

cc: OGC/OS  
ORIGINAL chair(1)  
Com(4)

BEFORE THE FEDERAL MARITIME COMMISSION  
WASHINGTON, D.C.

FILED

MD  
Pub

APR 16 2015

DOCKET NO. P2-15

Federal Maritime Commission  
Office of the Secretary

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

Pursuant to 46 CFR §§502.51, 502.74 and 502.76, the National Customs Brokers and Forwarders Association of America, Inc. (“NCBFAA” or “Association”) respectfully petitions the Federal Maritime Commission (“FMC” or “Commission”) to initiate a rulemaking that would expand the Negotiated Rate Arrangement (“NRA”) exemption in 46 CFR Part 532 to allow: (1) inclusion of economic terms beyond rates into NRAs; and (2) modification of NRAs at any time upon mutual agreement between NVOCCs and their customers.

**I. INTRODUCTION AND INTEREST OF THE PETITIONERS**

The NCBFAA, together with its 1,000 members and 28 regional associations, is the national trade association representing the interests of freight forwarders, NVOCCs and customs brokers in the ocean shipping industry. NCBFAA’s members are involved in the transportation and/or logistical arrangements of approximately 90% of the cargo that moves into and out of the United States by ocean. Most of NCBFAA’s members operate as NVOCCs and are therefore directly affected by the tariff requirements in the Shipping Act and the Commission’s regulations.

**II. BACKGROUND**

Since 1984, when the Shipping Act was enacted, the ocean shipping marketplace has changed dramatically. The Ocean Shipping Reform Act of 1998 (“OSRA”) significantly changed the nature of both the Commission’s regulatory oversight and the way international

ocean shipping was conducted. One of the primary changes was the transition from a “one size fits all” tariff based common carrier system to a competitive marketplace where rates between shippers and carriers, both vessel operators and NVOCCs, were individually negotiated and largely kept confidential. In recognition of this change in how business is actually conducted, the NCBFAA has long been a proponent of easing unnecessary and costly regulatory burdens on the NVOCC industry that hindered the efficient implantation of the policies embodied in OSRA.

In that regard, the Association initially filed a petition in 2003 seeking a broad exemption from the mandatory rate filing requirements of the Act.<sup>1</sup> Although the Commission accepted that petition and initiated a rulemaking, the agency ultimately concluded that it would issue a more limited exemption suggested by several other petitioners – namely, Non-Vessel Operating Service Arrangements, or “NSAs.”<sup>2</sup> These NSAs were the functional equivalent, for NVOCCs, of service contracts and came with the same regulatory requirements. Any NVOCCs wishing to have a confidential NSA with its customer was required to file the contract with the FMC and publish its essential terms in its tariff. (46 C.F.R. Part 531.)

While the NSA exemption has had some limited utility for some NVOCCs, it has provided little relief for the overwhelming majority of NVOCCs and their customers. And, even to those companies that do have NSAs, NVOCCs still needed to publish rate tariffs that supposedly memorialized the services they were proposing to provide for other customers. However, as the Commission is now aware from the large number of comments that have been submitted from the industry, the sea change in the industry due to OSRA meant that NVOCC tariffs were no longer being used to publish the rates that an NVOCC was *proposing* to its

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<sup>1</sup> See Docket No. P5-03, *Petition of the National Customs Brokers and Forwarders Association of America, Inc. for Limited Exemption from Certain Tariff Requirements of the Shipping Act of 1984*.

<sup>2</sup> See the Final Rule issued in Docket No. 04-12, *Non-Vessel Operating Service Arrangements* (69 Fed. Reg. 75850, Dec. 20, 2004.) (“NSA Decision.”)

shippers. Rather, NVOCC tariff rates were almost always published *after* the negotiations between the NVOCC and the customer were concluded. The process of rate tariff publication had become mostly an afterthought – an anachronistic regulatory requirement from the pre-OSRA days where rates were not separately negotiated and all rates were publicly available.

In the post-OSRA environment, negotiated rates became narrowly tailored and were typically applicable only to specific movements for specific shippers and thus were not instructive for or relevant even to other shippers who might be interested in moving similar commodities in the same trade line. Moreover, in view of differing surcharges applied by the vessel operators, it was virtually impossible for NVOCCs to craft “one size fits all” tariff rates for all customers. To the contrary, as the rates offered by the vessel operators (the NVOCC “buy rates”) often differed dramatically, NVOCC rate offers to different shippers (the “sell rates”) varied constantly even for the same commodity moving in the same trade line. And, of course, since rates were no longer filed at the FMC but instead were maintained separately by each NVOCC on their website or tariff publishing company, there was no longer any publically available source by which a shipper, carrier or even competing NVOCC could attempt to ascertain the market for NVOCC rates in a given trade.

