WORLD SHIPPING COUNCIL

PARTNERS IN TRADE

Comments of the

World Shipping Council

Submitted to the

Federal Maritime Commission

In the matter of

Petition of the National Customs Brokers and Forwarders Association of America, Inc. for Initiation of Rulemaking; Notice of Filing and Request for Comments

Petition P2-15

June 5, 2015

The World Shipping Council ("WSC" or the "Council") files these comments in response to the Commission's notice and request for comments published in the Federal Register on April 28, 2015, with respect to the petition filed by the National Customs Brokers and Forwarders Association of America, Inc. (the "NCBFAA petition"). The Commission designated the NCBFAA petition as Docket No. P2-15.

The NCBFAA petition asks the Commission to amend its regulations governing Negotiated Service Arrangements (NSAs) and Negotiated Rate Agreements (NRAs), two mechanisms that are available under Commission regulations as complete or partial alternatives to tariff publication for cargo carried by non-vessel operating common carriers (NVOCCS). Specifically, the NCBFAA petition requests that the Commission amend its regulations with the effect that NVOCCs would be allowed to include all terms of their service offerings into a single document that has the attributes of today's NSAs, but that there be no requirement to file those contracts with the Commission. NSAs are the NVOCC equivalent of vessel operating common carrier (VOCC) service contracts.

The Commission's call for comments on the NCBFAA petition does not propose any changes to the Commission's NSA or NRA regulations. Thus, if the Commission were to take any action on the petition, the Commission would have to publish a notice of proposed rulemaking describing the regulatory changes that the Commission proposed to make. Although there is no pending proposal for a change to the Commission's regulations, the Council believes that the issues raised by the NCBFAA petition are important. The Council also believes that those issues are most logically and equitably considered alongside requests that vessel operating common carriers have made for changes to the Commission's regulations governing service contract amendment filing.

1. Background on the NCBFAA Petition and the Council's 2013 Request that the Commission Review its Service Contract Regulations

As the NCBFAA recounts at pages 2-4 of its petition, the development of the Commission's current regulations on NRAs and NSAs began with a petition that NCBFAA filed in 2003, and culminated in the Commission's 2011 decision in Docket No. 10-03. In 2004, the Commission amended its regulations to allow for NSAs, which are the NVOCC equivalent of VOCC service contracts. In 2011, the Commission further amended its regulations to allow for the use of NRAs, which allow the rate agreed by an NVOCC and its shipper customer to be memorialized outside of a tariff or NSA, and not filed with the Commission.

Ocean common carriers have also requested changes to the Commission's service contract regulations. Most recently, for example, the Council in August of 2013 filed comments on the FMC's Initial Draft Strategic Plan for FY 2014-2018. In those comments, the Council asked the Commission, among other things, to amend its regulations governing the timing of service contract amendment filing. The Council's 2013 comments followed a unanimous Commission vote in February of 2013 to proceed with a review of its service contract regulations.

Two and a half years after the Commission's unanimous vote to review its service contract regulations, the new NCBFAA petition and the pending WSC comments from 2013 together present an appropriate opportunity for the Commission to turn to its promised service contract regulatory review. Streamlining the requirements applicable to contract amendment filing by both VOCCs and NVOCCs would reduce regulatory burdens and increase the speed with which carriers (VOCCS and NVOCCs) could respond to shipper service requests, without affecting the Commission's visibility into contract activity.

2. VOCC and NVOCC Service Contract Regulatory Requirements Must Be the Same

The NCBFAA petition, at page 12, argues that because ocean common carriers did not object to the establishment of the NSA and NRA mechanisms, VOCCs should not object to the current request that NVOCCs be released from all tariff publication and service contract filing requirements. The petition goes on to state that: "Hence, the fact that VOCC rates are still subject to the formalities pertaining to service contract filing and rate tariff publication should not be of concern or control the result here."

We respectfully disagree.

Although VOCCs have been willing to accept some misalignment in the regulatory burdens on NVOCCs and VOCCs, the relief requested in the current NCBFAA petition, if granted by itself, would provide NVOCCs a level of commercial flexibility that would be unavailable to VOCCs and that would give NVOCCs an unfair and artificial competitive advantage over VOCCs. Such a discriminatory regulatory distinction would be inconsistent with the Shipping Act's first stated purpose of establishing "a nondiscriminatory regulatory process. . . ." 46 U.S.C. § 40101(1).

