

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Petition No. P2-15

**PETITION OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS
ASSOCIATION OF AMERICA, INC. FOR INITIATION OF RULEMAKING**

**COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE**

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The National Industrial Transportation League (“League”) submits its comments regarding the Notice of Filing and Request for Comments (“Notice”) issued by the Federal Maritime Commission (“FMC” or “Commission”) on April 23, 2015. The Commission’s Notice concerns the National Customs Brokers and Forwarders Association of America, Inc.’s (“NCBFAA”) petition to the FMC requesting a rulemaking (“Petition”) to revise existing regulations governing NVOCC Negotiated Rate Arrangements (“NRAs”)¹ and Negotiated Service Arrangements (“NSAs”).² Specifically, NCBFAA asks the Commission to:

- Revise the NRA rules to allow the parties to an NRA to negotiate economic terms, in writing, beyond rates currently permitted in NRAs;
- Eliminate the NRA rule prohibiting modification of NRAs and allow NRAs to be modified upon mutual agreement of the parties to the NRA; and
- Revise the NSA rules to eliminate the contract filing and essential terms publication requirements or eliminate 46 C.F.R. Part 531 in its entirety.

The League supports the granting of the Petition, subject to the comments below. The League believes that expanding the NRA exemption, and eliminating the NSA filing and

¹ 46 C.F.R. Part 532.

² 46 C.F.R. Part 531; Petition of the National Customs Brokers and Forwarders Association of America, Inc. for Initiation of Rulemaking, Federal Maritime Commission, Docket No. P2-15, 6 (April 18, 2015) (“NCBFAA Petition”).

publication requirements, as requested in the Petition will result in greater efficiencies and flexibility in the provision of international ocean transportation services by NVOCCs.

I. INTEREST OF THE LEAGUE

Founded in 1907, the League is a national organization of shippers and other companies engaged in the freight transportation business in the United States. The majority of the League's membership and receive a wide variety of commodities, using all modes of carriage, across interstate, intrastate, and international boundaries. Many League members require international ocean transportation services and, thus, may use the services of non-vessel-operating common carriers ("NVOCCs"). Thus, League members will be directly impacted by the NCBFAA Petition.

II. COMMENTS ON THE PROPOSED RULE

The League has a long history of supporting regulatory reforms that will foster a competitive and efficient ocean transportation system, and reduce unnecessary regulation. Indeed, the League was actively involved in the reform efforts leading to passage of the Ocean Shipping Reform Act of 1998 ("OSRA"), which was designed to increase competition and efficiencies in the provision of ocean transportation by facilitating contractual relationships between individual ocean carriers and their shipper customers. The League also supported action by the FMC to exempt NVOCCs from certain tariff publication requirements in 2004, in order to permit NVOCCs to negotiate confidential service contracts with their customers in NSAs that are filed with the FMC, and in 2011 to allow NVOCCs to negotiate confidential rates with its customers in writing in NRAs.³ The League supported these actions to modernize NVOCC tariff

³ See Comments of the National Industrial Transportation League, Federal Maritime Commission, Docket No. 10-03 NVOCC Negotiated Rate Arrangements (June 4, 2010).

regulation and allow for more flexible business arrangements to meet the demands of the market following the passage of OSRA.

The League commends the Commission for soliciting comments on this latest NCBFAA proposal to expand the scope of the NRA exemption and to modify the NSA regulations. The League believes that further modernization of the regulations governing NVOCC transactions in order to reflect the post-OSRA market place will benefit the ocean transportation system. The NCBFAA's Petition, subject to the League's comments herein, has the potential to result in substantial commercial benefits by increasing service options, reducing regulatory costs and burdens for NVOCCs, and providing shippers and NVOCC's greater flexibility in their shipping arrangements.

In its Petition, the NCBFAA requests the Commission to "authorize NVOCCs to include any economic or service terms in NRAs as long as those terms are appropriately memorialized in writing in a manner consistent with the existing NRA regulations."⁴ Currently, the NRA exemption permits only the negotiation of rates, and all other service terms are governed by the NVOCC's rules tariff. The NCBFAA asserts that NVOCCs and shippers would like to, but cannot currently cover a variety of terms under NRAs, including:

- minimum volumes or time/volume rates
- liquidated damages
- credit terms
- service guarantees and/or service benchmarks, measurements and penalties
- surcharges, GRIs, or other pass-through charges from the carriers or ports
- rate amendment processes
- EDI services
- dispute resolution
- liability
- rate or service amendments⁵

⁴ NCBFAA Petition at 6.