Yet, the regulatory obligation and concomitant burden and expense to publish these negotiated rates in tariff form remained. And, the availability of the NSA option was of little utility to most NVOCCs in view of the formality, burden and cost of doing so. The NCBFAA accordingly, in 2008, filed another petition with the Commission, again seeking an exemption from mandatory rate tariff publication.<sup>3</sup> After considering comments filed in response to the NCBFAA Petition, the FMC initiated another rulemaking inviting further comments from the

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<sup>3</sup> This petition was filed in Docket No. P1-08. *Petition of the National Customs Brokers and Forwarders Association of America, Inc. for Exemption from Mandatory Rate Tariff Publication* (filed July 31, 2008).

industry.<sup>4</sup> In that Notice of Proposed Rulemaking (“NPRM”), the Commission found that it had the statutory authority and discretion under Section 16 of the Shipping Act to grant the requested exemption and that doing so “would not result in substantial reduction in competition or be detrimental to commerce.” (*Id.*, at 25153.) As particularly relevant here, the Commission noted that any exemption that might be issued would be subject to several conditions – namely, that NVOCCs would continue to publish their standard rules tariffs, that those tariffs would be made available free of charge, that any rates agreed to by the NVOCCs and their customers be memorialized in writing prior to the date cargo is tendered, that this documentation must be retained for 5 years and that it was to be available to Commission staff on request.

Ultimately, and again after considering a large number of comments filed in response to the NPRM, the Commission granted the requested exemption.<sup>5</sup> In its NRA decision, the FMC promulgated regulations implementing the conditions as first suggested in the NPRM. Ultimately, various regulatory requirements that had initially been imposed were dropped, as was the condition that had restricted the use of NRAs to US licensed NVOCCs.<sup>6</sup>

However, although not embodied in the actual NRA regulations in 46 C.F.R. Part 532, the Commission’s discussion of the scope of the exemption contained limiting language that has proven over time to be an unnecessary restriction to the nature of the arrangements into which NVOCCs can enter with their customers. In that regard, the NRA Decision stated that NRAs would not be able to include non-rate economic terms, such as credit and payment terms, rate methodology, minimum quantities, forum selection or arbitration clauses. According to its

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<sup>4</sup> This Notice of Proposed Rulemaking (“NPRM”) was commenced in Docket 10-03, *NVOCC Negotiated Rate Arrangements* 75 Fed. Reg. 25151 (May 7, 2010).

<sup>5</sup> See the decision issued in Docket No. 10-03, 76 Fed. Reg. 11351 (March 2, 2011) (the “NRA Decision.”)

<sup>6</sup> See the decisions issued in Docket No.11-22, 77 Fed. Reg. 33971 (June 8, 2012) and 78 Fed. Reg. 42886 (July 18, 2013). The one additional regulatory condition that remained in place was the requirement that the NRA could not be modified after the initial shipment was tendered. (*See* current 46 CFR § 532.5(e).)

decision, that deferral was attributable to concerns raised by Commission staff that including these “economic terms” in NRAs “could cause overlap and confusion between NRAs and NSAs....” Although a majority of the Commissioners were not prepared to grant the broad exemption the NCBFAA proposed, the Commission indicated it would revisit possible expansion of the terms that could be included in proceedings that would commence in the future. (NRA Decision, 76 Fed. Reg. at 11355.)

Following up on that commitment, the Commission issued a Notice on November 4, 2011 seeking comments from the shipping public on how to improve the Commission’s existing regulations. That Notice was issued in a matter entitled “Retrospective Review of Existing Rules.” The NCBFAA took the opportunity to provide responsive comments on November 21, 2011 concerning several issues, particularly, as relevant here, to the NSA and NRA regulations, and suggested that the Commission implement many of the changes suggested in this Petition.

### **III. SCOPE OF RELIEF**

The NRA exemption has been a resounding success and the NCBFAA greatly appreciates the Commission’s willingness to recognize that its regulations should evolve as the industry changes in response to the OSRA amendments to the Shipping Act. At this point, the Commission staff recently estimated that 40-45% of the approximate 5,100 licensed and registered NVOCCs have now taken advantage of the NRA relief granted by the Commission. The exemption has greatly simplified and rationalized the NVOCC rate negotiation process, permitting scarce resources to be put to more efficient use and eliminating a significant cost center that clearly no longer was relevant, let alone important, in the NVOCC market. And, not surprisingly, this benefit was achieved without any harm to shippers or other detriment to commerce.

