.5-Requirements for NVOCC Negotiated Rate Arrangements

In order to qualify for the exemptions to the general rate publication requirement as set forth in section 532.2, an NRA must:

(d) may not be modified after the time the shipment is received by the carrier or its agent (including originating carriers in the case of through transportation).

In its analysis for §532.5-Requirements for NVOCC Negotiated Rate Arrangements, the Commission states:

“NRAs must be concluded and in place prior to the date the cargo is received by the common carrier or its agent (including originating carriers in the case of through transportation). **These requirements are based on the applicable rate provision of the Commission's tariff regulations found at 46 CFR § 520.7(c). The Commission wishes to note that the regulation as proposed does not allow for any modification to the NRA after the cargo is received by the carrier or**

its agent (or the originating carrier in the case of through transportation)." (Emphasis Supplied).

The Commission's current tariff regulations at 46 CFR § 520.7(c) state:

Applicable rates. The rates, charges, and rules applicable to any given shipment shall be those in effect on the date the cargo is received by the common carrier or its agent including originating carriers in the case of rates for through transportation.

The issue arises in that in the Commission's Proposed Rule §532.5 (d), if taken literally is ambiguous. That section states that an NRA " may not be modified after the time the shipment is received by the carrier or its agent (including originating carriers in the case of through transportation)." This section appears to indicate that an NRA may not be modified in a day, month, a year, or for that matter, ever. However, current 46 CFR § 520.7(c) makes it clear that in the tariff context, the rates that apply are those that are in the tariff as of the date the cargo is received by the NVOCC or when the trucker picks up the cargo in the case of through transportation. It appears that the intent of §532.5 (d) is that of 46 CFR § 520.7(c)---i.e., to set the applicable rate at the time the cargo is tendered to the NVOCC. The way that §532.5 (d) is drafted it appears to say that rates contained in NRAs may never be amended which UTi believes is not intended by the Commission.

From the tone of the Proposed Rules, it is UTi's interpretation that the Commission intends for the parties to freely amend or modify the rate levels (up or down) upon agreement so long as they adhere to the NRA requirements. This interpretation seems reasonable since the "30 day" rule (§520.8 (a)) has been specifically exempted as well as §520.14, the Special Permission section which would allow increases of rates on less than 30 day notice. UTi respectfully requests that this be clarified by the Commission---i.e., that the Commission clarify that the parties may modify the rates contained within an NRA at any time, whether to increase or decrease the rate, if the parties agree to do so in a writing following the prescribed Proposed Regulations for NRAs. The NRA has all the elements of a contract, and should be flexible to allow amendments freely, if agreed to by the parties in writing.

III. UTI ACCEPTS THE PROPOSED RULES WHICH WOULD EXEMPT NVOCCs FROM THE REQUIREMENTS OF SECTION 10(B)(4), AND SECTION 10(B)(8).

UTi supports the exemption of the above noted statutory provisions in that an NVOCC that opts to become exempt from tariff publication of rates has in effect removed itself from all corresponding statutes and regulations which refer to tariffs. In other words, an exempt NVOCC could not readily violate a provision that prohibits discriminatory practices in services pursuant to a tariff, nor could it violate prohibitions related to unreasonable preferences or advantages or undue or unreasonable prejudices or disadvantages related to its tariff services.

These sections of the Shipping Act should be added to the list of exempt provisions for NVOCCs which opt to become exempt.

For all of the foregoing reasons, UTi supports the NCBFAA Petition, and respectfully requests that the Commission address the matters raised herein with regard to exempting NVOCCs from the specified tariff obligations currently required by the Commission's rules and regulations.

Respectfully submitted,


Name: CHRISTOPHER D. DALE

Title: PRESIDENT

On Behalf of:
UTi, United States, Inc.