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**BEFORE THE  
FEDERAL MARITIME COMMISSION**

**DOCKET NO. 21-03**

**Comments on Advance Notice of Proposed Rulemaking**

**Carrier Automated Tariffs**

**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 concerning the Federal Maritime Commission’s Advanced Notice of Proposed Rulemaking (ANPRM) on access and practices related to common carrier tariffs. Established in 1917, the NYNJFFF&BA is one of the oldest trade associations for licensed freight forwarders, non-vessel operating common carriers (NVOCC), and Customs Brokers in the United States with over 125 regular members and industry –related affiliates, including beneficial cargo owners, truckers, and warehouses. This issue is of interest to our membership, which consists of both publicly traded global logistics giants as well as small businesses.

Our comments will address the specific questions raised from the point of view of the NVOCC and include the real-world environment impacting the issues of tariffs and charges.

**Tariff Access Fees**

The Shipping Act requires that ocean carriers, including NVOCCs maintain automated tariffs showing all their rates, charges, classifications, rules, and practices. Electronic access has to be available to the public and any fees, if charged, must be reasonable. The Commission has expressed a concern that the level of fees to access

tariffs may be set in a way that discourages inquiries. Before responding to the specific questions the Commission has raised, the NYNJFF&BA would like to comment that we have not identified a single company in our association that looks up either VOCC or NVOCC tariffs for the purpose of determining applicable ocean freight rates. NVOCC members have indicated that they believe the tariff rates they are posting and making publicly available online are not being accessed. This is because tariffs are not the mechanism driving rate levels. The market is determining the ocean freight rate and not tariffs. Carrier websites are checked for surcharge amounts and effective dates. The issue of paying or charging unreasonable fees does not exist for our membership. Some of our members quote customers door to door or port to port on a transactional basis with the data drawn from the database they maintain in the form of a tariff system. NVOCC customers request rates by email or through online portals. Larger NVOCCs have an automated quotation response system accessing their tariff database. Smaller NVOCCs will usually respond to a quote request by email as an NRA or once accepted later filed in a tariff. Rate information is passed to shippers for free and offered as a service to retain and develop new customers.

The Commission's guidance on access was issued over 20 years ago in the transition period to carrier published automated tariffs. Since that time the internet and access to information online has exploded. All ocean carriers and NVOs have developed websites for commercial purposes in disseminating information and improving shipment costs. The marginal cost of making tariffs accessible has become negligible.

1. Do you agree or disagree with the Commission's guidance that "a reasonable charge" for access should recover only cost and expenses incurred by carriers in making their tariff accessible to the public"?

The NYNJFF&BA believes that VOCCs and NVOCCs should not charge for information that is required by regulation to be publicly available. It should not be necessary nor should it be the role of The Commission to determine what is a "reasonable charge" for recovery of costs in making tariff information publicly available.

2. In your experience, do you believe the carriers you do business with are charging tariff access fees that only recover the costs and expenses incurred in making tariffs accessible to the public?

The NYNJ/FF&BA does not know of NVOCCs or Carriers who are charging for access to their rate and rules tariffs. No member has complained that access fees are being charged or are too high. Some online tariff filing services may charge a fee. Tariff access fees are a non-issue since we do not believe that there is any demand for access.

3. Are you inhibited from accessing common carrier tariffs because of tariff access fees or tariff access processes?

Tariff access processes are cumbersome in the sense that specific rates or surcharges are not always easily found. The carriers' websites provide a lot of information. Navigating to the specific surcharge or rate is not a quick process. Often the information is not found in an actual tariff but rather is located in the advisory notice of a change that has been posted.

### **Pass-through Charges**

The Commission has expressed a concern that the carrier practices of pass-through charges could be undermining a shipper's ability to know the total freight charges that will be applied to cargo movements. The issue of pass-through charges is an important one for NVOCCs. The following comments will address specific questions the ANPRM raises as well as larger issues surrounding the concept of pass-through charges and tariff rates.

### Typical Charges

Our NVOCC membership is offering rates to shippers either through the Negotiated Rate Arrangement exemption and/or through its tariff structure. In either case, they are subject to 46 CFR 520.8(b)(4) providing that charges where NVOCCs are acting only as a collection agent can be passed through without 30 day notices or without being included in a tariff. These types of charges include detention, demurrage, port shifting or lifting charges, and other additional terminal related fees.

In recent years it has become increasingly difficult for NVOCCs to manage rapid changes in the total costs of the ocean freight secured from VOCCs. This has largely been

due to a) carriers adding new and different types of surcharges to the base ocean freight rates, b) the practice of filing surcharges in tariffs and then reducing the levels by the effective date if not supported by the market, c) congestion at ocean and interior ports, and d) increasingly the application of administrative fees or additional premium fees to guarantee space availability. NVOCC's agreements with carriers through service contracts or rate quotes subsequently accepted and filed will be subject to certain charges Valid at Time of Shipment (VATOS). The VOCC will list the charges that will be included in the lumpsum rates and the ones that will be subject to change. Most common surcharges subject to change are: adjustments for the price of fuel (i.e., bunker adjustment factor, marine fuel recovery, etc.); low Sulphur fuel, peak season, general rate increases, (revenue recovery), congestion, origin and destination documentation fees. For the NVOCC, the VOCC surcharges are outside of their control and impossible to fix at the time of an NRA. The NVOCC is acting as a collection agent for the carrier and passing these charges through to the shipper.

