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BEFORE THE MARITIME COMM

FEDERAL MARITIME COMMISSION

Docket No. 10-03

NVOCC NEGOTIATED RATE ARRANGEMENTS

COMMENTS OF

THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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Date: June 4, 2010

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The National Industrial Transportation League (“League”) hereby submits its comments in support of the Notice of Proposed Rulemaking (“NPRM” or “Notice”) issued by the Federal Maritime Commission (“FMC” or “Commission”) on April 29, 2010. In the NPRM, the agency proposes to exempt licensed non-vessel operating common carriers (“NVOCCs”) from certain statutory and regulatory requirements regarding publication of rates in tariffs when such NVOCCs enter into Negotiated Rate Arrangements (“NRAs”) with their shipper customers, in accordance with the proposed rule (“NRA Rule”). The League commends the FMC for its issuance of the proposed exemption which the League believes will result in greater efficiencies and flexibility in the provision of international ocean transportation services by NVOCCs. The League also urges the agency to adopt and implement the proposal as soon as possible, subject to its comments below.

I.

INTEREST OF THE LEAGUE

Founded in 1907, the League is the oldest and largest organization of shippers in the United States. Its members conduct industrial and/or commercial enterprises of all sizes throughout the nation and overseas. The League’s members ship a wide variety of commodities,

via all modes of carriage, across interstate, intrastate, and international boundaries. A number of League members use the services of NVOCCs that are currently required to comply with the tariff publication requirements set forth in the *1984 Shipping Act*, as amended by the *Ocean Shipping Reform Act of 1998* (“*OSRA*”). Thus, League members will be directly impacted by the proposed exemption.

II.

COMMENTS ON THE PROPOSED RULE

The genesis for this NPRM was the Commission's decision on February 18, 2010 to grant in substantial part the petition of the National Customs Brokers and Forwarders Association of America, Inc. (“NCBFAA”), filed in 2008, to exempt all NVOCCs from certain tariff publication requirements when the NVOCC negotiates rates with its customers in writing. The League strongly supported a granting of the NCBFAA petition based on its firm belief that the NVOCC tariff exemption furthers *OSRA's* policy of deregulation, by promoting “the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace.” 49 U.S.C. § 40101(4).

The League applauds the Commission for issuing this NRA proposal in order to implement the NVOCC rate tariff exemption and modernize NVOCC tariff regulation to meet the demands of the post-*OSRA* marketplace. The proposed NRA rule will result in substantial commercial benefits by enhancing service options for shippers, reducing regulatory costs and burdens for NVOCCs, and providing both NVOCCs and their customers with greater flexibility and efficiencies in their shipping arrangements.

At the same time, however, the League has identified several aspects of the proposed rule that require greater clarification and/or modification. As such, the League's comments address

the following five components of the proposed rule: (A) the scope of the exemption; (B) clarification and modification of certain NRA requirements; (C) the need to extend the exemption to certain tariff-related prohibitions set forth in 46 U.S.C. §§ 41104(4) and (8); and (D) the need for a Safe Harbor provision to protect the interests of both shippers and NVOCCs who enter into NRAs.

A. Scope of the Exemption

In the proposed NRA Rule, the exemption from certain tariff publication requirements is offered only to licensed NVOCCs, although the Commission has requested comments on whether the exemption should also be extended to unlicensed but registered NVOCCs (i.e. foreign-based). As stated in its prior filings on the NVOCC tariff exemption issue, the League supports application of the exemption to all NVOCCs (both licensed and registered) based upon its belief that such universal application will maximize the pro-competitive and more flexible shipping arrangements for NVOCCs and their customers. The League also believes that such approach is consistent with *ORSRA's* policy of providing “an efficient and economic transportation system in the ocean commerce of the United States that is, insofar as possible, in harmony with, and responsive to, international shipping practices,” as universal application will maintain uniformity in the global transportation market. *See* 46 U.S.C. § 40101(2).