The competitive disparity between a VOCC that is required to file all service contracts and amendments before that VOCC may carry cargo under that contract or amendment and an NVOCC that may simply agree to a rate with its customer and accept the cargo is obvious. The NVOCC under that regulatory scenario could move the cargo as soon as it agreed to commercial

terms with the shipper. A VOCC competing for the same cargo, in contrast, would have to agree to commercial terms, prepare the documentation required by the Commission's regulations, and file that information before it could move the cargo.

As discussed in more detail below, WSC members have advised that the process beginning with commercial agreement on contract terms to filing with the Commission takes, on average, twenty-four to forty-eight hours if no problems are encountered. That time period, which would not apply to NVOCCs under the relief requested by the NCBFAA petition, would act as an artificial regulatory distortion of competition between NVOCCs and VOCCs seeking the same cargo in the same market. There is no regulatory justification for such discriminatory regulatory treatment or for creating such a competitive distortion.

Especially as the pace of commerce continues to accelerate,[1] placing an artificial restriction on only one class of carrier is not consistent with the controlling statutory requirements. Such an outcome would be all the more indefensible because the class of carriers that would be disadvantaged – VOCCs – is the class of carriers that physically transport the cargo. It is one thing to provide statutory recognition for the existence and operation of NVOCCs. It is quite another to provide them with a government-sponsored advantage over the vessel operating carriers without which NVOCCs literally could not exist. The competitive distortion that would result from simply granting the relief requested by the NCBFAA is, by itself, a sufficient reason not to grant that relief in the form requested.

There is a second reason why VOCC and NVOCC service contract requirements must align. It is not uncommon that an NVOCC will require a service contract amendment from its underlying VOCC in order for the NVOCC to pursue a particular piece of business. Assuming that the VOCC provides the NVOCC with service contract terms that the NVOCC can successfully re-sell to its customer, the VOCC cannot accept any cargo under those terms until it has filed an amendment to its service contract with the NVOCC. Thus, even though the NVOCC under a no-file NSA scheme could immediately accept cargo from the ultimate shipper without having to file with the FMC, the cargo still could not move until the VOCC had completed its regulatory requirements. In that case, neither the NVOCC nor its shipper would benefit from the regulatory relief that the NCBFAA petition has requested. The slowest link in the process controls how fast the cargo can move.

If, on the other hand, the service contract/NSA amendment filing requirements are the same for both NVOCCs and carriers, then there is no artificial "slow link" that governs the

[1] One measure of the time-sensitive nature of the rate and service negotiation process is the number of service contract amendments that are executed. That number continues to climb. For example, there were 582,480 service contract amendments filed in 2014 versus 366,808 filed in 2010.

commercial process for all parties. Instead, all parties would be able to respond to rate quotes and bookings on the same terms.

In short, there would be two undesirable outcomes if the Commission were to address only NVOCC or only VOCC service contract regulatory relief. The first outcome would be that the Commission would create an artificial, discriminatory and inequitable competitive advantage for one group. The second outcome, which would apply in those situations in which both NVOCC and VOCC contracts would have to be amended to accommodate a particular piece of business, would be to negate any relief granted, because the party in the chain with the greatest regulatory burden would still determine the speed at which any given transaction could be completed.

Because NVOCCs necessarily rely on VOCCs to transport NVOCC cargo, and the Commission's regulations require both VOCCs and NVOCCs to comply with certain regulatory requirements before any cargo moves, it is logically impossible to provide regulatory relief only to NVOCCs, but not to VOCCs. Fortunately, the Commission is not faced with an either/or choice. To the contrary, a tailored and even-handed set of changes to the Commission's service contract, NRA, and NSA regulations would benefit all parties – VOCCS, NVOCCs, and shippers.

3. A Proposal for Equitable Regulatory Reform

As noted above, the Council in August of 2013 proposed a number of possible approaches to service contract regulatory reform. In the interest of simplifying the issues and making alignment between NVOCC and VOCC filing requirements easier, the Council here proposes a streamlined set of regulatory changes that the Commission could propose in a notice of proposed rulemaking. These changes would provide comparable regulatory relief from contract amendment filing requirements for both VOCCs and NVOCCs.

