Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

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FEDERAL MARITIME COMMISSION

[Petition P1–08]

Petition of the National Customs Brokers and Forwarders Association of America, Inc., for Exemption From Mandatory Tariff Publication

Comments of the U.S. Department of Justice

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450 Fifth Street, NW.,
Washington, DC 20530.

Dated: February 5, 2010.

Comments

The United States Department of Justice ("Department") files these comments in support of the petition of the National Customs Brokers and Forwarders Association of America, Inc. ("the Petition") requesting an exemption for non-vessel-operating common carriers ("NVOCCs") from certain tariff publishing and enforcement requirements. NVOCC tariff publishing requirements impose significant costs that limit competition, resulting in higher shipping rates. These costs far outweigh any justification. The Department has long supported exempting NVOCCs from all tariff-publishing requirements to produce the greatest competitive benefits.[1] Granting the relief requested by the Petition would represent a meaningful step in that direction by reducing unnecessary burden and enhancing competition.

A. NVOCC Tariff-Publishing Requirements

Many shippers of overseas cargo, particularly smaller ones, book shipments through NVOCCs instead of contracting directly with the operators of ocean-going vessels ("vessel-operating common carriers" or "VOCCs"). NVOCCs provide a variety of services for their shipper customers. By negotiating service contracts with VOCCs for the aggregated volume of their shipper customers' cargoes, NVOCCs can obtain better rates than individual shippers could obtain on their own. In addition, many NVOCCs provide intermodal combinations of ocean and inland transportation services. Some add still other services to their transportation packages, such as packing, loading, labeling, warehousing, customs clearance, supply-chain management and other logistical services.

The Shipping Act of 1984 requires that each common carrier, including NVOCCs, publish tariffs showing all "rates, charges, classifications, rules, and practices between all points or ports."[2] Tariffs must be published for all rates that are charged shippers regardless of whether the particular rate has been individually negotiated and, in addition to detailing the rates to be charged, must provide information about the places between which cargo will be carried, each classification of cargo in use, any rules that affect the total of the rates or applicable charges, and samples of contracts and bills of lading. The Act provides for substantial fines for each instance of non-compliance.

Tariff publishing requirements place a particularly high burden on NVOCCs due to the nature of their business. As explained in multiple comments filed in this proceeding, NVOCCs typically handle small to mid-size shipments on a spot basis rather than through long-term contracts. Shippers routinely contact NVOCCs to negotiate rate quotes to move a particular shipment at a specific time. NVOCCs in turn deal with multiple VOCCs to provide the actual transportation, and the VOCCs frequently adjust rates and surcharges they impose on the NVOCCs. As a result, NVOCCs typically tailor their charged rates to the specific circumstances of each shipment and, accordingly, must make frequent tariff filings and adjustments to meet the regulatory requirements. This is a costly and burdensome process.[3]

The Federal Maritime Commission ("Commission") has issued rule changes in which it has used its exemption authority under § 16 of the 1984 Shipping Act, later broadened by the Ocean Shipping Reform Act ("OSRA"),[4] to relieve NVOCCs from certain tariff publication requirements. Most notably, the Commission has exempted from full tariff-publishing requirements certain formal written contracts between NVOCCs and shippers ("NVOCC Service Arrangements" or "NSAs").[5] The rule allows the contracting parties to keep competitively sensitive aspects of the agreement (such as price and quantity) confidential. However, NVOCCs still have to file the agreements with the Commission and publish their essential terms in tariff form.[6] This raises the same cost and burden issues NVOCCs face under the general tariff publishing rules.[7] NSAs are not widely used.[8]

[1] *See* FMC Petition No. P3–03, Comments of the United States Department of Justice on Petition of United Parcel Service for an Exemption Pursuant to Section 16 of the Shipping Act of 1984 to Permit Negotiation, Entry and Performance of Service Contracts (Oct. 10, 2003) ("DOJ Comments in P3–03"); Comments of the U.S. Department of Justice, FMC Docket No. 4–12 (Dec. 3, 2004) ("DOJ Comments in 4–12"); Comments of the U.S. Department of Justice, FMC Docket No. 05–06 (Oct. 20, 2005) ("DOJ Comments in 05–06").

