

**BEFORE THE
FEDERAL MARITIME COMMISSION**

DOCKET NO. 21-03

CARRIER AUTOMATED TARIFFS

**COMMENTS OF THE NATIONAL CUSTOMS BROKERS AND FORWARDERS
ASSOCIATION OF AMERICA, INC.**

The National Customs Brokers and Forwarders Association of America, Inc. (“NCBFAA” or “Association”) submits these comments in response to the Advance Notice of Proposed Rulemaking (“ANPRM”) published in this docket on April 8, 2021 (86 Fed. Reg. 18240). The ANPRM requested public comments on two issues relating to the tariff publication regulations found in Part 520 of the Commission’s regulations – (1) Tariff Access Fees and (2) Pass-Through Charges. The NCBFAA is submitting comments regarding both of these issues.

The NCBFAA is the national trade association representing the interests of over 1000 non-vessel operating common carriers (“NVOCCs”), freight forwarders, and customs brokers operating in the shipping industry, as well as 28 regional associations. NCBFAA members are involved in the transportation and/or logistical arrangements of approximately 90% of the cargo that moves into and out of the United States by ocean. A large number of NCBFAA’s members are NVOCCs or freight forwarders, and as such are directly affected by the tariff requirements in 46 C.F.R. Part 520 relating to tariff access fees and pass-through charges. Accordingly, the members of the NCBFAA have a significant interest to be heard concerning potential the interpretation and potential changes to the regulations governing tariffs.

As a preliminary matter, the NCBFAA strongly supports the FMC’s initiative to review its current regulations to evaluate and identify regulations that are outdated, unnecessary, ineffective, eliminate jobs or inhibit job creation, impose costs that exceed benefits, or otherwise interfere with regulatory reform initiatives. The market environment in the ocean shipping industry and the commercial relationships between and among VOCCs, NVOCCs, forwarders and shippers are dynamic and constantly evolving. The COVID-19 pandemic and the associated commercial and operational disruptions in the supply chain have only served to accelerate change in the ocean shipping industry. The Commission’s regulations – particularly those relating to the applicability and interpretation of the tariff requirements – should both reflect and be consistent with changing market conditions.

I. GENERAL COMMENTS OF THE NCBFAA REGARDING TARIFF ACCESS FEES AND PASS-THROUGH CHARGES

A. Tariff Access Fees

The NCBFAA agrees that carrier tariffs should be accessible to NVOCCs, freight forwarders and shippers at minimal or no cost. Most, if not all, of the large steamship lines self-publish their tariffs and make them available on their websites. In such cases, there would appear to be little justification for imposing any subscription or user fees for access to the tariffs and many carriers do provide access to their tariffs at no charge. NCBFAA members have indicated, however, that a limited number of carriers continue to charge tariff access fees that appear to be exorbitant and thus tend to discourage the public access to VOCC rates that the tariff publishing requirements are designed to encourage.

For those carriers and/or NVOCCs that use third-party tariff publishing services, tariff access charges should reflect and be designed to recover only the actual costs incurred for maintaining access to the tariffs. The NCBFAA notes that an increasing number of NVOCCs are

establishing rates through NVOCC Service Arrangements (“NSAs”) and NVOCC Negotiated Rate Arrangements (“NRAs”) pursuant to 46 C.F.R. Parts 531 and 532. Since the exemptions for NSAs and NRAs require that NVOCC rules tariffs be accessible to the public free of charge, many NVOCCs do not charge any tariff access fees at all.

B. Pass-Through Charges

The NCBFAA generally supports the Commission’s efforts to clarify the scope and applicability of Section 520.8 regarding pass-through charges, but it urges the Commissions to avoid adopting an unduly narrow interpretation of Section 520.8 that fails to take into account the manner and timing of how various rates, surcharges and other fees and charges are established and assessed to NVOCCs by VOCCs, terminals and other entities. In the current market environment, NVOCCs typically pass on charges at cost because they are faced with the near impossible task of attempting to include in their freight rates an almost infinite variety of additional fees and charges – the assessment of which they cannot reliably predict and over which they have no control. Many of these additional charges and fees are established with little or no notice and/or are constantly changing. Consequently, the tariff filing requirements in Part 520 should be broadly interpreted to facilitate the ability of NVOCCs to pass through to their customers charges and fees over which NVOCCs have no control.