Despite the League's strong support for universal application of the exemption, it is aware that the Commission has proposed to limit its scope to licensed NVOCCs, based on potential enforcement-related concerns that were expressed during the public hearing on May 24, 2010. If the Commission decides that its concerns prevent the immediate extension of the exemption to all NVOCCs, the League proposes that the Commission adopt the NRA Rule with the licensing limitation as soon as possible to effectuate in a timely manner the commercial benefits that will

flow from the rule. The League also urges the Commission to simultaneously initiate a further review of the basis for its concerns regarding the extension of the exemption to foreign-based NVOCCs, and to conclude such review within one year. The Commission should also include within the scope of its review, a determination as to whether the risk of retaliation against U.S.-based NVOCCs in foreign jurisdictions is likely to materialize. Unless the FMC determines after the review that the enforcement risks involved are so substantial and widespread as to completely outweigh the commercial benefits to be gained through a universal exemption and/or the potential risk of retaliation, the League supports the extension of the exemption to foreign-based NVOCCs upon conclusion of the Commission's review.

The League also notes that in the event that the Commission determines that its concerns are based primarily upon the activities of only a few NVOCC “bad actors,” the Commission has the authority to revoke the exemption with respect to any particular foreign-based NVOCC(s) that fail to comply with the NRA requirements or otherwise abuse the exemption. Such approach would allow the Commission to protect the shipping public while simultaneously achieving the commercial benefits of a universal exemption.

B. NRA Requirements

An NRA is defined under the proposed rule as “a written and binding arrangement between a shipper and an eligible NVOCC to provide specific transportation service for a stated cargo quantity, from origin to destination.” Proposed 46 C.F.R. § 532.3(a). In order to qualify for the exemption 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; (c) clearly specify the rate and to which shipments the rate will apply; and (d) may not be modified after the time the shipment is received. Proposed 46 C.F.R. § 532.5. Furthermore, before entering into NRA, an NVOCC

must “provide the prospective shipper all the applicable terms as set forth in its rules tariff; or “provide electronic access to its rules tariffs to the public free of charge.” Proposed 46 C.F.R. § 532.4.

The League supports the proposed NRA requirements overall but asks the Commission to clarify the rule in certain respects. First, it would be useful for the FMC to clarify that an exchange of informal writings (e.g. emails or similar documents) may be sufficient to satisfy the requirement that an NRA must be “agreed” by the shipper and NVOCC, to the extent that such informal written communications manifest such agreement (i.e. an offer and acceptance). The League believes that such clarification would be more consistent with current business practices used by NVOCCs and their customers. Further, such clarification will help avoid disputes between the parties to an NRA over the type of document that constitutes a workable and compliant agreement.

Second, the League is concerned that the NRA requirements as proposed are not sufficiently clear as to the scope of the rate provisions that may be included within an NRA. Under the proposed rule, the NRA must “clearly specify the rate” (proposed 46 C.F.R. § 532.5(b)) and a “rate” is defined as “a price stated for providing a specified level of transportation service for a stated cargo quantity, from origin to destination, on and after a stated date or within a defined time frame.” Proposed 46 C.F.R. §532.3(b). Furthermore, a “Rules tariff” is defined to include “terms and conditions governing the *charges*, classifications, rules, regulations and practices of an NVOCC, but does not include a rate.” Proposed 46 C.F.R. § 532.3(c) (emphasis added).

Reading those NRA requirements together, it is not sufficiently clear whether an NRA may include only a base rate or must include all rates and charges applicable to the NRA service,

such as surcharges and assessorial. It also is not clear whether charges may be incorporated into an NRA from the rules tariff or other sources. The League believes that parties to an NRA should be able to negotiate an all-inclusive rate or a base rate with itemized surcharges. Thus, to prevent promote compliance and prevent potential disputes between shippers and NVOCCs, the League suggests that the final version of the rule clarify this point. Furthermore, to the extent that the parties agree to apply surcharges or assessorials contained in the NVOCC's rules tariff, the NRA must specifically incorporate and identify which such surcharges or assessorials apply in order to avoid confusion or surprise.