[2] *See* 46 U.S.C. 40501 (formerly Section 8 of the Shipping Act).

[3] For example, the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") estimates that tariff publication expenses can be as much as $240,000 per year. NCBFAA Petition at 8. *See also* Comments of Global Link Logistics at 2 ("The cost to a small NVOCC to comply with tariff publishing requirements is a hardship. At GLL we spend in excess of $200,000 annually."); Comments of A.N. Deringer at 2 ("Our tariff rate publishing and management costs are an additional expense. The labor needed to produce the number of quotes, manage carrier updates, and keep our tariff current requires an additional investment of over $75,000 annually."); Comments of C.H. Robinson Worldwide at 2 ("[T]he average cost for tariff filings per annum exceeds over $130,000."); and Comments of NACA Logistics (USA) at 2 ("The full costs of establishing a tariff Web site, rate tariff publication, maintenance of same, internal IT development and the costs of personnel assigned to tariff compliance is estimated at $100,000 annually in resources. We feel this is a high cost for a system that is not utilized by the shipping public.").

[4] 46 App. U.S.C. 1715 (1998).

[5] An NSA is essentially a contract between an NVOCC and a shipper in which the shipper makes a commitment to provide a certain minimum quantity or portion of its cargo or freight revenue over a fixed time period, and the NVOCC commits to a certain rate or rate schedule and a defined service level. *See* 46 CFR 531.3(p) (2005).

[6] FMC Docket No. 04–12, 69 FR 75850 (Dec. 20, 2004).

[7] *See, e.g.,* Comments of RS Express at 1–2 (filing NSAs is a cumbersome process that is worthwhile only for major contracts).

[8] In 1998, OSRA gave VOCCs and their shipper customers the right to enter freely into confidential service contracts, without the need to publish commercially sensitive terms and conditions. VOCCs typically enter into long-term contracts with large shippers that routinely ship significant quantities of cargo. In contrast, NVOCCs enter into formal, long term contracts much less frequently. The Petition states that in 2007, VOCCs filed 43,699 original service contracts compared to 762 original NSAs filed by NVOCCs for the same time period. NCBFAA Petition at 8.

B. The Petition

The Petition seeks to broaden the filing exemption to cover those instances where an NVOCC has individually negotiated rates with its shipping customers and memorialized those rates in writing.[9] In other words, while the NSA rule exempts formal contracts from tariff publication and enforcement requirements, the Petition's request would cover short-term "spot market" rate agreements between NVOCCs and shippers, by far the most common transaction for NVOCCs. Other parties interested in this proceeding have submitted comments requesting that the Commission further expand the requested exemption to apply to service terms negotiated in conjunction with rates (*i.e.,* vessel capacity, cargo loss and damage rules, equipment needs and delivery requirements).

C. The Department Supports the Petition

The proposed elimination of the NVOCC tariff publication requirements is an appropriate exercise of the Commission's exemption authority under 46 U.S.C. 40103(a), which allows the Commission to exercise its exemption authority if the exemption "will not result in a substantial reduction in competition or be detrimental to commerce." That standard is clearly met here.

As the Department explained in prior comments, "exempting all NVOCCs from all tariff publication requirements would produce the greatest competitive benefits."[10] Even the more limited approach set-forth in the Petition would create important benefits. The current tariff filing requirement hampers an NVOCC's ability to respond quickly in the marketplace. The proposed exemption will allow NVOCCs to be more flexible in a dynamic contractual environment, thereby allowing them to be more responsive to their shippers' needs. It would likely promote competition and commerce by eliminating substantial regulatory costs to NVOCCs, a savings that could be passed on to its shipper customers in the form of lower shipping rates.

