BEFORE THE
FEDERAL MARITIME COMMISSION

DOCKET NO. 17-10

Comments on Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements

Submitted by

NEW YORK NEW JERSEY FOREIGN FREIGHT FORWARDERS & BROKERS ASSOCIATION, INC.

The New York New Jersey Foreign Freight Forwarders and Brokers Association, Inc. (“NYNJFFF&BA”) respectively submits its comments on the Notice of Proposed Rulemaking (“NPRM”) under Docket No. 17-10. Established in 1917, the NYNJFFF&BA is one of the oldest trade associations for licensed freight forwarders, NVOCCs, and Customs Brokers in the United States with 100 regular members and 25 industry-related affiliates. The membership, consisting of both publically traded global logistics giants as well as small businesses, will be directly impacted by the proposed regulations.

Previously, the NYNJFFF&BA has supplied the Federal Maritime Commission (“Commission”) with comments in support of the Petition (Docket No. P2-15) submitted by the National Association of Customs Brokers and Forwarders Association of America (“NCBFAA”) and of removing outdated tariff regulations in response to the Regulatory Reform Initiative Notice of Inquiry (Docket No. 17-04). Our Association applauds the intent of the proposed rule to amend NVOCC Negotiated Rate Arrangements (“NRA”) and NVOCC Service Arrangements (“NSA”) to modernize, update, and reduce regulatory burdens.
Shipper Acceptance upon Booking

The NYNJFFF&BA supports the Commission’s proposal to streamline the process of shipper acceptance of NRAs and to recognize the practical reality that when the shipper books cargo it signifies the acceptance of the rate and terms offered by the NVOCC. The very act of asking for service to commence is a normal practice in any other industry and reflects agreement between the two parties. We are pleased to see that the Commission realizes NRAs are usually issued in the form of emails or email attachments and the exclusive requirement of a written acceptance places an unnecessary extra burden on all parties. It is useful that the Commission is clarifying that acceptance of the NRA can be demonstrated by the booking of shipments. While we do believe it is a good practice for an NVOCC to alert its customer that a booking constitutes acceptance of the NRA terms, we do not believe it should be necessary to have a regulation requiring it in order for an NRA to be valid. In fact, one of our members already incorporates the following: *Acceptance of the quotation shall become binding after receipt of the cargo by the carrier or its agent (or the originating carrier in the case of through transportation).* We would like to suggest to the Commission that the requirement for a “prominent written notice “ be removed and the wording of any such notice be left to the NVOCC to determine what works best for their system of communication. Thus, the proposed addition in 532.5 (c) (1) should be eliminated.

We believe that the Commission may be stuck on considering NRAs contracts before a booking is made. This is a fiction since an accepted NRA does not require a shipper to ship a single TEU. The contractual element does not come into the picture until a party books cargo at the offered rate, with or without a prominent notice that this is the case. And even then it is questionable whether a shipping party is obliged to tender cargo for shipment even though it has booked cargo. It seems that this is one of the problems being addressed by the New York Shipping Exchange. The bottom line is
that it is an excessive formulaic governmental requirement with no real business/regulatory/legal purpose to insist that an NRA rate offer is not accepted unless there is a prominent notice that a booking is an acceptance of the NRA. It is truly an unnecessary governmental intrusion into the everyday world of buying and selling ocean transportation.

Authorize Amendments of NRAs

The Commission’s proposal to permit NRAs to be amended is important to make it more flexible and efficient for both the NVOCC and the shipper. Since NRAs cannot currently be modified, any changes require the issuance of a new NRA. By allowing amendments, NRAs can be applied more easily to more shipments. The NYNJFFF&BA is in favor of allowing NRAs to be amended after the receipt of the initial shipment. However, we are not in favor of having such changes applied only to shipments where the cargo has not yet been received. If the shipper agrees in writing to accept a change in the NRA terms after the carrier or its agent has received the cargo, why would the Commission prohibit this? The shipper will be protected because his agreement to the change in the NRA will be required if it is after the cargo is received. There may be instances when an NRA could include surcharges such as a GRI that are subsequently removed by the ocean carrier. The NVOCC would be prohibited from amending the NRA if the cargo had been received. The key protection for the shipper is that they must agree to the change if cargo has been received. The act of booking would be sufficient for future shipments after an NRA has been amended.