The World Shipping Council's request for regulatory relief focuses on the Commission's rules on filing service contract amendments. Under 46 C.F.R. §§ 530.3(i) and 530.10, a service contract amendment must be filed with the Commission before any cargo moves pursuant to that amendment. The Council proposes that the requirement for filing amendments prior to cargo movement be changed to allow for amendments to be filed within a defined period after their execution, and that cargo be allowed to move prior to filing.

NVOCC NSAs should be provided with the same relief. As discussed in more detail below, this approach would allow the Commission to continue to have full visibility into all contracts and amendments, while allowing all parties to contracts – whether they are VOCCs,

NVOCCs, or shippers – to conduct business at the speed dictated by commercial considerations, not the speed dictated by government regulations.

The Council focuses this proposal on service contract amendments (as opposed to the filing of the base service contract) for two related reasons. First, based on Commission statistics, service contract amendment filings outnumber contract filings by approximately ten to one. Second, amendments are more likely to reflect time sensitive responses to the market by shippers and carriers, and thus delays in their effectiveness are more likely to negatively affect U.S. exporters and importers.

The time that it takes to agree to a contract amendment between a carrier and a shipper and to file that amendment varies depending on several factors, including: where the people handling the amendment are located, local holidays, speed of document exchange, extent of the changes being made to the contract, and whether any of the parties or commercial filers encounter technical or transmission problems. At the end of the day, the process requires a certain level of human interaction, with the uncertainties inherent in such a system. We are advised by our members that the process averages about 24-48 hours when everything goes well; however, circumstances can cause the average processing time to be even longer.

Having a 24 to 48-hour or longer delay between the time a commercial agreement is reached and the time that agreement can be implemented because of a restrictive regulatory requirement is a burden on commerce and appears to serve no Commission regulatory need.

As the Commission is no doubt able to see from its SERVCON system, service contract amendments are not filed in a well-modulated, even flow over the course of the year. Some times are busier than others. For example, during seasons in which contracts in various trades typically expire, there is a period of intense activity to file amendments that extend those contracts. The concentrated volume of amendments can slow down the parties' ability to timely process those amendments. Particularly if the purpose of an amendment is to extend the contract, failure to file before the underlying contract expires means that the affected shipper does not have access to the anticipated service contract rates. Once a service contract expires, it cannot be amended. That can upset valid commercial expectations for both parties to the contract, and typically requires making adjustments to future contract terms in order to try to put the parties back where they originally intended to be. That adjustment process is itself inexact, inefficient, and time consuming. If service contract amendments could be filed with the Commission in periodic batches, those disruptions and inefficiencies could be avoided, with no negative implications for any party or for commerce. Section 4 of these comments discusses the Commission's recent experience with such a situation.

Another situation in which shippers may be harmed by the strict rule that contract amendments must be filed before they may be applied to cargo is when a carrier announces a general rate increase. Some shippers negotiate exceptions to such increases on a case-by-case basis, and those exceptions are then reflected in a service contract amendment. Because such situations can involve the need to process such amendments in a short period of time, and the consequence of failing to file on time is that the shipper is required to pay more, these are situations in which shippers would benefit from greater flexibility in the Commission's rules.

Finally, because the situations in which the strict amendment filing timing requirements cause the greatest problems are those situations that occur when amendment volumes are high, the timing requirement also increases the probability for human error as contract personnel rush to make all required filings within the deadlines imposed by the parties' commercial needs. Providing some relief from the artificial regulatory filing deadlines would reduce confusion and the possibility for error during peak amendment processing periods.

In order to address the above issues, the World Shipping Council proposes that the Commission amend its regulations to allow service contract amendments to be filed within 90 days of the underlying commercial agreement, and that NVOCC NSA amendments receive the same treatment. Carriers may file within a shorter time, but having some flexibility would allow for periodic "batch filing", which in turn would allow carriers to more efficiently handle the amendment processing work load. In the event that the Commission had a need for documentation of a particular amendment before it is filed, then the service contract or NSA parties could be required to provide that information promptly upon request. In this way, there would be no impediment to the Commission's regulatory functions from the proposed changes to the regulations.