Section 520.8(b)(4) of the Commission’s regulations provides that tariff amendments that address charges that are not under the control of the carrier – and for which the carrier acts merely as a collection agent – can go into effect immediately upon publication if the carrier did not get (presumably sufficiently advance) notice from the “agency” imposing the charge. Although Section 520.8 does not specifically describe such charges as “pass-through” charges, it appears to contemplate that the carrier will not mark up such charges by specifying that the carrier acts as a mere collection agent for such charges. Section 520.8 lists terminal charges and canal tolls as

examples, but also includes the broader category of “additional charges, or other provisions not under the control” of the carrier.

The ANPRM indicates that the Commission may interpret Section 520.8(b)(4) narrowly with respect to NVOCCs. For example, the ANPRM states that the Commission does not consider VOCC General Rate Increase (“GRIs”) to fall within the scope of pass-through charges under Section 520.8 and indicates that for cargo moving under tariff rates, NVOCCs are required to publish GRIs in their tariffs and provide 30 days’ notice to their shippers before the GRIs can go into effect. The ANPRM does not state whether the Commission takes a similar view with respect to other VOCC charges or surcharges, although it does indicate that Section 520.8 applies to both governmental and nongovernmental charges, which presumably would include VOCC charges or surcharges other than GRIs that are passed through without mark-up.

As set forth below in the NCBFAA’s responses to the Commission’s specific questions, NVOCCs are faced with the task of recovering from their customers numerous charges and fees over which NVOCCs have no control. Such charges and fees are assessed by a variety of entities (VOCCs, governmental agencies, terminals, container yards, etc.) to cover many different costs and services. The amounts of the various charges are increased or decreased over time – often with little or no notice. Charges addressed to similar costs or services are identified in a variety of ways by VOCCs and other entities using different terminologies. New fees and charges are added on a continuing basis. Because NVOCCs are often given insufficient notice of the applicability and/or amounts of these charges, they have little choice but to pass the charges on to their customers without mark up or in some cases subject to an administrative fee.

Moreover, the COVID-19 pandemic has fundamentally changed the way in which ocean shipping rates are established and applied by VOCCs – a change that has made it virtually

impossible for NVOCCs to operate without passing through very significant “premium” charges. As the supply chain faced the ever-increasing demand last year when buying patterns in the United States spiked, VOCCs introduced a new “premium” surcharge under a variety of names and possible applications. Whether called SPOT, SPGO, Guaranteed Allocation, Equipment Guarantee, or simply Premium Surcharge, this new premium surcharge has become widely used, and in many cases doubles the original base freight rate including all other surcharges. It is not uncommon to have a premium surcharge applied to FAK all-in rates just to obtain a booking from the VOCCs. While it may be possible to secure a very low percentage (perhaps ten percent) of bookings at contract FAK rates, the vast majority of bookings in the current market are rejected unless a premium surcharge is applied, effectively doubling the rate.

The amounts of these premium surcharges vary from carrier to carrier, and from week to week, so there is no practical way for NVOCCs to effectively publish the charges. Moreover, as bookings are now being made three to six weeks earlier than they used to be, the effective rate quoted at the time of booking may also be subject to one or two GRIs and one or more additional Peak Season Surcharges. In addition, even the premium surcharge that the NVOCC was required to agree to pay at the time of booking to obtain guaranteed space or equipment may be increased at the time of loading in order to avoid having cargo rolled over.