In the 4 years that have passed, it has become clear that the limitations on what can properly be included in NRAs were unnecessary and that it is time for the Commission to review those restrictions. The NCBFAA now requests that the Commission specifically 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. While the Association recognizes that expanding the utility of NRAs may negate the need to have NSAs, that should not be of concern. Both NRAs and NSAs are separately negotiated by NVOCCs and their customers, both are confidential and both serve the same purpose – memorializing rate and service offerings in a non-tariff format. Hence, in the view of the NCBFAA, granting the relief requests here would eliminate the need to have the separate NSA exemption.

#### **IV. DISCUSSION**

As noted above, the NRA Decision made a distinction between the freight rates offered by NVOCCs and other economic terms that are frequently relevant to the services being provided. More specifically, the NRA Decision indicated that the NRA exemption would not apply to economic terms as credit, late payment interest, freight collect or prepay, rate methodology, minimum quantities, time/volume arrangements, penalties or incentives, the methods for implementation of rate changes, or provisions for arbitration, forum selection for disputes and variance of per-package liability limits. The only reason advanced for this limitation was that Commission staff had raised concerns “that expanding the scope of the NRA beyond rates could cause overlap and confusion between NRAs and NSAs, which, unlike NRAs must be filed with the Commission.” NRA Decision, at 11355.

While permitting NRAs to include economic terms other than the base rates may reduce or eliminate the role for NSAs, the NCBFAA believes that NSAs have never been more than a midpoint on the way to full recognition of the need for rate tariff reform. To understand this, it is helpful to put the issuance of the NSA exemption in proper context. When the Commission decided to permit NVOCCs to enter into NSAs, it did so without further consideration or discussion of the NCBFAA's request for the broader rate tariff exemption. Instead, the Commission elected to grant the more limited request of a few large NVOCCs who believed that (1) the agency was unlikely to grant the broad exemption sought by the Association and (2) it would be helpful if they could enter into confidential contracts in a manner similar to the vessel operators' service contracts.

The passage of time, however, has demonstrated that the perceived advantage of having NSAs pales in comparison to the demonstrable benefit of the NRA exemption. Over the most recent 5-year period, an average of only 82 NVOCCs have entered into any of these arrangements. This is to be contrasted with the approximate 2,300 NVOCCs who have already taken advantage of the NRA exemption, many of whom have totally migrated to this process and no longer publish any rates in tariff format.<sup>7</sup> Similarly, over the past 5 years, NVOCCs filed an average of 1,445 NSAs per year; again, this is to be contrasted with the hundreds of thousands of rates that presumably have been established by NVOCCs through NRAs.

It seems clear, accordingly, that the NSA exemption has provided benefits to a relatively few NVOCCs in a relatively limited number of occasions. One of the issues with NSAs that has restricted their usage is that they need to be filed with the Commission and, accordingly, are no less burdensome than tariff publication. Indeed, since one needs to also publish the essential

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<sup>7</sup> As NVOCCs are not required to advise the Commission of their intention to use NRAs except through putting an item to that effect in their rules tariff, it is possible that the number of companies taking advantage of the exemption is higher than 2,300.

terms of NSAs in tariffs, NSAs are even more burdensome than regular rate tariffs. And, any amendments to NSAs must also be published. Hence, the use of the NSA exemption carries with it the significant burden and expense that the Commission agreed was no longer warranted when the NRA exemption was issued. While NSAs do offer confidentiality, the record in the various NRA/NSA proceedings demonstrates that even rate tariffs are functionally confidential since they are rarely accessed by anyone. More to the point, NRAs are just as confidential as NSAs and are not subject to public review, so that NSAs no longer have any advantage in that respect.

The record in the NRA proceeding conclusively demonstrates that shippers and NVOCCs alike supported the broad, unrestricted use of NRAs. All of the large number of comments filed in Docket 10-03 (with the understandable exception of several tariff publishing companies) pointed out that rate tariffs were no longer useful, as OSRA changed the way shippers dealt with both carriers and NVOCCs. Now, virtually all traffic and rate arrangements are separately negotiated on a one on one basis. And, those negotiated arrangements applied to more than just base rates, as the contracting parties – and in this environment, the NVOCCs and shippers are contracting parties – often want to cover a variety of service terms, 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 amendments

Each of these terms are relevant to some extent to every rate and service negotiation between an NVOCC and an existing or prospective customer. Yet, none of the items on this list can properly be included in an NRA. Instead, the parties must either file those terms in an NSA or simply not cover them except in a tariff format, which is contrary to the commercial interests of the shipper and NVOCC.