#### Tariff Treatment of Pass-Through Charges

For NVOCCs filing rate tariffs, the pass-through charges do not have to be included in a tariff to be recovered from the shipper. Other surcharges, such as general rate increases, would have to be included in their tariff.

For NVOCCs utilizing the NRA exemption from tariff filings and publication rates and surcharges are quoted in writing to the shipper. Rates are presented with an indication that certain specific surcharges will be passed through. These pass-through charges that are not fixed by the VOCC in contracts or filings, most notably PSS and GRIs, are not indicated with a specific dollar amount. The NRA regulations allow NVOCCs to treat GRIs as pass-throughs in an NRA transaction. These charges are identified by name in the NRA quote or NVOCC rules tariff. As such they are allowed to be charged but not marked up by the NVOCC. The amount to be charged may not be indicated. If a current amount is shown or incorporated in the overall rate, it is annotated as subject to change based on the VOCC rate in effect at the time of cargo receipt.

In its ANPRM, the Commission made reference to “broader interpretations” by NVOCCs” of VOCCs charges and surcharges, including GRIs. NVOCCs are simply not in control of these surcharges and fees which can change rapidly. One of the areas which

has been causing issues with many NVOCCs in the current congested climate are the increase in charges being assessed by ocean carriers when they suspend service contract rates. The carriers at present are not granting bookings to NVOCC service contract parties unless they agree to pay additional increased service amounts to secure space. Usually, these charges are given different names by the carriers such as “Revenue Recovery Surcharges”, “Space Arrangement Fees”, “Additional Premium Deposits”, “Sea Priority Go”, and other such designations. In view of the various designations provided by ocean carriers, it would be impossible to guess which of these designations might be applied by any given ocean carrier before they accept cargo for a particular vessel voyage. Under current global shipping conditions, space needs to be reserved 3-4 weeks in advance of sailing dates. Market rates and premiums are being determined on a daily basis. In order to move containers, shippers are submitting booking requests without knowing exactly what the cost will be. Containers will not be loaded unless an NVOCC accepts the additional fees and surcharges applicable at the time of cargo receipt. NVOCCs are not expanding the definition of a pass-through, they are merely responding to the exigencies of the ocean freight market dynamics.

The NYNJFF&BA suggests that the NRA quote be allowed to include a general description of the type of pass – through charges. Each VOCC uses a different terminology and the exact name cannot be known in advance. NVOCCs, in general need flexibility to charge these pass-through rates that are out of their control. Shipper customers need their cargo to move or risk stopping production or losing sales. As a result, they have accepted increased costs and the risk of additional charges outside the control of the NVOCC. Regulations currently require a pass-through charge to be specifically named. An NVOCC should not be obligated to use a precise term that may be unknowable at the time of the quote to the shipper. A general description of a charge that would be passed through at cost should be sufficient for shipper acceptance.

#### Notification and Communication of Pass- through Charges

NVOCCs will communicate pass-through charges as a component of an NRA quotation or indication of applicability in their Rules Tariffs.

Many neutral NVOCCs will send industry wide notices of changes in their tariffs for example, general rate increases and indicate the effective date 30 days later. They may

reduce or remove the rate prior to the effective date. Some large neutral NVOCCs will quote on a transactional basis with a limited effective date, identifying and fixing the surcharge amounts. Quotations to a shipper will usually include a notice that temporary additional charges beyond the control of an NVO may occur. NVOCCs usually do not know exact pass-through charges applicable to specific shipments until billed by the carrier or terminal. NVOCCs have a great incentive and consider it vital to maintain a good communication of any change in order to preserve the customer relationship and obtain acceptance of its invoices.

### Assurance of Pass-through charges at Cost

Shippers can be assured that NVOCCs are not inflating pass-through charges because the actual amounts can be discoverable through publicly available online information. These charges can be independently verified. Furthermore, NVOCCs can provide a short statement on an NRA quotation or in an NVOCC Rules Tariff that verification of pass-through charges can be provided upon request.

We would like to bring to the Commission's attention that in some instances NVOCCs are paying third parties more than the actual pass-through charge. An example would be when a trucker pays a carrier for container per diem after free time has expired and then bills the NVOCC including an administration fee, perhaps 10% of the funds advanced. Why is the trucker allowed to do this but the NVOCC cannot? The cost of administration, increasingly onerous with charges proliferating and changing frequently, is real. NVOCCs should be allowed to include an administrative fee for pass-through charges to recover this cost. An NVOCC will always have an out-of-pocket processing fee, usually paid to third parties, such as Pay Cargo, or an accounting cost associated with the pass-through payment. This should be allowed when clearly identified and noted in its rules tariff or NRA

### **General Observations on VOCC Pass-Through Charges**

In the ANPRM the Commission has raised questions concerning VOCC treatment of pass-through charges. This is particularly pertinent under the present congested conditions at U.S. ports. For NVOCCs demurrage and detention are considered pass through charges. For VOCCs, these are revenue generating line items. Steamship lines are

charging demurrage according to their tariff rates that exceed the amount assessed by terminals to recover costs for use of space after free time expires.

