

NVOCC service contracting: the intermediary industry seeks full equality in contractual freedom

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The February 2005 Legal Lookout article proclaimed that the wait was over; that non-vessel operating common carriers had (virtually) been set free; that the shackles of (most) anticompetitive restrictions the Ocean Shipping Reform Act of 1998 (OSRA) had left on NVOCCs were unlocked; and that the species of ocean transportation intermediary which operates as carriers to actual shippers and shippers to steamship lines could now (pretty much) operate like everyone else in the liberated age of deregulated international carriage.

Well, folks, it now appears we're getting close to nixing those parenthetical qualifiers which for some six months now have left ocean-shipping waters somewhat unsmooth. Per a January 19, 2005 U.S. Federal Maritime Commission (FMC) decision – issued after prolonged and intensive scrutiny by government, law and industry concerns – NVOCCs are now able to enter into volume and time-oriented service contracts with ocean carriers. This allows the intermediaries to enjoy the same market forces and economies of scale other shipping players have capitalized on for over six years. NVOCC participation in custom-made service contracts, labeled in the regs as “NVOCC Service Agreements” or “NSAs,” has been a bit slow in the uptake, as intermediaries haven't yet hit their stride in operating contractually (as opposed to tariff-based common carriage). While NVOCC-shipper contractual relationships may never reach the 90-95% level of shipper-carrier service contracting, experts opine that we're still in the early stages, and that NSAs will become normative in coming years.

But FMC's emancipation of NVOCCs wasn't complete, and smaller intermediaries currently are making some persuasive arguments before the U.S. District Court for the District of Columbia that a remaining inequity of yesteryear be lifted. Under the revised regs, shippers' associations whose memberships include an NVOCC may not enter into NSAs with NVOCCs. This, urge the aggrieved shippers' associations, isn't fair.

Shippers' associations are non-profit shipper pools designed to give their members bargaining power in the volume-hungry world of ocean transportation. They often open their doors to NVOCCs who can increase their volumes – and therefore their bargaining leverage – significantly. In carving out this exception, FMC attempted to avoid an antitrust implication suggested by an earlier federal court decision that held NVOCC-to-NVOCC agreements might be antitrust-exempt as defined by the Shipping Act of 1984 (which OSRA attaches to and modifies). The problem arises from legislative history that shows Congress clearly rejected NVOCC antitrust immunity as an OSRA consideration. If an NVOCC could contract with another NVOCC simply by joining a shippers' association, FMC reasoned, then it essentially might be skirting Congress' antitrust

restrictions. This conceptual ambiguity results from the fact that NVOCCs by definition are concurrently carriers and shippers.

Plaintiff the American Institute for Shippers' Associations ("AISA"), which is comprised of smaller shipping coterie and is supported by other shippers' groups, feels that the earlier precedent is based on distinguishing premises. More importantly, AISA points to a very recent federal court decision out of the U.S. Court of Appeals for the Fourth Circuit (issued *after* promulgation of regs allowing NVOCCs to enter into NSAs) that eviscerates the notion that inter-NVOCC contracts produce antitrust immunity under relevant circumstances.

If you ask AISA and its allies, they'll point out that (1) FMC has long recognized that it is powerless to regulate shippers' association membership; (2) the Shipping Act defines the term "shipper" to include NVOCCs, thereby precluding FMC from tinkering with the concept; (3) mechanisms remain in the more tightly-managed NSA regs to avoid the negative implications of price fixing antitrust laws are designed to combat; (4) the current regulatory regime is unfairly biased against smaller NVOCCs who have greater need for leveraged bargaining power; and (5) explicit Congressional intent of market force control would be furthered by elimination of the restriction. And hey, an NVOCC member wouldn't be an actual party to a shippers' association's NSA, would it? An individual member, at least theoretically, doesn't control the terms of an association's NSA. So what is FMC worried about?

What industry concerns might be harmed by NSAs between carriers and shippers' associations containing NVOCC members? Certainly associations that don't have NVOCCs in their ranks might like to avoid the added competition, and some carriers have always been nervous about the monopsony that might result from their customers having too much bargaining power. Perhaps larger NVOCCs might like to see smaller intermediaries hampered by inability to effectively contract with carriers. But from legal, regulatory and public-policy standpoints, antitrust concerns don't trump the industry benefits transportation players and the shipping consumer would derive by shippers' associations contracting freely with carriers.

Given the complexities of shipping law and economics, it isn't surprising that years must pass before all of OSRA's kinks are attended to, much less ironed out. Should AISA succeed in its suit against FMC, the evolutionary process of shipping regulation will be moving in the right direction.

Ref: American Institute for Shippers' Associations v. Federal Maritime Commission, pending in the U.S. Court of Appeals for the District of Columbia Circuit under Docket No. 05-1036; and Gosselin v. United States, 2005 U.S. App. LEXIS 11144 (4th Cir. 2005).