BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 17-10

AMENDMENTS TO REGULATIONS GOVERNING NVOCC NEGOTIATED RATE ARRANGEMENTS AND NVOCC SERVICE ARRANGEMENTS

COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

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The National Industrial Transportation League ("NITL" or "League") submit its comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Maritime Commission ("FMC" or "Commission") on November 29, 2017.1 The NPRM proposes to amend FMC regulations governing non-vessel operating common carrier ("NVOCC") Negotiated Rates Agreements ("NRA") and NVOCC Service Arrangements ("NSA"). The League commends the Commission’s efforts to modernize existing regulations governing NVOCC transactions to better reflect the current ocean transportation market place and remove unnecessary regulatory burdens.

I. LEAGUE INTERESTS

Founded in 1907, NITL is a national organization of shippers and other companies engaged in freight transportation throughout the United States. A majority of the League’s members ship and receive a variety of commodities across interstate, intrastate and international

boundaries using all modes of carriage. For international ocean transportation, specifically, some members use the services of NVOCCs and will be directly impacted by the proposed rulemaking.

Additionally, the League and its members have a long history of supporting regulatory reforms that foster a competitive and efficient ocean transportation system while also reducing unnecessary regulation. Indeed, NITL has previously supported FMC action to exempt NVOCCs from certain tariff publication requirements in order to permit NVOCCs to negotiate confidential service contracts with their customers in NSAs filed with the FMC in 2004. In 2011, NITL supported an exemption to allow NVOCCs to negotiate confidential rates with customers in writing in NRAs.² The League and its members supported these actions to allow more flexible business arrangements and competitive options to meet the demands of the dynamic ocean transportation market.

II. BACKGROUND

This NPRM arises from a petition for rulemaking filed by the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") in April 2015. The NCBFAA’s petition ("NCBFAA Petition") requested the initiation of a rulemaking to eliminate the NSA provisions in 46 CFR part 531, or alternatively, eliminate the filing and essential terms publication requirements for NSAs.³ In addition, the NCBFAA petitioned the Commission to expand the NRA exemption in 46 CFR part 532 to include economic terms beyond rates, and to delete 46 CFR § 532.5(e) which prevents parties from amending or modifying an NRA once the

² See Comments of the National Industrial Transportation League, NVOCC Negotiated Rate Arrangements, FMC Docket No. 10-03 (Jun. 4, 2010).

³ See Petition of the National Customs Brokers and Forwarders Association of America, Inc. for Limited Exemption of Certain Tariff Requirements of the Shipping Act of 1984, FMC Docket No. P2–15. The NCBFAA Petition was filed on April 16, 2015.
initial shipment is received by the carrier or its agent (including originating carriers in the case of through transportation). In response, the Commission published a Notice of Filing and Request for Comments on April 28, 2015,\(^4\) and industry stakeholders, including NITL, filed comments accordingly. Based on the comments it received, the Commission granted the NCBFAA Petition on August 2, 2016, and initiated a rulemaking limited in respect to certain revisions requested in the NCBFAA’s Petition. However, due to a separate rulemaking proceeding to amend portions of 46 CFR Part 531 related to NSAs at that time,\(^5\) the initiation of the NCBFAA Petition’s rulemaking was delayed until the recently issued NPRM on November 29, 2017.

III. NITL COMMENTS

By increasing service options, reducing regulatory costs and burdens for NVOCCs, and providing shippers and NVOCCs greater flexibility in their shipping arrangements, the League believes that, subject to its comments herein, the proposals in the Commission’s NPRM have potential to provide substantial commercial benefits for the ocean transportation industry. The NPRM addresses and seeks comments on the following proposals: (1) elimination of the NSA filing and tariff publication requirements; (2) expanding the NRA exemption to include non-rate economic terms; and (3) modifying the NRA exemption to authorize amendments of NRAs and shipper acceptance upon booking. The League addresses each of those proposals in turn.

1. *Elimination of NSA Filing and Publication Requirements*

NITL supports the NPRM proposal to eliminate the SERVCON filing and essential terms publication requirements for NSAs. The League agrees with the Commission that these


\(^5\) See *Service Contracts and NVOCC Service Arrangements*, FMC Docket No. 16–05.
requirements “appear[] to provide little regulatory benefit.” The League is not aware of shippers that need or rely on the essential terms publication for any business purpose. Also, it does not appear that the Commission engages in routine review of filed NSAs or their essential terms, to fulfill its enforcement duties. In cases where a complaint is filed regarding an NSA or where the agency initiates its own investigation regarding a matter involving an NSA, the Commission could require NVOCCs to disclose the NSA contract terms in the context of the specific proceeding. Thus, the League agrees with the elimination of the NSA filing and essential terms publication requirements and recommends that the Commission require NVOCCs to disclose NSA terms upon its request to fulfill and compliance and enforcement purposes.

