

Secretary

From: Joseph Saggese [jsaggese@naaai.com]
Sent: Tuesday, November 30, 2004 5:16 PM
To: Secretary
Subject: Docket No. 04-12; Non-Vessel-Operating Common Carrier Service Arrangements
Attachments: NAAA NPRM Comments_v1.pdf; NAAA Comments_v1.DOC

Bryant L. VanBrakle, Secretary
Federal Maritime Commission
800 N. Capitol Street, N.W.
Room 1046
Washington, D.C. 20036

Re: Docket No. 04-12; Non-Vessel-Operating Common Carrier Service Arrangements

Dear Mr. VanBrakle:

Attached please find Comments in Response to the Notice of Proposed Rulemaking on Non-Vessel-Operating Common Carrier Service Arrangements submitted by the North Atlantic Alliance Association Inc. The Comments are being submitted in both Word and PDF versions.

Please kindly acknowledge receipt of the submission by return email.

Thank you for your assistance. Do not hesitate to contact the undersigned with any questions.

Sincerely,

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cc: bs/GC
ORIGINAL Public

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Washington, D.C.

Non-Vessel-Operating Common Carrier Service Arrangements

Docket No. 04-12

**COMMENTS IN RESPONSE TO THE NOTICE OF
PROPOSED RULEMAKING
ON NON-VESSEL-OPERATING COMMON CARRIER
SERVICE ARRANGEMENTS**

Submitted by

The North Atlantic Alliance Association Inc.

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Dated: November 30, 2004

**COMMENTS IN RESPONSE TO THE NOTICE OF
PROPOSED RULEMAKING
ON NON-VESSEL-OPERATING COMMON CARRIER
SERVICE ARRANGEMENTS**

I. Introduction

The following comments are submitted by the North Atlantic Alliance Association Inc.¹ (herein "NAAA" or the "Association") and support the Federal Maritime Commission's ("FMC" or the "Commission") Notice of Proposed Rulemaking ("NPRM") to exempt from tariff publication requirements of the Shipping Act of 1984, as amended, (the "Shipping Act")² and permitting non-vessel-operating common carrier ("NVOCC") service arrangements ("NSAs") for the movement of cargo pursuant to confidential rates (as opposed to publicly available NVOCC tariffs).³ The NAAA is a shippers' association, as defined by the Shipping Act,⁴ consisting of U.S. and foreign-based NVOCC members⁵ and has been in continuous operation since 1992. The NAAA and its individual member NVOCCs understand and recognize the importance of providing the ocean transport intermediary community parity with vessel-operating common carrier ("VOCC") service contracts. Thus, the proposed rule, once implemented, will provide (1) increased pricing options for NVOCCs and shippers; (2) relief from the current regulatory burdens of tariff publication, adherence,

¹ These comments reflect the position of the North Atlantic Alliance Association Inc. In addition, individual member NVOCCs may also submit comments in response to the NPRM.

² See 46 U.S.C. app. § 1701 *et seq.*

³ See 69 FED. REG. 63,986 (Nov. 3, 2004).

⁴ 46 U.S.C. app. § 1702(22).

⁵ Each members of the NAAA publishes a tariff in electronic format in accordance with FMC regulations (the location of individual NVOCC tariffs may be viewed at www.fmc.gov/oti/oti_index2.htm) and, if a U.S.-based NVOCC, is a licensed Ocean Transportation Intermediary ("OTI"), as defined at § 3(17)(A) and/or (B) of the Shipping Act of 1984, as amended, 46 U.S.C. app. § 1702(17)(A) and (B). Foreign-based NVOCC members are registered with the FMC, publishes an electronic tariff, and satisfies the financial responsibility requirements as required by the Commission. See generally 46 C.F.R. § 515 *et seq.*

and enforcement requirements of the Shipping Act; and (3) the opportunity for NVOCCs to enjoy the same type of market-oriented benefits VVOCCs have embraced since passage of the Ocean Shipping Reform Act of 1998 ("OSRA"). As explained in more detail below, while the NAAA believes that the final rule should be revised to permit NVOCC shippers' associations to negotiate and enter into NSAs with other NVOCCs (when acting as carriers), we find the overall proposal to be acceptable and call upon the Commission to implement the new rule as expeditiously as possible.