The sole reason for this quandary is the concern expressed by Commission staff, but not by the members of this industry, that NRAs may start to look like NSAs. While that may well be the case, that is not necessarily a bad result. The underlying rationale that led the Commission to grant the NRA exemption is that “the ability of NVOCCs to enter into NRAs may increase competition and promote commerce *by allowing NVOCCs to better serve their shipper customers.*” (NRA Decision, at 11354; emphasis added.) Yet, by determining that some terms cannot be included in NRAs, the better service that the Commission had in mind has been artificially limited. After all, both NSAs and NRAs are intended to cover specified volumes of cargo, rather than just single shipments.<sup>8</sup> There is no apparent rationale for a system where the consequences for a shipper not satisfying its volume commitment may be covered in a single document in the case of the NSA, while this topic may not properly be addressed in the NRA (but rather must be separately published in the NVOCC’s rules tariff). Putting the matter simply, this limitation creates inconveniences for both parties and impedes their ability to negotiate a

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<sup>8</sup> An NSA is defined as “a written contract ... in which the NSA shipper makes a commitment to provide a *certain minimum quantity or portion of its cargo or freight revenue* over a fixed time period.... The NSA may also specify provisions in the event of nonperformance on the part of any party.” (46 CFR § 531.3(p); emphasis added.) Similarly, an NRA is defined as “a written and binding arrangement ... to provide specific transportation service for *a stated cargo quantity....*”(46 CFR § 532.3(a); emphasis added.)

single comprehensive arrangement that would serve their respective interests in a way that the parties themselves desire.

The Association recognizes that NVOCCs can circumvent some of the “no other economic term” restrictions in various ways. For example, although an NRA cannot now properly be amended, the same result can be achieved issuing a superseding NRA or limiting the term of a particular NRA to 1 day or 1 week so that they expire, thus permitting a new NRA to take the place of the old one. That is still amending the agreement of the parties. And, NVOCCs can publish credit terms, service benchmarks, surcharges and minimum volumes in tariff format. Of course, if they did this in rule or rate tariffs, the varying terms agreed to by their various customers would have to be separately and carefully published so as to be limited to just the parties that had agreed to those terms. That makes the process exponentially more technical and complicated.

This raises the question as to why should the industry be required to accomplish indirectly what it cannot do directly? Who benefits from this restriction? Certainly not NVOCCs, who must carefully publish these separately negotiated items in tariff form. Nor do shippers benefit, as they now need to refer to both the NRA and various tariff publications to understand the full nature of their contractual obligations (unless they signed an NSA). And, since tariffs are established and published unilaterally, shippers may not actually know about or have agreed to tariff-based provisions to which they would be bound. Moreover, even assuming this was relevant, the Commission’s regulatory oversight is not improved by compelling NVOCCs to separate out parts of their rate and service offerings into exempt and non-exempt parcels.<sup>9</sup>

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<sup>9</sup> When OSRA amended the agency’s section 16 authority to issue exemptions, it specifically deleted two of the four criteria originally contained in the Shipping Act. One of those now deleted criteria was that an exemption not

The NCBFAA is aware that the Commission determined, when issuing the NSA exemption in 2004, that not filing NSAs “could substantially impact the competition between large NVOCCs and VOCCs.” (NSA Decision, at 75852.) Respectfully, it is time for the Commission to revisit that hypothesis, as this concern was misplaced. While both NVOCCs and VOCCs are treated as carriers under the Act, there are obvious differences in their activities as well as in the way they are regulated. As explained by former FMC Chairman Koch:

Competition between NVOCCs and vessel operators (VO’s) to the extent it exists, differs fundamentally from VO-VO competition. When vessel operators compete, someone wins and carries the cargo and someone loses and doesn’t. To the extent VO’s and NVO’s “compete,” the competition is for who issues a shipper a bill of lading and makes a little more money as a result. Even when the NVO wins in that exercise, the VO’s aren’t total losers because they will – they must – still carry the cargo on their ships.

*Statement of Chairman Koch on NVOCC Tariff Filing*, 26 S.R.R.465 (August, 1992). The Commission fully endorsed that perspective when issuing the NRA exemption, by pointing out that no VOCC raised any concern about being put at a competitive disadvantage due to any tariff exemption. (NRA Decision, at 11352.)