Many of the surcharges introduced by the carriers over the years in order to recover costs have lost transparency in terms of their calculation and relationship to the true costs in the eyes of the shipper. Detention or per-diem for use of a container far exceeds the actual costs. Surcharges introduced to cover temporary or fluctuating costs, such as for adjustments to the cost of fuel have become permanent. These previously were part of the overall cost of moving cargo by sea. The base ocean freight component of shipping costs has diminished as a portion of the total costs to a shipper.

Pass-through charges, booking priority or fee acceptance at the time of shipment take immediate effect. This has increased the risk factor for the shipper in knowing the total costs for moving freight by ocean.

Maritime regulations allow VOCCs to pass on such costs as terminal storage fees and to do so with margin merely because they file them in their tariffs and may have discounts for providing volume and acting as a collection agent. If NVOCCs must bill pass-through charges as per outlay then it is only fair that VOCCs do the same. If VOCCs are allowed a reasonable administrative fee for processing pass-throughs, then so should it be for NVOCCs.

### **Tariffs Contributing to Lack of Transparency in Freight Costs**

Much of US maritime regulation was designed to protect the shipper from the abuses of power from steamship line conferences and enjoyment of limited anti-trust immunity and to encourage competition among carriers. The structure of publicly accessible tariffs was meant to make pricing available on a non-discriminatory basis when ocean cargo was moving under common carriage terms. Increasingly, ocean carriage has moved almost entirely to a system of carriage under contract or agreed pricing. Steamship lines and marine terminals have in place a required system of publicly available tariffs for various services. This requirement is now used to defend the practice of rigidly billing according to published rates regardless of whether it is reasonable or not. The tariff system encourages the widespread use of confusing surcharges and provides a huge money making vehicle for carriers. Once intended to help protect the shipper from carrier abuse and to ensure freight cost transparency, it has become a tool to achieve the exact opposite.

Tariffs have become a weapon against the shipper being able to know what his freight costs will be.

Current regulation does not encourage the correction of abuse. For example, when containers cannot be returned to the port because there is insufficient space to receive them, a steamship line can continue to collect per diem for the use of the equipment. When terminals are so congested they cannot make containers available for pickup within the free time they are still charging demurrage for use of the storage space. When steamship line schedules are changed and cargo is rolled, storage on containers waiting for loading can still be charged demurrage. One of the purposes of the Shipping Act of 1984 and OSRA in 1998 was to provide an efficient and economic transportation system. Changes in the maritime shipping industry in the past 22 years suggest current regulation may actually be contributing to the problem.

### **Recommendation**

The tariff system for carriers, whether VOCCs or NVOCCs, no longer serves a useful purpose. It did at one time to prevent discriminatory pricing when steamship line conferences set rates and ocean freight moved under common carriage terms. Now ocean freight moves under contract rates agreed between the carrier and the shipper. Even if service contracts are not in place, a steamship line provides individual quotes for specific traffic moving within an identified time period or initiates a small quantity service contract. The wild card has been that these quotes are still subject to surcharges Valid at Time of Shipment (VATOS).

Advances in computer technology and communication have created conditions for easy access to information and instant quotation. Ocean freight market rates are readily available to anyone instantaneously. There is no longer a need to require the maintenance of electronic auto-tariff filing.

Large NVOCCs offering their own Less than Container Load (LCL) services have managed to provide transparent fixed rates to shippers by limiting the time for the duration of the offer and tightly controlling costs. These NVOCCs have honored their rate quotations despite the volatile current market conditions. If NVOCCs can do this, why can't VOCCs, who are controlling the vessels, the most critical component?

The issuance of this ANPRM is focused on improving transparency in freight costs as part of the Commission's stated mission to protect the public from unfair and deceptive practices. The NYNJFF&BA respectfully suggests that transparency in freight costs can best be achieved by extending the exemption of tariff rate filing to VOCCs as was done to NVOCCs. However, there should be a regulatory requirement that the total freight rate inclusive of all components agreed with the shipper for a set of services whether in an extended contract or transactional quote must be fully transparent and the terms respected. The requirement to maintain publicly available rules and terms and conditions for the contract of carriage under a bill of lading is in the public interest and should be preserved.

This review of pass-through charges is only necessary because of the unfortunate tariff structure still in place. It may lead to a temporary fix for a troubled transportation that needs a complete overhaul and amendments to the Shipping Act.

Executed on June 7, 2021

On Behalf of the NYNJ Foreign Freight Forwarders & Brokers Association, Inc.

A handwritten signature in cursive script, appearing to read "William B. Skinner", followed by a horizontal flourish.

William B. Skinner

President

NYNJ Foreign Freight Forwarders & Brokers Association, Inc.