*The Evolution of the
North Atlantic Alliance Association Inc.*

The NAAA was established in 1992 by forward-thinking NVOCCs based in the United States and Europe. At the time of its founding, the NAAA served the primary purpose of providing collective ocean freight rate-negotiating capability to small and medium-sized NVOCCs serving the U.S.-Europe Trans-Atlantic trades. The Association is a non-profit shippers' association and currently has approximately 40 individual member NVOCCs. The NAAA is active in major North-South and East-West trade lanes affecting U.S. foreign commerce. In 1993, the NAAA entered its first shipping season by enrolling in a 1,500 TEU time/volume rate ("TVR") for Freight-All-Kinds (or F.A.K) cargo with the Trans-Atlantic Agreement.⁶ Subsequent to 1993, the NAAA has negotiated and entered into on behalf of its members various ocean transportation programs (*e.g.*, TVRs, service contracts) with the TACA and/or individual non-conference lines serving the Trans-Atlantic trades.⁷ Today, the NAAA's members collectively account for tens of thousands of TEUs on

⁶ The Trans-Atlantic Agreement was the predecessor carrier conference to the Trans-Atlantic Conference Agreement ("TACA").

⁷ During the mid-1990s, the NAAA expanded its scope of operations to include additional trade lanes beyond the Trans-Atlantic. The decision to enter additional trade lanes reflected the members' desire of utilizing the cooperative buying model to the fullest in securing favorable ocean freight rates and services. The

the Atlantic, which represents one of the largest portions of containerized traffic moving between the United States and Europe.⁸ When other trades are considered, NAAA volume exceeds 100,000 TEUs on an annual basis.⁹

The NAAA is governed by a Board of Director drawn from individual NVOCC members and currently consists of five members charged with the responsibility of overseeing the policy-making and direction of the Association. Additionally, the Association employs a full-time Executive Managing Director who is responsible for contract negotiations with VOCCs (and conferences), as well as providing day-to-day operational support to the members. The NAAA is a professional association of equally professional transportation providers that each supports the collective buying power of the shippers' association concept. The NAAA recently marked its 12th anniversary. This is proof that the Association provides meaningful services to its members—and its VOCC partners.

As noted above, the Association has a long-standing history of negotiating service contracts with VOCCs on behalf of its members. This relationship-building is mutually beneficial, since VOCCs are able to secure a typically large volume commitment, and the Association is able to obtain favorable rates and services. The NAAA believes its relationships with select VOCCs result in stability for a particular trade and a sense of cooperation and professionalism between our two segments of the ocean shipping industry. We are confident that the introduction of NSAs will further enhance the NAAA's proven track record of providing benefits to its members and our VOCC partners.

NAAA's diversification also reflects the need for NVOCCs to provide their shipper-clients with high-quality ocean and multi-modal transport services and rates on a global basis.

⁸ These figures are based on internal NAAA and VOCC partner lifting reports (1992-2003).

⁹ *Id.*

II. The Proposed Rulemaking Responds to Changes in the Ocean Shipping Industry and Provides NVOCCs and Shippers with Greater Transport Options

It has been well-documented that VOCCs, NVOCCs, shippers, and shippers' associations have overwhelmingly accepted the regulatory reforms brought about by OSRA. In fact, the Commission recently concluded that confidential service contracts are now the preferred transportation program for oceanborne cargo in U.S. foreign commerce.¹⁰ In several U.S. trade lanes, the FMC has found that over 90% of all oceanborne cargoes move under confidential service contracts.¹¹ In addition, the NVOCC industry has evolved since 1998 and now includes sophisticated, global transportation companies that historically were not involved in ocean transportation matters.¹² The FMC's proposed rule responds to the continually changing face of international ocean shipping and the arrival of new companies to the NVOCC industry.

The proposed rule is based on a joint proposal offered by several NVOCCs and trade associations¹³ in August 2004 that asked the FMC to provide an exemption from the Shipping Act's tariff publication rules and permit NVOCCs to enter into "NVOCC Service Agreements."¹⁴ The NPRM would enable NVOCCs to enter into ocean transport agreements with shippers in lieu of moving all cargo under publicly available tariff rates. The NSA rule is modeled on the current service contract rules at 46 C.F.R. § 530 *et seq.* Specifically, the definition of NSA is based on the definition of service contract as found in the Shipping

¹⁰ See FMC, *The Impact of the Ocean Shipping Reform Act of 1998* (Sept. 2001) at 16-20.

¹¹ *Id.*

¹² This includes such companies as United Parcel Service, FedEx, DHL-Danzas, TNT, and BAX Global.

¹³ The Joint Commenters were: BAX Global Inc., BDP International, C.H. Robinson Worldwide, Inc., FedEx Trade Networks Transport & Brokerage, Inc., United Parcel Service, Inc., the National Industrial Transportation League, and the Transportation Intermediaries Association.