Moreover, NVOCCs, unlike ocean carriers, do not enjoy or seek antitrust immunity. As a result, the terms of NRAs or NSAs, unlike service contracts, do not contain collectively established boilerplate terms and conditions or include “voluntary guidelines” relating to pricing or service conditions. To the contrary, every NRA or NSA reflects private negotiations between a shipper and an NVOCC and covers *their* rate and service arrangements that typically pertain to traffic and logistical services for a specified volume of traffic over a stated period of time. While the filing of ocean carrier service contracts may be necessary or helpful for the FMC in ascertaining whether VOCCs are abusing the terms of their antitrust-immunized approved

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substantially impair effective regulation by the Commission. Regardless, the Commission has access to the underlying NRA communications and accordingly still has the ability to review the entirety of the arrangements.

agreements, no such purpose is served by requiring NVOCCs to go through the same elaborate procedures. Instead, these procedures only add to unnecessary NVOCC costs without any countervailing public benefit.

While the Commission may have had a notion of comparable fairness in mind when authorizing the NSA exemption (*i.e.*, Why exempt NVOCC tariffs or contracts if the same benefit is not being accorded VOCCs?), that form of *quid pro quo* would not be sound regulatory policy. As noted above, NVOCCs are fundamentally different in important respects from VOCCS. It is worth noting, moreover, that VOCCs did not advocate, during the NSA rulemaking proceeding, that NVOCCs be burdened with filing NSAs. Similarly, VOCCs did not suggest that there was anything inappropriate about the Commission granting the NRA exemption even though they sought no similar treatment. 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.

So, the question becomes: What purpose is served by the current form of the NSA exemption as compared to the NRA exemption? As all topics covered by NRAs must be in writing, shippers are just as well protected by NRAs as they are by NSAs. Nor is the FMC's oversight somehow enhanced by NSAs as compared to NRAs. The Association is not aware that those NSAs that have been filed with the Commission have provided any useful regulatory or other information to the FMC. To the contrary, the NCBFAA suspects that such documents have rarely, if ever, been reviewed. Certainly, there has been no public information disseminated suggesting that the Commission has analyzed these contracts or otherwise used them for any regulatory purpose. Rather, it appears that the filing requirement for NSAs harkens back to the days of mandatory rate tariff filing, in that they are filed and essentially forgotten.

Similarly, there does not appear to be any essential regulatory benefit from either restricting the terms that can be included in an NRA or continuing the filing requirement for NSAs. Since the existing NRA regulations require that NVOCCs maintain the records of such agreements for a period of 5 years, that information is readily available to Commission staff or the relevant parties on request.

In authorizing NSAs and NRAs, the FMC found that granting both these exemptions was within its statutory authority under Section 16 of the Shipping Act and that doing so would not result in any substantial reduction in competition or be detrimental to commerce. Those conclusions would not change if the two exemptions were combined into a single mechanism. As the regulatory requirements pertaining to those separate exemptions create unnecessary confusion and add expenses that hinder efficiency, the FMC should now look to meld the features of NSAs and NRAs into a single arrangement. To do this, the Commission should remove the existing restrictions pertaining to NRAs so that these could (1) include both rates and other economic terms; and (2) be modified at any time upon mutual agreement between NVOCCs and the shippers. In this way, the FMC could simplify the regulations by allowing a broad single exemption that simplifies the regulatory scheme and removes unnecessary, burdensome rules.

## V. CONCLUSION

When the Commission determined that the changes to the shipping industry initiated by OSRA justified approval and implementation of the NSA and NRA exemptions, it concluded that both exemptions satisfied the section 16 (now 46 U.S.C. § 40103) criteria of the Act; namely, that granting the exemptions would not result in any substantial reduction in competition or be detrimental to commerce. The record of the intervening years has demonstrated that those

conclusions were correct. The NVOCC industry has significantly benefitted from the easing of anachronistic regulatory constraints that served little purpose. Similarly, shippers have been able to receive the more tailored services Congress contemplated when enacting OSRA in 1998. The time is appropriate for the Commission to take the further step of peeling away one further artificial constraint that has limited the utility of NSAs and NRAs.

NCBFAA respectfully requests that the FMC initiate a rulemaking to revise its regulations in 46 CFR Parts 531 and 532 to:

1. Make it clear that NRAs may both properly include economic terms beyond rates and be modified at any time upon mutual agreement between an NVOCC and a shipper;
2. Delete 46 C.F.R. § 532.5(e) that precludes any amendment or modification of an NRA; and
3. Either eliminate the filing and essential terms publication requirement of NSAs or eliminate 46 C.F.R. Part 531 in its entirety.

Respectfully submitted,



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Date: April 16, 2015