

## *Coming to a Head: Intermediaries Lash Out Against Carriers for Alleged Squeeze Out*

by *Steven W. Block* August 2002

**Reprinted with permission from  
*Marine Digest and Transportation News***

Rumblings from ocean transportation intermediaries (OTIs) – the freight forwarders and non-vessel operating common carriers (NVOCCs) lumped together by regs promulgated in 1999 to implement the Ocean Shipping Reform Act (OSRA) – are getting louder. Quite a bit louder, as many of these intermediaries recently went to the mat with carriers comprising the Transpacific Stabilization Agreement (TSA) over alleged discriminatory practices in eastbound Pacific trades. The arena where the OTIs, represented by the National Customs Brokers and Forwarders Association of America (NCBFAA) and the International Association of NVOCCs (IANVOCC), and carriers of the TSA will duke it out is the U.S. Federal Maritime Commission (FMC), whose commissioners and administrative law judge will referee what may become a significantly precedential debate.

A dispute like this has been brewing for quite some time now. OSRA is none too kind to our friends in the middle, as its regulatory shift to market-driven shipping relationships isn't designed to protect those who "merely" facilitate the process. OTIs really didn't do a good job protecting their interests when OSRA was being negotiated. Consequently, they find themselves ironically more regulated in the post "deregulation" era than they did in the good old days when tariffs and common carriage ruled the waterfront. OSRA and its implementing FMC regs at least dissuade, and in some instances flat prohibit, OTIs from enjoying the benefits of contractual freedom, thereby reducing incentives for shippers to book cargo through intermediaries. Many shippers simply can get better rates by contracting directly with carriers or working through shippers associations.

Carriers have long harbored a love-hate relationship with intermediaries, but the warm and fuzzy side of that equation has diminished with OSRA and current economic circumstances. Many carriers would just as soon not see OTIs score a buck off of bookings that would otherwise be made directly with shippers. Thus, the stage is set for the current show down.

The NCBFAA and IANVOCC action against TSA represents intermediary efforts to nip this attitude in the bud before general "trends" develop, before carriers adopt similar practices designed – from the OTI perspective – to "squeeze out the middleman," and before OTIs suffer further economic setbacks. The OTIs allege that TSA carriers agreed with each other not to do business with intermediaries until after they'd struck deals with all available Pacific shippers directly. This would be tantamount to a right of first refusal in favor of shippers, which seriously inhibits intermediaries' ability to obtain preferential rates.

In fact, allege the intermediaries, TSA carriers went so far as to charge NVOCCs and forwarders more for the same services provided to shippers who book directly, either by way of higher rates or “peak-season surcharges” which are waived for cargo owners. Of course, much of this activity is under the cloak of now secret service contracts. Such actions, if proven, would violate both the spirit and letter of OSRA, which prohibits pacts between carriers restricting free dealing.

NCBFAA and IANVOCC want reparations from TSA and, most importantly, an FMC directive nixing TSA’s alleged practices forever more (as provided by regs and OSRA itself). The FMC has taken the petition quite seriously, canvassing the waterfront for input from all concerned. These kinds of proceedings can take quite a while to resolve, but the pending threat of sanctions and other economic consequences might be enough to prompt an OTI-carrier settlement. Meanwhile, FMC staff are reviewing information and considering its many options as to how to proceed.

The role OTIs play in the international transportation process is evolving, uncertain, and significant to all concerned. Procurement of advantageous freight rates is a highlighted part of this role, but by no means the only service OTIs provide in keeping the gears of our complex industry grinding. Few shippers and carriers are set up to attend to the myriad details attendant to international transportation. By consolidating cargo shipments, NVOCCs can provide reliable and consistent volume placement with carriers. Naturally, that volume placement comes with a price tag. On the other hand, many carriers and shippers are getting used to the business advantages of dealing with each other directly. At this juncture, balances must be struck, decisions must be made, and an evenhanded approach must be adopted regarding OTIs.

**Ref: Petition of NCBFAA and IANVOCC against TSA, No. P1-02, pending before the FMC.**