
BEFORE THE
FEDERAL MARITIME COMMISSION

Comments on Notice of Proposed Rulemaking on Carrier Automated Tariffs

Docket No. 21-03; RIN 3072-AC86

Dated May 10, 2022

July 6, 2022

I. Introductory Comments on the FMC’s Notice of Proposed Rulemaking

The National Customs Brokers & Forwarders Association of America, Inc. (“NCBFAA” or the “Association”) submits the following comments to the Federal Maritime Commission (“FMC” or “Commission”) in response to the FMC’s Notice of Proposed Rulemaking (“NPRM”), “Carrier Automated Tariffs,” published in the Federal Register at 87 Fed. Reg. 27,971 (May 10, 2022).¹ The NPRM seeks comments on the proposed modifications to its rules governing Carrier Automated Tariffs, which are intended to:

- (1) Make access to ocean common carrier tariffs free-of-charge;
- (2) Allow a non-vessel operating common carrier (“NVOCC”) to cross reference the terms in vessel-operating common carrier (“VOCC”) tariffs;
- (3) Clarify the ability for an NVOCC to reflect increases in certain pass-through charges from VOCCs without notice;

¹ On June 6, 2022 the NCBFAA submitted a request for extension of the public comment period. In informal discussions with the FMC, NCBFAA was granted a 30-day extension to the comment period, from the original deadline of June 9, 2022 to the extended deadline of July 9, 2022. Due to the fact that the public comment period was near close when the Association submitted its extension request, the FMC could not issue a Federal Register notice for the granted 30-day extension to the comment period.

- (4) Update the definition of “co-loading” to apply only to less than container loads; and
- (5) Require the bills of lading accompanying Full Container Load (“FCL”) shipments to be annotated with the names of all other NVOCCs involved in the transaction.

The NCBFAA represents more than 1,000 member companies, consisting of the nation’s leading freight forwarders and customs brokers. As intermediaries facilitating the movement of goods throughout the country, freight forwarders and customs brokers are privy to the business practices of common carriers, the business relationship between industry stakeholders, and the fluidity of logistics and transportation. Given this breadth of experience and insight, the Association has reviewed and prepared comments on several of the matters raised by the Commission in the NPRM, including:

- The proposed ability for NVOCCs to cross-reference VOCC tariffs;
- The prohibition on administrative fees connected with pass-through charges;
- The new co-loading definition; and
- The proposed requirement for annotated invoices.

Given the Association’s industry experience with the ocean shipping sector, the NCBFAA welcomes the opportunity to submit comments on these topics in response to the Commission’s request for written commentary on the proposed regulatory modifications.

II. Comments in Response to Certain Proposed Modifications

A. NVOCCs Cross-Referencing VOCC Tariffs

The Association is concerned with the NPRM’s proposed modification creating the ability for NVOCCs to cross-reference VOCC tariffs in their NVOCC Rate Arrangements (“NRA[s]”), NVOCC Service Arrangements (“NSA[s]”), and/or rules tariff with respect to certain charges, fees and accessorials passed through at cost. While these proposed modifications create an option for NVOCCs

rather than being mandatory, and have the apparent intent to help NVOCCs, the modifications would likely be unduly burdensome for NVOCCs and shippers alike.

With respect to NVOCCs, cross-referencing VOCC tariffs in the NVOCCs' tariffs would require the NVOCCs to disclose these business relationships to their shipper-customers. This disclosure poses a risk of undermining the existing business dynamics between VOCC, NVOCC, and shipper. As the intermediary between the VOCC and shipper, the NVOCC represents the shipper and leverages its industry experience and business relationships to secure the best routes, options and costs possible. The disclosure of business relationships may prompt shipper-customers of NVOCCs to attempt to directly engage with the VOCCs despite the shipper-customers' potential inexperience or unfamiliarity with negotiating and securing rates and transportation with VOCCs.