Act¹⁵ and NSAs would be subject to the same regulatory requirements that apply to VOCC service contracts. We note that the proposed NSA rule would require NVOCCs to file the arrangement with the FMC and publish the essential terms of the NSA in a tariff format (this is comparable to VOCC service contract requirements).¹⁶ Additionally, the NSA rule would not alleviate an NVOCC from any of the Shipping Act and/or FMC regulatory requirements that must be satisfied in order to offer common carrier services in U.S. foreign trade. Lastly, the NSA rule would be voluntary and available to *all* NVOCCs in good standing with the Commission's regulations at 46 C.F.R. § 515 *et seq.*, thus enabling NVOCCs to continue to publish and rate shipments in accordance with their tariff. The NAAA agrees with the above conditions and finds that the proposed NSA rule provides NVOCCs with the long-desired parity with VOCC service contracts. The NSA proposal represents a workable solution to an important issue for both NVOCCs and shippers.

The NAAA believes that the moment is now for the Commission to extend the deregulatory benefits of OSRA to all involved in ocean shipping—including shippers' associations with NVOCC members. We are especially pleased that the FMC recognizes in the NPRM that OSRA provides the appropriate authority to further the deregulatory aspects of OSRA without the need to await future legislative amendments to the Shipping Act. The NSA rule is an example of the type of Section 16 exemption action Congress intended the Commission to take when enacting the OSRA amendments. In short, the NAAA believes that the proposed rule provides much-needed pricing and regulatory flexibility to tailor individual ocean transportation arrangements between NVOCCs and their shippers, while

¹⁴ See Joint Comments Supplemental Comments Requesting Expedited Adoption of a Conditional Exemption from Tariff Publication (Aug. 2, 2004).

¹⁵ See 46 U.S.C. app. § 1702(9); *see also* 46 C.F.R. § 530.3(q).

ensuring compliance with the core legal responsibilities associated with status of NVOCCs as common carriers under the Shipping Act. We applaud the FMC for taking a pro-active and timely position on the NSA rule and welcome its final adoption for usage by the ocean shipping industry and public.

III. The Final Rule Should Permit NVOCC Shippers' Associations to Enter NSAs with Other NVOCCs

While the NAAA endorses the overall NSA NPRM, we do not agree with the proposed prohibition on shippers' associations that include NVOCC members from entering into NSAs as shippers with other NVOCCs as carriers. The restriction is apparently grounded on the possibility that NVOCCs may utilize the NSA concept for anti-competitive activities. This prohibition may actually have the unintended consequence of limiting the application and usage of NSAs. For the reasons we outline below, we ask that the FMC consider eliminating this particular prohibition when issuing the final NSA rule, or in the alternative, permit this type of activity contingent upon further examination by the Commission as the NSA rule is implemented and adopted for use by the ocean shipping industry and public.

As noted, the FMC bases this restriction on apparent antitrust concerns stemming from what it concludes may be a gap between Commission oversight of collusive carrier behavior, the lack of U.S. Department of Justice ("DOJ") regulation of NVOCC antitrust and competition activities, and the possibility that the Section 16 NSA exemption may be viewed, arguably, by some as granting NVOCCs antitrust immunity along the same lines as VOCCs

¹⁶ See 46 C.F.R. § 520 *et seq.*

under Section 7(a)(2) of the Shipping Act.¹⁷ From the outset, the NAAA does not believe that the proposed NSA rule would immunize NVOCCs behavior from the antitrust laws. Beginning with the enactment of the Shipping Act, 1916, it has been well-established that VOCCs were the only class of common carriers that Congress intended to enjoy immunity from the antitrust laws.¹⁸ Permitting an NVOCC to enter into an NSA in its capacity as a with an NVOCC as a carrier shipper would likely not result in anti-competitive behavior. The FMC recognizes the significant changes to the NVOCC industry in the past six years and the fact that NVOCCs play a key role in the supply chain. Prohibiting an NVOCC shippers' association from entering into an NSA with an NVOCC acting as a carrier appears to be counter-productive to recent developments and the noted importance of NVOCCs in today's ocean shipping environment.

We also maintain that current U.S. Department of Justice "safe-harbor" antitrust guidelines¹⁹ (for the conduct and operation of shippers' associations) may be relevant to NVOCC shippers' association NSAs by providing (1) adequate, well-established guidance to

¹⁷ The Commission asserts in the proposed rule that, unlike ocean common carrier "agreements," multiple NVOCC service arrangements would not be filed in accordance with Sec. 5 of the Shipping Act (providing for *ocean* common carrier collective rate-setting authority). However, we note that under the proposed rule, NSAs (and all amendments to an NSA) would be filed with the FMC. This filing requirement would presumably apply to NVOCC shippers' associations' NSAs with an NVOCC acting as a carrier. Thus, the FMC would have access to each NSA affecting U.S. foreign commerce and could examine those arrangements that it suspects as raising possible competition concerns as outlined in the Notice of Proposed Rulemaking.