⁵ NCBFAA Petition at 6.

Additionally, NCBFAA notes that NVOCCs have found ways to circumvent the “no other economic terms” by issuing a superseding NRA or limiting a NRA to a very short time period (1 day or 1 week) so that a specific provision can expire.⁶ NVOCCs also may limit a published tariff to only a single shipper. NCBFAA believes that on-going efforts to circumvent the current NRA regulations to meet the business needs of the marketplace demonstrates that revisions are required.⁷

The League recommends that the Commission adopt the NCBFAA proposal to permit NVOCCs and shippers to negotiate economic or service terms in NRAs in order to facilitate efficient and competitive shipping arrangements. As noted by the League in its 2010 Comments filed in Docket No. 10-03, *NVOCC Negotiated Rate Arrangements*:

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.⁸

The League continues to believe that expanding the NRA exemption to permit the negotiation of terms beyond rates will increase the ability of NVOCCs to respond to the needs of shippers in the marketplace. Modifying the NRA rules in this manner will enhance flexibility and assist shippers and NVOCCs with the negotiation of agreements that will most benefit both parties, since many shippers may prefer to negotiate terms that are different from the NVOCC's

⁶ NCBFAA Petition at 10.

⁷ *Id.*

⁸ NITL 2010 Comments at 7.

rules tariff. It is well-known that the rules in NVOCC tariffs are largely one-sided in favor of the NVOCC. The utility of the NRA rule will be improved if the parties were able to negotiate terms in addition to rates that could be customized to address the business requirements of the parties. However, should the Commission allow broader negotiations in NRAs of terms beyond rates, there is an increased risk that a conflict in terms may occur between the NRA and the NVOCC rules tariff. The League believes that the Commission should expressly address this issue and promulgate a rule that ensures, in the event of a discrepancy between the terms of an NRA and an NVOCC's tariff, the negotiated terms of the NRA would control.

The NCBFAA also advocates for elimination of 46 C.F.R. § 532.5(e) which prohibits modification of an NRA after the time the initial shipment is received by the carrier. The League supports allowing a shipper and NVOCC the power to modify an NRA at any time but only to the extent that the modification is based on a mutual written agreement between the parties and, such agreement, should not be in the form of the NVOCC's tariff, bill of lading, or other shipping document that is not subject to mutual negotiation. Again, adoption of this rule would enhance the parties' flexibility to react to the dynamic international shipping marketplace but there should be appropriate procedures for accomplishing the amendment.

The NCBFAA advocates for the elimination of the filing and essential terms publication requirement of NSAs. The League supports elimination of these requirements. The League agrees with NCBFAA that the existing NSA filing requirement appears to serve no useful purpose because the Commission does not (and need not) rely on these submissions to fulfill its enforcement duties. The League instead recommends the Commission require NVOCCs to provide NSA contract terms to the Commission upon its request. The Commission could require NVOCCs to provide NSA contract terms to the agency in cases where a complaint is filed

concerning an NSA or where the agency has initiated its own investigation into a matter involving an NSA. However, it does not appear that the FMC engages in the routine review of NSAs or their essential terms, and the League is not aware that shippers need or rely on essential terms publication for any business purpose.

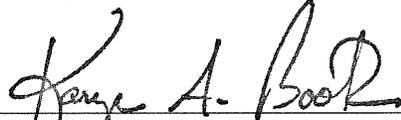
Alternatively, NCBFAA advocates for the elimination of 46 C.F.R. Part 531 in its entirety. Although, the League generally supports the NCBFAA petition, the League believes that NSAs should remain as an option for any shippers and NVOCCs that desire the increased formality of the NSA requirements. Therefore, the League does not support the wholesale elimination of Part 531.

**III.
CONCLUSION**

For the foregoing reasons, the League respectfully requests that the Commission adopt the NCBFAA's Petition subject to the clarifications and modifications proposed herein.

Respectfully Submitted,

THE NATIONAL INDUSTRIAL
TRANSPORTATION LEAGUE



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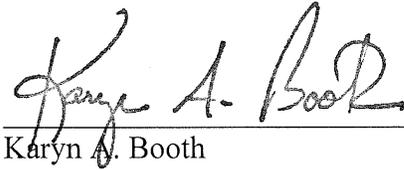
June 8, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June 2015, I served a copy of The National Industrial Transportation League's Comments upon the following via first class mail:

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