Cross-referencing tariffs will also present various commercial complications. Even the most experienced NVOCC can struggle with navigating a VOCC tariff and must reach out to the VOCC sales representative to track down and confirm charges. These VOCC tariffs are not always user-friendly and can be challenging to identify the appropriate charge and its current status. NVOCCs opting to cross-reference a VOCC tariff would be faced with how to best present the information so that it is digestible for their shipper-customers. For example, NVOCCs could opt to provide a list of sources for an accounts payable person to look at but the format must be readable. NVOCCs would also need to proactively update these cross references and ensure that its employees are trained on maintaining and updating the cross references. NVOCCs would be obligated to constantly monitor all changes, filing dates and effective dates for the cross-referenced VOCC tariffs.

Cross-referencing may also require additional recordkeeping activities for NVOCCs. For example, as a VOCC update its tariffs, NVOCCs may wish to document evidence of the cross-

referenced charges to prove their origin in the event that a dispute arises. These various operations would add administrative burdens.

Furthermore and perhaps most importantly, the proposed change would not provide any material benefit to shippers. As noted, experienced NVOCCs appreciate the complexity of VOCC tariffs and rely on their experience to locate specific charges. Cross-referencing a VOCC charge in the NVOCC's tariff may frustrate shipper-customers who then try to parse through the VOCC tariffs. As shipper-customers struggle with tracking down charges, they will ultimately call on the NVOCCs to assist them with navigating the tariff.

Given that the cross-referencing would likely be cumbersome for both NVOCCs and shipper-customers alike, NCBFAA does not support the proposed change to add a § 520.7(a)(3)(iv) to the regulations to allow NVOCCs to cross reference a VOCC's tariff for certain specified surcharges and accessorial.

B. Allowance for Nominal Service Fees in Connection with “Pass-Through Charges” from VOCCs

The NPRM proposes to allow NVOCCs to pass through charges by a VOCC that are imposed on the VOCC by an outside entity, such as canal tolls, taxes, and other third-party levies over which the VOCC has no control. The proposed regulation would require the NVOCC to pass through these charges without a markup. While the NCBFAA supports the modification to explicitly acknowledge that NVOCCs are permitted to pass through these charges, it respectfully requests that the FMC make clear in the regulations that, when passing through the VOCC charge, the prohibition against markups *excludes* nominal service fees charged by NVOCCs in connection with the charge. Often NVOCCs must advance funds to cover the costs paid on behalf of shipper-customers. In order to compensate the NVOCC for the advancement of funds, the NVOCC may charge a nominal service fee. Historically this

has not been considered a markup of the pass-through charge but instead an administrative fee for the service provided by the NVOCC to advance the funds. Such administrative fees are understood to be distinct from regulated surcharges under the Shipping Act of 1984, as amended, because NVOCCs are providing a service as a collecting agency. This collecting agency service comes at an administrative cost to the NVOCC. FMC's proposed rule should therefore make clear that NVOCCs passing through the VOCC charges will not be expected or required to provide the service for free.

In the Association's experience, it is common practice to apply a nominal disbursement fee to the entire invoice. This nominal disbursement fee is not a mark-up of VOCC-originated charges, but rather intended to cover the NVOCC's cost of the outlay. Similarly, nominal administrative fees are invoiced to customers in the case of delinquent accounts. NVOCCs will typically apply a nominal late fee or interest charge for collections. Again, such disbursement fees, late fees and/or interest charges should not be considered "markups" within the scope of the FMC's proposed rule that NVOCCs may pass through the charges from VOCCs without markup.

In light of the above, the Association respectfully requests the proposed language for § 520.8(b)(4) be revised to clarify that nominal and reasonable administrative fees are excluded from the scope of the FMC's prohibition against "mark[ing] up these charges above cost."

C. Co-Loading

The FMC provides a proposed definition for "co-loading" at 46 CFR § 520.2 that limits the scope of such activity to less than container loads ("LCL"). The Association is puzzled by the FMC's choice to single out LCL cargo without providing a definition in parallel for full container loads ("FCL"), and does not support the issuance of a definition for LCL co-loading without the clarity of proper terminology for FCL co-loading. In the freight forwarding industry, "co-loading" has long been

understood to cover both LCL and FCL co-loads. Dating back to 1984, the FMC acknowledged that the ocean shipping industry embraced the concept of FCL co-loads. Co-loading of FCL shipments can be conducted in a valid and compliant manner and is commonplace in the ocean shipping industry. To this day, FCL-to-FCL transactions are a regular part of most NVOCCs' business operations.