¹⁸ We note that OSRA's legislative history contains commentary on a substantially similar point:

[T]he bill deletes the reference to NVOCCs in section 4(a)(5) of the 1984 Act. Section 4(a)(5) of the 1984 Act appears to allow agreements between ocean common carriers and NVOCCs to be filed in the same manner as ocean common carrier conference agreements and be provided antitrust immunity. This provision is inconsistent with section 8 of the 1984 Act, which requires agreements between ocean common carriers and NVOCCs to be filed as service contracts subject to the antitrust laws . . . [t]he Committee agrees and eliminates the conflicting provision in section 4. *See* S. Rept. 105-61 at 20, 105th Cong. (July 31, 1997).

¹⁹ *See* Comments of Charles F. Rule, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, before the Chemical Manufacturers Association (Oct. 21, 1985).

the trade and (2) protection to both shippers and carriers.²⁰ In addition, we note that until the late 1980s, it was standard procedure of most new shippers' associations to seek DOJ clearance by way of a Business Review Letter ("BRL") request.²¹ As a practical compromise, we see no reason why the BRL could not be utilized in the setting of an NSA involving both an NVOCC as a carrier and an NVOCC shippers' association.

This issue is important to the NAAA since our association should have the *option*, as a shipper under the Shipping Act, of negotiating an NSA with as many *common carriers* as commercially feasible—no matter whether it be with VOCCs or NVOCCs. For example, even today the NAAA could elect to ship cargo via a TVR published in a tariff format by an NVOCC, VOCC, or VOCC conference. Prohibiting an NVOCC shippers' association from entering into an NSA with another NVOCC acting as a carrier fails to recognize the fact that in some trades (or sub-trades) NVOCCs play a considerable role. Thus, in order for the NAAA (and other NVOCC shippers' associations) to negotiate truly competitive transportation rates for its members, there may be times in the future when it might need to enter NSAs with NVOCCs as carriers. As noted, the NAAA provides a means of securing favorable ocean transportation rates to its small and medium-sized NVOCC members, who in turn pass along the savings in ocean transportation rates to their shipper-customers. Simply put, as service contracts (and soon NSAs) become the preferred means of moving cargo in

²⁰ The Committee Report adopted during consideration of OSRA even points to the applicability of the "safe-harbor" guidelines to multiple shipper service contracts with VOCCs outside of the formal context of shippers' associations: "[T]he Committee intends that the Department of Justice "safe-harbor" guidelines should apply to the collective activity of shippers with respect to a service contracts." See S. Rept. 105-61 at 19 (July 31, 1997).

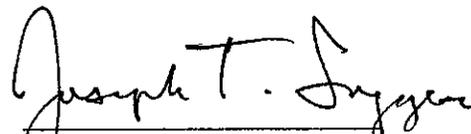
²¹ Shippers' associations were first lawfully recognized by the Shipping Act of 1984. Since the cooperative buying entities were new to international ocean shipping, ocean common carriers and conferences routinely asked for proof that the organizations had obtained Department of Justice clearance (*i.e.*, a Business Review Letter) prior to beginning service contract negotiations. This often led to prolonged procedural maneuvering for ocean carrier conferences and shippers' associations. The adoption of the DOJ "safe-harbor"

U.S. foreign commerce, NVOCC shippers' associations (subject to oversight by the Commission and adhering to the DOJ antitrust "safe-harbor" guidelines) should enjoy the option of entering NSAs with NVOCCs as carriers.

In conclusion, the NAAA supports in general the proposed NSA rulemaking and asks that the Commission consider eliminating the prohibition on NVOCC shippers' association NSAs with other NVOCCs. Additionally, while we believe the issue of NVOCC shippers' associations NSAs with other NVOCCs is important, we do not believe the Commission should delay final implementation of the rule. The proposed NSA rule is needed by the ocean shipping industry and an expeditious final rule will enable shippers and NVOCCs to begin NSA negotiations in time for the important 2005 Eastbound Trans-Pacific shipping season.

The NAAA appreciates the FMC's consideration of its comments and trusts that the final NSA rule will be implemented in a timely manner.

Respectfully submitted,


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Dated: November 20, 2004

guidelines for shippers' associations essentially replaced the need for a Business Review Letter for the ocean shipping industry.