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BEFORE THE

FEDERAL MARITIME COMMISSION

FMC Docket No. 10-03

NVOCC Negotiated Rate Arrangements

COMMENTS

SUBMITTED BY THE

TRANSPORTATION INTERMEDIARIES ASSOCIATION

AND THE

INTERNATIONAL FEDERATION OF FREIGHT FORWARDERS ASSOCIATIONS (FIATA)

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The Transportation Intermediaries Association ("TIA") submits these comments on the above referenced Notice of Proposed Rulemaking ("NPRM") that would provide a voluntary exemption from tariff publication for negotiated rate arrangements ("NRAs") agreed in writing between non-vessel-operating common carriers ("NVOCCs") and their customers. The proposed regulations set forth in the NPRM are simple, elegant and workable. We commend the Commission and its staff for the careful thought they have given to the proposal, and urge its prompt adoption as a final rule.

IDENTITY AND INTEREST OF THE TRANSPORTATION INTERMEDIARIES ASSOCIATION AND THE INTERNATIONAL FEDERATION OF FREIGHT FORWARDERS ASSOCIATIONS

TIA is the professional organization of the $162 billion third party logistics industry. TIA is the only U.S. organization exclusively representing transportation intermediaries of all disciplines doing business in domestic and international commerce. TIA is the voice of transportation intermediaries to shippers, carriers, government officials, and international organizations.

TIA members include approximately 1200 motor carrier property brokers, surface freight forwarders, international ocean transportation intermediaries (ocean freight forwarders and non-vessel-operating common carriers), air forwarders, customs brokers, warehouse operators, logistics management companies, intermodal marketing companies, and motor carriers.

TIA is also the U.S. member of the International Federation of Freight Forwarders Associations ("FIATA"), the worldwide trade association of transportation intermediaries representing more than 40,000 companies in virtually every trading country. FIATA strongly endorses and joins in these comments, which are submitted on behalf of both organizations.

THE ROLE OF TRANSPORTATION INTERMEDIARIES

Transportation intermediaries or third party logistics professionals act as the "travel agents" for freight. They serve tens of thousands of shippers and carriers, bringing together the transportation needs of the cargo interests with the corresponding capacity and special equipment offered by rail, motor, air, and ocean carriers. Transportation intermediaries play a key role in cross border transportation.

Transportation intermediaries are primarily non-asset based companies whose expertise is providing mode and carrier neutral transportation arrangements for shippers with the underlying asset owning and operating carriers. They get to know the details of a shipper's business, then tailor a package of transportation services, sometimes by various modes of transportation, to meet those needs. Transportation intermediaries bring a targeted expertise to meet the shippers' transportation needs.

Many shippers in recent years have streamlined their acquisition and distribution operations. They have reduced their in-house transportation departments, and have chosen to deal with only a few "core carriers" directly. Increasingly, they have contracted out the function of arranging transportation to intermediaries or third party experts. Every Fortune 100 Company now has at least one third party logistics company ("3PL") as one of its core carriers. Since the intermediary or 3PL, in turn, may have relationships with dozens, or even thousands, of underlying carriers, the shipper has many service options available to it from a single source by employing an intermediary.

Although intermediaries are described in the business and trade literature as "non-asset-based," many intermediaries in fact own some assets, broadly defined. These include local pick up and delivery vehicles, over the road trucks, warehouses and cargo consolidation centers, complex computer and telecommunications systems, dispatching centers and sales offices.

Past studies submitted by FIATA in earlier FMC tariff exemption proceedings (*see, e.g.*, Tariff Filing by Non-Vessel-Operating Common Carriers, Docket No. 92-22, Statement of Paul Unsworth), and included in testimony before Congress when it was considering the legislation that became the Ocean Shipping Reform Act of 1998 (OSRA), have shown that there are thousands of companies in the intermediary industry. Despite this fragmentation and intense competition, approximately 80% of the NVOCC business is controlled by 20% of the companies. Most of those 20% are very large companies that move many thousands of containers annually. The rest are small to medium size companies, many owned and run by their founders, who aspire to the success of their larger counterparts, and compete head-to-head with the majors in niche or specialized markets where they can gain a competitive edge.