Third, the League is concerned that the NRA requirements as proposed are not sufficiently clear as to whether shippers and NVOCCs have adequate flexibility to negotiate and establish economic and/or service-related terms other than the base rate. The parties to an NRA may wish to negotiate credit and payment terms, volume incentives, loss and damage provisions, among other terms, which may conflict with the generic terms set forth in the NVOCC's generic rules tariff. Providing options for alternative payment or service arrangements is a common practice when parties negotiate international transportation arrangements and the League believes that providing parties with flexibility to customize NRAs promote increased efficiencies and competition in the ocean shipping marketplace. As such, the League suggests that the NRA Rule should be modified and clarified to permit the parties to an NRA to add unique payment or service terms.

Fourth, the final rule should also clarify that in the event of a discrepancy between the terms set forth in the NRA and the NVOCC rules tariff, the terms of the NRA will govern.

C. The Commission Should Extend the Exemption to the Prohibitions in 46 U.S.C. §§ 41104(4) and (8)

The NRA exemption would apply to several statutory and regulatory provisions regarding publication of rates, including the types of rates, increases to rates, rate refunds, and adherence to published rates. Proposed 46 C.F.R. § 532.2. In its Notice, the Commission seeks comment on whether the exemption should also be extended to the prohibitions in 46 U.S.C. §§ 41104(4) (prohibiting common carriers from unfair or unjustly discriminatory practices in service pursuant to a tariff) and (8) (prohibiting common carriers from undue preference or unreasonable preference or advantage or undue or unreasonable prejudice or disadvantage for tariff service). In response, the League believes that the exemption should apply to such prohibitions.

The underlying purpose of the tariff exemption is to provide NVOCCs with a flexible and confidential mechanism to negotiate rates in real time on a per shipper basis. Prohibiting NVOCCs from discriminating or providing preferences in NRAs is inconsistent with the stated purpose and contract-based shipping practices. Further, shippers do not require protection from discriminatory pricing practices based on the abundance of ocean transportation intermediaries that operate in U.S. foreign commerce, as well as vessel operating common carriers and shippers' association options, which collectively provide shippers with multiple service choices and competitive pricing in most cases. As such, the League supports the extension of the exemption to 46 U.S.C. §§ 41104(4) and (8).

D. The Commission Should Provide a Safe Harbor Rule to Protect Shippers and NVOCCs

Finally, the League supports the incorporation of a “safe harbor” provision that would protect both shippers and NVOCCs against reversion to a tariff rate or term in the event that the

Commission determines that a particular NRA has not met all of the requirements set forth in the NRA Rule.¹ The League is concerned that, without safe harbor protection, unintended potential enforcement consequences may exist in the event that there is an inadvertent failure to comply strictly with the NRA requirements. Thus, the League believes that the Commission should set forth the minimal requirement that to the extent that there is some written evidence of a rate that is to apply to an international shipment, whether it be informal writings or emails, that such shipment will be subject to safe harbor protection and, thus, qualify for the exemption.

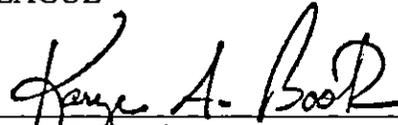
III.

CONCLUSION

For the foregoing reasons, the League respectfully requests that the Commission adopt the proposed NRA Rule with the clarifications and modifications proposed herein.

Respectfully Submitted,

THE NATIONAL INDUSTRIAL TRANSPORTATION
LEAGUE



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¹ The League notes that shippers may already be entitled to protection pursuant to 46 U.S.C. 41109(d) which prohibits the Commission from ordering a person "to pay the difference between the amount billed and agreed upon in writing with a common carrier or its agent and the amount set forth in a tariff or service contract by that common carrier for the transportation service provided." However, it is possible that the Commission could determine that an NRA is defective prior to the issuance of an invoice for a particular shipment.