4. The Commission's *Hino Motors* Special Docket Decision Crystallizes the Reasons Why the Service Contract Amendment Filing Regulations Must Be Changed

The Commission very recently issued a decision in Special Docket No. 3388, *Application of Kawasaki Kisen Kasha, Ltd. for the Benefit of Hino Motors* ("*Hino Motors*," issued May 8, 2015; reissued May 29, 2015), that provides perhaps the clearest reason why the Commission's service contract amendment filing regulations need to be changed now.

In *Hino Motors*, the carrier and the shipper agreed to extend their service contract, but through an error the service contract amendment extending the contract was not filed before the contract expired. Faced with no means of bringing cargo already shipped in the interim under a service contract rate, the carrier filed a tariff rate and requested relief from late filing

under the Commission's special docket procedure that implements 46 U.S.C. § 40503. Because that provision only applies to tariff publications, and the Commission found that the parties in fact were seeking to address a service contract filing failure, the Commission found itself bound by the statute to deny the requested relief. The result was that the carrier and shipper parties were prevented by the Shipping Act from implementing the commercial agreement to which they had agreed and the terms of which were not in dispute.

The Commission's decision denying relief to the parties in *Hino Motors* described that outcome as "unfortunate" (*Hino Motors* at 5). In a separate concurring opinion in that case, Commissioner Doyle noted that the Commission has authority under Section 16 of the Shipping Act (now codified as positive law at 46 U.S.C. § 40103) to grant prospective exemptions with respect to service contract filing requirements, but that such authority could not be used to provide retroactive relief in the case before the Commission. Commissioner Doyle stated that "[i]t should not be the case that when a party makes an application to correct an honest mistake and provide a refund to an injured party that the Commission's statutes thwart such an outcome." (*Hino Motors* at 8).

Commissioner Khouri, in a separate concurrence, went further and expressly called upon the Commission to revise its service contract amendment filing regulations to allow amendments to become effective before they are filed with the Commission. Commissioner Khouri concludes his concurrence in *Hino Motors* with this statement:

> "The Commission's 53rd Annual Report – Letter of Transmittal to the United States Senate and House of Representatives states, 'The Commission provides regulatory relief where possible . . . .' It is past time for the Commission to give meaning to those words through action and amend these service contract filing regulations." (*Hino Motors* at 14)

The Council agrees with the Commissioner.

5. Conclusion

Two and a half years ago the Commission voted unanimously to consider changes to its service contract regulations. The World Shipping Council has provided a modest set of proposed changes that would provide relief that would benefit shippers and carriers alike. The NCBFAA petition provides an opportunity for the Commission to address changes to its NVOCC NRA and NSA regulations at the same time that it considers changes to its VOCC service contract amendment filing regulations.

Because VOCCs provide the transportation services that NVOCCs re-sell, and VOCCs provide those services to NVOCCs almost exclusively through service contracts, the regulations

that govern the relationships between VOCCs and NVOCCs, and the regulations that govern the relationships between NVOCCs and their shippers, must work as a single, integrated system. If those regulatory schemes do not mesh, the Commission will either create artificial competitive distortions or discrimination, or it will negate any relief that it provides to a single group, because any cargo movement can only occur when the most regulated party has complied with its regulatory obligations.

In support of even-handed regulatory relief, the Council proposes that the Commission revise its service contract and NSA regulations to allow VOCCs and NVOCCs, respectively, to file amendments to their service contracts and NSAs within 90 days of amendment execution, and that cargo be allowed to move under such amendments as soon as commercial agreement is reached. This recommendation would not disturb the basic requirement that all contracts and all contract amendments be filed with the FMC.

Respectfully submitted,

The World Shipping Council

John W. Butler, General Counsel

Certificate of Service

I hereby certify that I have on June 5, 2015, provided a copy of the foregoing comments of the World Shipping Council in Docket P2-15 to Edward D. Greenberg, counsel for the National Customs Brokers and Forwarders Association of America, Inc. at the address below by depositing same in the United States Mail, postage prepaid, and by electronic mail:

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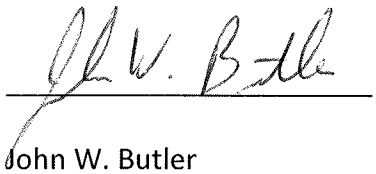

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