Shippers and Carriers Rely on Transportation Intermediaries

Shippers rely upon transportation intermediaries to arrange for the smooth and uninterrupted flow of goods from origin to destination, and many carriers rely upon them to keep their equipment filled and moving. It is, therefore, difficult to describe a typical intermediary, or to divide them into fixed categories. Most in international trade offer a mix of land, sea, and air services, customs brokerage (either directly or through subcontractors), warehousing, consolidation and deconsolidation, electronic tracking and tracing and trade advisory services (advice on letters of credit, commercial shipping terms, export administration requirements, transportation security and the like) adapted to the needs of their specific customer base or market niche.

BOTH LICENSED AND REGISTERED NVOCCS SHOULD BE PERMITTED TO USE THE EXEMPTION FROM TARIFF PUBLICATION

TIA has strongly supported use of the Commission's exemption authority under the Shipping Act of 1984, as amended ("Shipping Act"), to relieve NVOCCs from the burden and expense of tariff publication. Indeed, FIATA and the International Conference of TIA (previously the American International Freight Association) first petitioned the FMC for such an exemption in 1991, and they were active in the legislative efforts that led to the expansion of the FMC's exemption authority under the Ocean Shipping Reform Act of 1998 ("OSRA").

The Shipping Act's statement of purpose includes references to "a minimum of government intervention and regulatory costs;" providing "an efficient and economic transportation system that is, insofar as possible, in harmony with, and responsive to, international shipping practices;" and promoting US exports "by placing greater reliance on the marketplace."

We anticipate that the proposed exemption will reduce operating costs for our NVOCC members, and allow them to concentrate on quality and price, rather then expending unnecessary time and expense on administrative compliance.

Past Census data have shown that there are more than 15,000 3PLs by all modes operating in this country. The membership of FIATA includes more than 40,000 operating world wide. This is an extremely fragmented and highly competitive industry, with no one company controlling even

5% of the market. Competition is fierce, and the opportunity for any one NVOCC to "discriminate" among customers is non-existent, because the customer has thousands of other competing service providers from which to choose.

The elimination of NVOCC tariff publication as proposed by the FMC would bring ocean transportation operations into harmony with the procedures followed by all of the other modes of transportation—maintenance of written records of agreed rates that can be used if there is an audit or disagreement, as in virtually every other industry, without the need to replicate those records in a published or filed tariff.

The proposal would meet both of the standards for granting of an exemption: it will not result in a substantial reduction in competition or be detrimental to commerce. In fact, it will increase competition and promote commerce by making it easier and more efficient for NVOCCs to quote rates and to devote their resources to serving their customers.

NCBFAA's original petition requested a tariff publication exemption for ***all*** NVOCCs, whether or not they are subject to the licensing requirement under 46 USC § 40901(a) applicable to NVOCCs "in the United States." TIA and FIATA see no principled reason why the exemption should be limited to licensed NVOCCs, and urge the Commission to make it available to all NVOCCs.

By discriminating between licensed NVOCCs in the United States and those outside the United States that are subject only to the registration requirement, the proposed exemption could subject registered but unlicensed NVOCCs to an unreasonable competitive and cost disadvantage: they would have to continue to incur the cost (and potential enforcement risk) of tariff publication, and their rates would be on the public record for their competitors to see, while the rates of licensed NVOCCs able to avail themselves of the exemption would be confidential. Not only is this fundamentally unfair and contrary to the policy set forth in Section 1 of the Shipping Act to "establish a nondiscriminatory regulatory process," but the uneven playing field that it creates could lead to retaliation that may subject US NVOCCs to similar discriminatory treatment by our trading partners in other countries. Indeed, none of the public comments supporting the initial petition asked the Commission to limit the exemption to licensed NVOCCs, and no basis for such a distinction was offered in the NPRM.