The ANPRM notes that all common carriers, which includes NVOCCs, must include in their tariffs all rates and charges, including the pass-through charges described in 46 CFR §520.8. If Section 520.8 is strictly interpreted to require that NVOCC tariffs list each pass-through charge by name and amount, NVOCCs face an impracticable task given the number, variety and constantly changing nature of charges, surcharges and fees in the current market. While a strict interpretation of Section 520.8 may have been reasonable when the number of surcharges was

limited and the terminology identifying such charges was largely standardized – e.g., BAF, CAF, THC, etc. – those days are long past. In the current market environment, NVOCCs would need to adjust and revise their tariff list of pass-through charges and the applicable amounts on an almost constant basis.

In discussing the Commission’s view that VOCC GRIs cannot be treated by NVOCCs as pass-through charges under Section 520.8, the ANPRM notes that NVOCCs – like VOCCs – are required to publish GRIs and provide 30 days’ notice of the increase to their shippers. The ANPRM appears to assume that NVOCCs receive 30 days’ notice of VOCC GRIs and other increased charges, but that is seldom the case. While VOCCs may publish GRIs, Peak Season Surcharges (“PSS”) and similar increases in charges at least 30 days before they become effective, NVOCCs often do not receive prompt notice of the proposed changes. Moreover, VOCCs often publish substantial GRIs and PSS on 30 days’ notice as placeholders, only to later withdraw or substantially reduce the amount of those increases on one-day notice. If NVOCCs cannot treat GRIs and PSS as pass-through charges under Section 520.8, NVOCCs will find themselves in a perpetual “catch-up” race to avoid undercharging (due to the time lag inherent in amending their tariffs to reflect VOCC increases) or overcharging their customers (due to the time lag inherent in amending their tariffs to reflect VOCC decreases).

The NCBFAA recognizes that the ANPRM indicates the Commission’s concern that the “inappropriate” application of pass-through charges by NVOCCs could deny shippers full transparency regarding the total freight charges and thereby result in harm to shippers. However, the NCBFAA does not understand why the Commission’s concerns appear to be limited to NVOCC pass-through charges. NVOCCs – as shippers in relation to VOCCs – are also denied full transparency regarding the total costs they will incur, both for VOCC-related charges for which

NVOCCs do not receive adequate notice and for third-party charges passed through by VOCCs. The ability of NVOCCs to pass through charges to their customers is often the only practical and efficient way in which NVOCCs can protect themselves from the adverse effects of the lack of transparency into the charges they will incur.

Moreover, the Commission should consider the potential impact on shippers of severely restricting the use of pass-through charges by NVOCCs. Faced with incurring substantial and unpredictable costs over which they have no control but cannot efficiently pass through to their customers, NVOCCs would have little recourse but to substantially increase their rates and charges to shippers in an attempt to ensure that their tariff charges are sufficient to recover charges, surcharges and fees imposed by carriers, terminals, governmental agencies and other parties. Doing so would be an inefficient cost recovery mechanism that would likely lead to higher overall shipping costs to shippers than currently available based on the use of pass-through charges

II. RESPONSES OF THE NCBFAA TO THE COMMISSION'S QUESTIONS

The NCBFAA provides the following responses to the specific questions regarding pass-through charges listed in the ANPRM:

1. For an NVOCC, what are the typical charges that are not under its control and for which the NVOCC merely acts as a collection agent?

NVOCCs are subject to the assessment of a large number of charges, surcharges and fees that are not under their control and which they typically pass through to customers at cost and thus act as mere collection agents. NCBFAA members estimate that an exhaustive list of potentially applicable pass-through charges, surcharges and fees would number in the hundreds. In many cases, different carriers, governmental agencies and nongovernmental entities use different terminology for the same or similar charges, thus increasing the difficulty of specifically identifying each such charge in NVOCC tariffs. Moreover, new fees and charges are constantly

being added and the amounts of the charges are subject to change – often with little or no notice. NCBFAA members have noted the following as examples of charges that are typically required to be passed through to customers:

- VOCC GRIs
- Peak Season Surcharges¹
- Premium Service Charges
 - SeaPriorityGo (SPGO)
 - SPOT
 - Space Guarantee
 - Equipment Guarantee
- Fuel Related Charges
 - Emergency Fuel Surcharge
 - Fuel Recovery Surcharge
 - Low Sulphur Fuel Charge
 - Bunker Fuel Charge
 - Emergency Bunker Fuel Charge
 - Bunker Adjustment Factor
- AMS Fee
- Port Congestion Fee
- Heavy Weight Charge
- Overweight Surcharge/Fines
- Driver Waiting Time
- Shifting Fees
- Cost recovery Charges
- Telex Release Fee
- Booking Cancellation Fee
- Postponement Fee
- Emergency Intermodal Surcharge
- Currency Adjustment Factor
- Various Security Fees
- Terminal Fees
- International Ship & Port Security Fee
- IMO Surcharge
- Container Reposition Fee
- Alameda Corridor Charge
- Suez Canal Congestion Fee
- Gate Out Fee
- Equipment Imbalance Surcharge
- Container Retention Surcharge
- Container Maintenance Fee
- Panama Canal Adjustment Factor
- Low Water Surcharge

¹ VOCCs may impose multiple peak season surcharges (e.g., PSS1, PSS2, PSS3, etc.) to a single shipment.

Pier Pass
Wharfage
Flip charge
Chassis Split
Seal Fee
SOLAS Fee
Genset Fee
Electrical Usage Fee
Transshipping Fee
Aden Gulf Surcharge

2. For an NVOCC, how does its tariff specify or address those charges for which it merely acts as a collection agent?

NVOCCs attempt to list specific pass-through charges, surcharges and fees in their tariffs whenever possible. However, due to the number and variety of such charges, the frequent addition of new fees and charges, and the use of different terminology for the same or similar charges, NVOCCs must include in their tariffs broader language relating to pass-through charges and/or generic descriptions of the types of charges that may apply in order to ensure they are able to pass through and recover charges, surcharges and fees that NVOCCs must pay but over which they have no control.

3. How do common carriers communicate to shippers that the so-called pass-through charges are for the account of shippers?

NVOCC typically attempt to list anticipated pass-through charges in rate quotes or rate confirmations to shippers. However, because of the uncertainties regarding the applicability of many fees and charges to a particular shipment as well as the establishment of new fees and charges and/or changes, NVOCC often include language in rate quotes and rate confirmations to the effect that additional pass-through charges may apply.

4. How can shippers be assured that common carriers collect pass-through charges without adding any mark-up?

Most shippers of ocean freight are aware that various charges in addition to the base freight rate may be applicable and NVOCCs typically list pass-through charges separately on their invoices. Shippers can, and sometimes do, request that NVOCCs confirm that pass-through charges are not marked up. In many if not most cases, shippers can independently confirm that charges identified as pass-throughs are not marked up by the NVOCC by checking publicly available sources of information such as the underlying VOCC and port/terminal tariffs. The amounts of governmental and commercial fees and charges are also typically publicly available (usually online) or easily ascertained.

III. CONCLUSION

The NCBFAA appreciates the Commission's efforts to review its regulations in light of changing conditions in the marketplace and its consideration of the views of the ocean shipping industry before effecting regulatory changes. Regarding the issue of tariff access fees, the NCBFAA agrees with the Commission's guidance in Circular Letter 00-2 that a reasonable tariff access charge should recover only the actual costs incurred by the carrier in making its tariff available to the public. Moreover, the NCBFAA believes that the Commission should address instances where tariff access fees appear to be excessive on an individual basis.

The NCBFAA also believes that passing through charges that are beyond an NVOCC's control is an appropriate, and in many cases essential, mechanism to deal with the proliferation of add-on fees, charges and surcharges and to maintain efficient market pricing for NVOCC services. The Commission should eschew an overly narrow interpretation of the pass-through requirements set forth in Section 520.8, and to the extent the Commission proposes to revise Section 520.8, it should clarify that the regulation requires only a reasonable description of the types of charges and

fees that may be passed through to shippers. Moreover, the Commission should revisit its conclusion that the pass-through provision in Section 520.8 should not apply to VOCC GRIs.

Respectfully submitted,



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