In regard to NCBFAA’s request for removal of the NSA exemption in 46 CFR 531 in its entirety, the League believes that NSAs should remain an option for shippers and NVOCCs that prefer the increased formality of the NSA requirements. The League also agrees with the Commission that the agency can remove any unnecessary or burdensome regulatory requirements without eliminating the NSA option entirely.7

2. Expansion of NRAs to Include Non-Rate Economic Terms

The Commission is seeking comments on expanding the NRA exemption to include non-rate economic terms, including how expanding the NRA exemption to allow inclusion of non-rate economic terms may impact shippers’ commercial operations.8 The NPRM states that “[n]on-rate economic terms could include but are not limited to such terms as: Service

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6 NPRM at 17-18. The Commission sought comments on why the essential terms publication requirement should not now be removed as an unnecessary burden upon the use of NSAs. Id. In addition, the Commission pointed out that shippers, identified by the Commission as the beneficiaries of essential terms in the original 2003 NSA rulemaking, have not since commented on the continuing utility of essential terms publications, and thus maintaining the essential terms publication requirement appears to provide little regulatory benefit. Id.

7 NPRM at 18.

8 NPRM at 15.
amendments; per-package liability limits; provision of free time, detention or demurrage charges; provisions for arbitration, dispute resolution or forum selection; minimum volumes or time/volume rates; liquidated damages; credit terms and late payment interest; service guarantees and/or service benchmarks, measurements and penalties; surcharges, GRIs or other pass-through charges from the carriers or ports; rate amendment processes; and EDI services, etc.\textsuperscript{9}

The League has previously commented and continues to believe that the proposed expansion of NRAs would increase commercial options and arrangements between NVOCCs and shippers and improve the ability of NVOCCs to respond to particular shipper needs in the marketplace.\textsuperscript{10} NITL members have expressed that NRAs are often used in the spot-market where commercial flexibility and an ability to customize terms for a specific and potentially limited arrangements would be beneficial. Indeed, as stated in the NPRM, the alignment of the use of NRAs in the spot-market “heightens, rather than diminishes, the need for NRAs to respond to an ever-changing marketplace.”\textsuperscript{11} Indeed, allowing NVOCCs and shippers to negotiate terms different than those set forth in the NVOCC’s rules tariff will likely lead to more competitive and efficient shipping arrangements that meet the shipper’s commercial requirements and the demands of the market.

3. \textit{Authorizing Amendments to NRAs and Shipper Acceptance Upon Booking}

The NPRM proposes modifying existing NRA regulations to allow shipper acceptance of an NRA upon the making of a booking request, in addition to allowing modification of an NRA at any time upon mutual agreement of the parties. NITL supports the proposal to permit

\textsuperscript{9} Id.

\textsuperscript{10} See Comments of the National Industrial Transportation League, FMC Docket No. P2–15, \textit{Petition of the National Customs Brokers and Forwarders Association of America, Inc. for Limited Exemption of Certain Tariff Requirements of the Shipping Act of 1984} at 4 (Jun. 8, 2015); Comments of the National Industrial Transportation League, FMC Docket No. 10–03, \textit{NVOCC Negotiated Rate Arrangements} (Jun. 4, 2010).

\textsuperscript{11} NPRM at 20.
modification of an NRA at any time. Similarly to the above comments, this proposal would enhance parties' flexibility allowing shippers and NVOCCs to better react to the dynamic international shipping market. However, appropriate procedures for accomplishing such modification should be in place. Therefore, NITL supports providing parties an ability to amend an NRA at any time but only to the extent that the amendment is based on a mutual agreement between the parties that is not in the form of the NVOCC’s tariff, bill of lading or other shipping document not subject to mutual negotiation. The mutual agreement could be in the form of an informal writing such as an email or other electronic exchange which reflects the mutuality of the agreement.

In regard to the proposal that would allow acceptance of an NRA upon the making of a booking request, NITL has concerns. The NPRM proposes to allow the shipper’s acceptance of an NRA through the act of booking. This form of acceptance would be in addition to the current method of accepting an NRA which requires acceptance to be memorialized through a formal writing or email. The League believes that this proposal has the potential to create confusion over the enforceability of an NRA, including the ability of a shipper to cancel a booking if commercial circumstances change prior to the tender of the cargo. If the NRA becomes binding and enforceable at the time a booking is made, would that limit the shipper’s ability to cancel the NRA due to a change in the sale of goods or other commercial circumstances? This confusion is more likely to lead to potential disputes that would not be directly addressed by the Commission’s proposed notice requirement. Thus, with respect to a shipper’s “acceptance” of an NRA, the League prefers the current regulations which require a “meeting of the minds” between the parties to be reflected in a formal or informal writing, such as an email.
Notwithstanding these concerns, if the FMC were still to decide to provide greater flexibility for “acceptance” of NRAs, NITL recommends that acceptance of the NRA should be tied to the shipper’s tender of the cargo. Recognition of tendering the cargo as an acceptance is more consistent with existing transportation practices and broader commercial contract principles. Moreover, should the Commission permit flexibility for the “acceptance” of an NRA as proposed by the League or otherwise, NITL strongly supports the Commission’s proposed requirement that each NVOCC seeking to recognize the alternate form of acceptance must incorporate a prominent written notice to that effect on each applicable NRA or amendment to avoid any risk of surprise and potential disputes.

IV. CONCLUSION

For the foregoing reasons, the League respectfully requests that the Commission adopt the proposed rules subject to the recommendations and considerations provided herein.

Respectfully submitted,

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