At the public hearing on the NPRM, some concern was expressed that the Commission had been warned by unidentified "staff" that it might be difficult for the Commission to enforce the Shipping Act against registered but unlicensed NVOCCs if they were also exempted from the publication of tariff rates.[1] Concern was also expressed (with reference to a single pre-OSRA enforcement matter) that foreign blocking statutes might be invoked to frustrate Commission demand for records maintained abroad. We believe these concerns are unfounded. As noted in the NPRM, any NVOCC using the exemption would have to maintain records of the agreed rates for five years, and under § 532.7 of the NPRM, would be subject to the records availability

[1] Under the Administrative Procedure Act, data or information residing in the Commission's files, but not made a matter of public record in this rulemaking so that the public has an opportunity to review and comment upon it, may not lawfully form the basis for Commission action. *United States Lines Inc. v Federal Maritime Commission*, 584 F.2d 519 (DC Cir 1978). The corresponding FMC regulation is at 46 CFR § 502.226. Nevertheless, we address those concerns in these comments.

requirements of the Commission's regulation at 46 CFR § 515.31(g).[2] Failure to comply would subject the offending NVOCC to loss of the exemption and potential civil penalties or other enforcement action by the Commission.[3] As to the use of blocking statutes to frustrate Commission investigations, the Shipping Act already contains additional procedures and sanctions that apply where any common carrier subject to FMC jurisdiction invokes a foreign law to defend against a Commission subpoena or discovery order, including a reference to the State Department "for the purpose of assisting the Commission in obtaining the information or documents." 46 USC § 41108(c)(2).

COMMON CARRIAGE WILL SURVIVE WITHOUT PUBLISHED TARIFFS

Concerns about the preservation of common carriage were also expressed at the public hearing. Some argued that published tariffs are essential to the preservation of the system of common carriage embodied in the Shipping Act. Yet common carriage existed from 1916 until 1961 under the Shipping Act, 1916 *without* a requirement to publish tariffs. The tariff requirement was added in 1961 at the request of shippers who wanted protection from sudden and arbitrary rate increases by carrier conferences with antitrust immunity. The tariff requirement was imposed on NVOCCs only because they fell within the definition of "common carrier" under the statute, even though they have never had, and have not sought, antitrust immunity.

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[2] While the records availability regulation by its terms applies only to "licensees," it could easily be made clear that it applies under proposed § 532.7 to *any* NVOCC using the NRA exemption, whether licensed or registered.

[3] Registered NVOCCs using the NRA exemption would still be required to post the $150,000 bond required by the Commission.

Once it became clear to shippers in other modes that tariffs were no longer serving their intended purpose, but were instead inhibiting competition and increasing costs, [4] published tariffs for both asset based carriers and intermediaries were eliminated between 1980 and 1994. There was no outcry from shippers that common carriage had disappeared. Even in the ocean shipping industry, as the result of the Ocean Shipping Reform Act, more than 90% of containerized ocean freight now moves under service contracts with the ocean shipping lines. The Commission properly recognized this new reality when it approved a limited exemption for NVOCCs to enter into comparable service agreements with their customers. By our estimate, less than 4% of U.S. transportation moves under tariffs filed at this agency—the other 96%, valued at more than $729 billion annually, moves without filed or published rate tariffs, and without loss of either shipper protections or common carriage.[5]

TIA noted in its earlier comments on the petition giving rise to the instant NPRM that the outdated system of tariff publication, which was originally intended to guarantee certainty and uniformity in the assessment of rates and charges, has evolved into a complex system that often has the opposite effect, and that inhibits the ability of shipper and intermediary to state the terms of their commercial arrangements in easily understood, plain language. For example, intermediaries often act as both forwarder (agent) and carrier (NVOCC) on different segments of a transportation movement. While the commercial arrangements between the parties may be

[4] The most dramatic example was the trucking undercharge crisis at the now sunset Interstate Commerce Commission, where motor carriers agreed on discounted rates with their customers, but then failed to file the discounted rates properly in their tariffs. When these motor carriers became insolvent, bankruptcy trustees, looking for sources of funds to pay creditors and to fund employee benefit plans, sought to recover billions of dollars from innocent shippers, based on the difference between the agreed rates and the higher rates in the published tariffs. It took two Supreme Court cases and an act of Congress to remedy this situation, but not before the tariff system, meant to "protect" shippers, had cost them billions.