The costs associated with the tariff publication requirement greatly exceed any benefits. As the NCBFAA noted, tariffs are rarely, if ever, reviewed or consulted by shippers to determine ocean shipping rates.[11] When even the purported beneficiaries of tariff publication requirements find little value in them, the cost of requiring publication of those tariffs clearly exceeds any competitive or commercial benefits. Moreover, if tariff publications were of value to shippers, any NVOCC would remain free to publish them.

Conclusion

In conclusion, the Department supports the goal of the relief requested in the Petition to further exempt NVOCCs from tariff publishing and enforcement requirements.

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[9] The proposed exemption would incorporate the following principles: (1) The exemption would be voluntary, (2) the exemption would apply only to rate tariffs, not rules tariffs, (3) disputes concerning negotiated rates would be governed solely by contract law, (4) NSAs would continue to be filed with the FMC and NSA essential terms would continue to be published, (5) all negotiated rates would be required to be memorialized in writing, (6) the FMC would retain access to the negotiated agreements and any underlying written communications, (7) the exemption would not be construed to convey antitrust immunity to NVOCCs, and (8) the exemption would only apply to licensed or registered NVOCCs. NCBFAA Petition at 11.

[10] DOJ Comments in P3–03 at 1–2.

[11] NCBFAA Petition at 9, note 11.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the National Coordinator for Health Information Technology; HIT Policy Committee's Workgroup Meetings; Notice of Meetings

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice of meetings.

This notice announces forthcoming subcommittee meetings of a Federal advisory committee of the Office of the National Coordinator for Health Information Technology (ONC). The meetings will be open to the public via dial-in access only.

Name of Committees: HIT Policy Committee's Workgroups: Meaningful Use, Privacy & Security Policy, Strategic Plan, Adoption/Certification, and Nationwide Health Information Infrastructure (NHIN) workgroups.

General Function of the Committee: To provide recommendations to the National Coordinator on a policy framework for the development and adoption of a nationwide health information technology infrastructure that permits the electronic exchange and use of health information as is consistent with the Federal Health IT Strategic Plan and that includes recommendations on the areas in which standards, implementation specifications, and certification criteria are needed.

Date and Time: The HIT Policy Committee Workgroups will hold the following public meetings during March 2010: March 4th Meaningful Use Workgroup, 10 a.m. to 12 p.m./Eastern Time; March 9th Strategic Plan Workgroup, 9 a.m. to 12 p.m./Eastern Time; March 16th NHIN Workgroup, 2:30 p.m. to 5 p.m./Eastern Time; March 25th Privacy & Security Policy Workgroup, 2 to 4 p.m./Eastern Time; and March 29th Adoption/Certification Workgroup, 10 a.m. to 12 p.m./Eastern Time.

Location: All workgroup meetings will be available via webcast; for instructions on how to listen via telephone or Web visit *http://healthit.hhs.gov*. Please check the ONC Web site for additional information as it becomes available.

Contact Person: Judy Sparrow, Office of the National Coordinator, HHS, 330 C Street, SW., Washington, DC 20201, 202–205–4528, Fax: 202–690–6079, e-mail: *judy.sparrow@hhs.gov* Please call the contact person for up-to-date information on these meetings. A notice in the **Federal Register** about last minute modifications that effect a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice.

Agenda: The workgroups will be discussing issues related to their specific subject matter, *e.g.,* meaningful use, the NHIN, privacy and security policy, adoption/certification, or strategic planning. If background materials are associated with the workgroup meetings, they will be posted on ONC's Web site prior to the meeting at *http://healthit.hhs.gov*.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the workgroups. Written submissions may be made to the contact person on or before two days prior to the workgroups' meeting date. Oral comments from the public will be scheduled at the conclusion of each workgroup meeting. Time allotted for each presentation will be limited to three minutes. If the number of speakers requesting to comment is greater than can be reasonably accommodated during the scheduled open public session, ONC will take written comments after the meeting until close of business on that day.