

NVOCCs enter the modern world with contract freedom

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Late last year, the non-vessel operating common carrier (NVOCC) segment of the ocean transportation intermediary industry plucked an arm from the stockade of contract prohibition (see December 2004 *Legal Lookout* article). The U.S. Federal Maritime Commission (FMC) had granted NVOCCs provisional permission to enter into volume- and time-intensive contracts with their shippers, allowing them to enjoy, if a bit belatedly, the same freedom of contract the Ocean Shipping Reform Act (OSRA) bestowed on the rest of the international shipping universe.

Now, it appears NVOCCS have ripped all but, perhaps, a finger or two from that allegorical yoke. This may be the most exciting news those cargo-consolidating, slot-chartering, carriers-to-shippers/shippers-to-carriers have ever heard. Yes, it's official: effective January 19, 2005, the FMC has granted NVOCCs full authority to play by the same rules as everyone else. Unless someone successfully petitions a federal court to shoot down the FMC's decision (a possible eventuality depending on whom you ask), NVOCCs now can enter into confidential leveraged contracts with their shipper customers, free from concern that similarly situated shippers might assert "me-too rights." Gone is the 1984 Shipping Act's mandatory tariff publication requirement which had caused intermediaries so much grief since OSRA's implementation in May 1999.

This will strengthen the positions of NVOCCs in their negotiations with carriers, as the former will be better situated to commit freight volumes to the latter. It also will enable NVOCCs to best allocate their resources, providing the most advantageous rates in the trades and services their customers require. Shippers, and ultimately consumers, should derive the ultimate benefit of lower shipping costs and more advantageous shipping options.

The FMC's ruling is the culmination of a six-year effort by the intermediary industry (supported vocally by shipper groups) to correct its anomalously unjustified exclusion from the free-trade environment OSRA created. But some of the concerns that led to that exclusion produced an exception to the intermediaries' new freedom: NVOCCs still are prohibited from buddying up with each other in negotiating and forming an NVOCC Service Arrangement (NSA, the latest acronym in the ocean shipping world, not to be confused with the National Security Agency).

Some of the larger shippers associations, with which NVOCCS often compete for customers and freight, expressed discomfort at the new concept's snowball potential. The FMC also wasn't sure inter-NVOCC coteries would be kosher under the antitrust laws (from which intermediaries, unlike carriers, aren't exempt under OSRA). To keep an even keel (or, as FMC Commissioner Harold Creel put it, to avoid a "chilling effect")

without delaying the expanded authority), the feds carved out this proviso. The FMC apparently is a little nervous about the possible outcomes of pending court cases which address these competitive restrictions, and might reconsider them if the judiciary ultimately finds them unwarranted.

All NSAs (as well as their amendments on an ongoing basis) must be filed with the FMC before freight is moved pursuant to them. Regulatory oversight and ground rules are a bit more stringent than with carrier service contracts; there's a whole laundry list of items an NSA must include. Significantly, a contract's provisions must not be "uncertain, vague, or ambiguous"; and you can't refer to "terms not explicitly contained in the NSA itself unless those terms are contained in a publication widely available to the public and well known within the industry" (i.e., an NSA has to up front, in your face and easily interpretable). Also, an NVOCC is precluded from piggy-backing on a carrier's tariff.

In other words, NVOCCs can enter into contracts, but they have to be darned specific with no deviation or wiggle room allowed. Discriminatory practices or unreasonable preferences regarding rates or ports are expressly *verboden*. Some might say all the FMC has done here is allow NVOCCs to make custom tariffs for the trade segments of their various customers, with all the rigidity of common carriage enforcement from the days of yesteryear. Even if that assessment is fair, the intermediary industry indisputably is a lot better off now than it was before.

While the judiciary could nix or amend this development, NVOCC contract freedom fills the last major piece of the puzzle in an ocean shipping environment driven by market economy factors. Expect ocean transportation intermediaries to develop programs for their shipper customers offering more competitive rates and new services to those who can contractually commit volumes of freight over time. Further expect carriers to feel more secure in dealing with NVOCCs whose bookings are backed by contractual commitment.

Ref: FMC's final rule, "Non-Vessel-Operating Common Carrier Service Arrangements," to be published as 46 CFR Part 531, available on FMC's website at [http://www.fmc.gov/Dockets/04-12%20FINAL%20RULE%20\(2\).htm](http://www.fmc.gov/Dockets/04-12%20FINAL%20RULE%20(2).htm).