[5] The Council of Supply Chain Management, 18th Annual State of Logistics Report, September 2008, estimated truck transportation at $635 billion, rail at $54 billion, air at $38 billion and water at $32 billion.

clear to them both, the way that those arrangements are expressed in tariff language can give rise to confusion never intended by the parties.

Comments filed by one of the tariff consultants in this proceeding confirmed that: "Tariffs have always been complex documents that are read and understood only by highly trained people that work with them on a daily basis . . . . *They are not marketing or sales documents.* They are not easy to read or understand, and this is intentional." *Supplemental Comments of Distribution-Publications, Inc.*, page 2 (emphasis added). This may help to explain why, as one of the witnesses at the public hearing remarked, 99% of the "hits" on NVOCC tariffs are either from the publishing carrier or from other carriers checking on a competitor's rates, and not by shippers. Instead, shippers get their rate quotes and confirmations directly from the NVOCC with whom they are dealing. This makes sense, since 96% of shippers' transportation is conducted without tariffs; shippers no longer look to tariffs for rates and disregard the fact that the FMC continues to maintain a tariff regime, if they know that such tariffs exist at all.

Congress recognized this commercial reality when it attempted in OSRA to remedy any possible confusion resulting from disparities between rate quotes agreed between shippers and carriers, and the rates appearing in published tariffs. It added language in Section 13(f) of the Shipping Act, now codified at 46 USC § 41109(d), that makes the "amount billed and agreed upon in writing" between the carrier and the shipper controlling, even if the tariff for whatever reason does not conform to that rate. In effect, this provision constitutes a partial tariff exemption in and of itself, since by law it makes the agreed rate—and not the tariff rate—applicable, provided the other statutory conditions quoted above are met. The exemption contained in the Commission's

NPRM is very much in line with the policy reflected in the statute. Section 13(f) also answers the question asked in the NPRM as to whether the lower rate should prevail if there is a conflict between the tariff rate and a duly executed NRA: by law, the agreed rate reflected in the NRA must prevail, whether it is higher or lower than the corresponding tariff rate. [6]

Given the clear language of the statute, TIA also believes that it is unnecessary to prescribe a "safe harbor" for the form and content of NRAs. As some of the witnesses at the public hearing pointed out, NVOCCs need the flexibility to offer "all inclusive" lump sum rates to shippers who prefer them, and to condition other shippers' rates on the payment of fluctuating bunker surcharges, terminal handling charges or other ancillaries that the shipper may prefer to pay separately on a shipment by shipment basis. There should be no one-size-fits-all formula for NRAs prescribed in the final regulation.

Finally, concerns have been raised about the resolution of shipper-carrier disputes involving NRAs. It has been the experience of our members that most such disputes are resolved commercially between shipper and carrier, especially when a longer term customer relationship is at stake. Very few make it to court, and fewer still reach the trial and judgment stage. We see no reason that such disagreements should not be resolved like any other commercial dispute, without the need for intervention by the Commission. However, it was suggested that use of the Commission's mediation service might be required for any such dispute brought to the Commission because it involved an alleged violation of the Shipping Act. Use of alternative

[6] The wording of Section 13(f) is neutral as to whether the tariff rate is higher or lower than the agreed rate. The full text reads: "The Commission or a court may not order a person to pay the difference between the amount billed and agreed upon in a 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."

dispute procedures is strongly encouraged in the existing FMC regulations before the Commission will consider a formal complaint alleging a Shipping Act violation (*see* 46 CFR § 502. 62(e)), and TIA would not object to continuing such a requirement for complaints involving NRAs as well.

For the reasons set forth above the Transportation Intermediaries Association and FIATA support prompt Commission action to issue a final rule based on the NPRM, modified to include both licensed and registered NVOCCs.

Respectfully submitted,

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