Expanding the NRA Exemption

The Commission has invited comments on allowing NRAs to include non-rate economic terms. The NYNJFFF&BA has been appreciative of the Commission’s
exemption to the tariff filing requirement with the creation of the NRA, which is largely being used by most of our OTI members. However, our association has been a strong believer that this facility can be made more useful to the NVOCC and the shipper by including other elements relevant to the cost structure and services provided in moving the cargo. These can include but not be limited to: ocean carrier surcharges, such as GRIs; other pass through charges, including unforeseen detention and demurrage; free time for storage and equipment; time / volume commitments; service requirements; penalties and / or incentives; credit terms; liabilities; legal provisions for dispute resolution, etc. We do not believe there should be limits on what can be included in the NRA. This would allow NVOCCs to customize NRAs to the needs of individual shippers in either a simple or more comprehensive form. The shipper will be in a better position to understand all conditions that could affect the cost and movement of the cargo. At present this type of ocean freight rate agreement is only possible through a Negotiated Service Arrangement (NSA), which is not practical for the small and mid-sized companies.

Remove the NSA Filing and Publication Requirements

The NYNJFFF&BA supports the removal of any unnecessary and costly regulation. Our association does not see any regulatory benefit to the filing of NSAs and amendments with the Commission as well as the publication in tariff format of the essential terms. We are in favor of eliminating the NSA filing and publication requirements.

Removal of OTI NVOCCs Tariff and Tariff Publishing Requirements

The increasing use of NRAs and the fast-changing marketplace for rate determination has rendered OTI tariff publication useless. Shippers do not check filed
tariff rates in making a determination to tender cargo. It is long understood that shippers negotiate with NVOCCs and move their freight based on the agreed market rates. We would like to bring to the attention of the Commission that technology is also rapidly changing the speed and manner of how rates are determined by the marketplace. Many software intermediaries have emerged to offer immediate ocean freight rate comparisons that allow shippers a wide range of choice. It is time for the Commission to use its exemption authority to eliminate all tariff publishing requirements from the shipping regulations.

If tariff publishing requirements were removed, the need for such exemptions as NRAs and NSAs would no longer exist. Sections 531 and 532 can be eliminated. If they so choose, NVOCCs would be able to continue to offer customers formalized contracts, such as NSAs, and provide rate detail through NRAs. If they do so, it is because it meets the customer’s needs and has a real purpose, not because it is constructed as an exemption to a tariff filing requirement that no longer serves a useful purpose. Why is the United States virtually alone in the world in requiring the filing of tariffs for ocean transportation? In the U.S. shippers move freight by air and truck without negative consequences from rates not subject to an elaborate tariff filing or exemption structure. Why can’t this be true for freight that moves by ocean? Tariff filing requirements are as useful as buggy whips as we speed toward an era of driverless cars.

**Conclusion**

The comments in this submission reflect the majority views of our membership that the proposed rules for NRAs and NSAs are a step in the right direction to bring regulations more in line with business practice without any negative consequences for the shipping public. The Commission has asked for shippers’ comments. In the event that few shippers submit comments, it will be a reflection of how unimportant this issue
is to them. The OTI community provides them ocean freight service at mutually acceptable negotiated rates and terms. Disputes are resolved by the parties per business practice. Today’s competitive environment with easy access to market rate information is the best protection of the shippers’ interests. We hope that the Commission will go further than the proposed regulations and recognize how much the world has changed in the past 20 years since the Ocean Shipping Reform Act of 1998.

Executed on January 29, 2018
On Behalf of the NYNJ Foreign Freight Forwarders & Brokers Association, Inc.

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