Most FCL co-loads are end-to-end transactions moving under a valid rate vehicle, whether it be an NRA, NSA, or tariff. Prior to engaging in any FCL co-loading, an NVOCC will first establish a relationship with a beneficial cargo owner ("BCO") and issue the bill of lading under the applicable rate vehicle. The bill of lading will then be rated properly in accordance with the applicable rate vehicle and pursuant to US shipping laws and regulations. The ultimate transaction between the NVOCC and VOCC will also move under a rate tariff. At each point of the transaction, the shipment will move under a valid rate vehicle and be handled in a manner that ensures all transactions are legal and compliant.

Given the commonplace nature of FCL co-loads if the FMC intends to restrict the definition of "co-loading" to only mean LCL loads, the FMC must provide industry with a parallel defined term in 46 C.F.R. § 502.2 that covers FCL co-loading activities. For example, these FCL activities could be defined as "chain loading" or any other term that the Commission deems appropriate. This additional definition would add clarity to the regulations for businesses engaged in FCL co-loading. Industry would then be able to develop and tailor their practices to take into account the newly defined terms for LCL and FCL co-loads.

D. Annotated Invoices

The NPRM proposes new language at 46 CFR § 520.11(d) that would require a bill of lading accompanying FCL shipments to be annotated with the identity of any and all other NVOCCs associated with the cargo. While the Association understands and appreciates the value of transparency, this requirement would be unduly burdensome for NVOCCs and would provide little benefit to shippers.

Perhaps most importantly, the proposed requirement does not appear to confer any measurable benefit to shippers. At the same time, the proposed requirement would undermine the business of NVOCCs, because, similar to the proposed option for NVOCCs to cross-reference tariffs, NVOCCs would be required to disclose their business relationships to their shipper-customers. These annotated invoices would identify friendly competitors and turn that business knowledge over to the shipper-customer.

Moreover, annotating invoices would increase administrative burdens on the shoulders of NVOCCs, which could in turn slow business operations, especially in transactions where goods are re-tendered to more than one NVOCC. Significantly, this requirement would disproportionately impact smaller NVOCCs, which typically seek allocation from any source available. Particularly where there are multiple NVOCCs in the transaction chain, small-sized NVOCCs may not know all of the parties involved in the transaction.

The proposed requirement also raises concerns with how US-based entities can enforce the requirements for foreign-based NVOCCs registered with the FMC. As those operations take place overseas, a US-based entity may not have complete visibility and oversight or be privy to the identity of all NVOCCs involved in a transaction.

The Association notes that claim in the NPRM that the proposed requirement would “provide[] information to the beneficial cargo owner which allows for a more expedient determination of cargo status and location *and places no additional burden on the NVOCC*” (emphasis added). In fact, the requirement would be very burdensome for NVOCCs attempting to determine any and all NVOCCs in the transaction chain and having to annotate bills of lading accordingly. Due to the uncertainty of this requirement’s impact, the NCBFAA respectfully requests a regulatory impact analysis, such as an Office of Management and Budget (OMB) impact study, on the potential effects of the proposed requirement.

Such an impact study would better capture the effect of this proposed requirement and outline its benefits and burdens.

III. Conclusion

In conclusion, the NCBFAA supports the FMC's efforts to update US shipping laws and regulations to promote fluidity and transparency within the ocean shipping sector. However, the Association respectfully emphasizes that some of the proposed regulatory modifications would create commercial complications and undercut the existing business practices and operations of NVOCCs. In such cases, the Association does not support the language proposed.

The NCBFAA appreciates the opportunity to provide the FMC with its thoughts and opinions on these regulations. Please do not hesitate to contact the undersigned if the Commission has any questions on these comments.

Respectfully submitted,



Jose D. Gonzalez, *President of NCBFAA*