

***Eradication of NVOCC Tariff Requirements? OTIs Pound on the FMC's Door.***

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Here come our friends in the middle! Yes, ocean transportation intermediaries (OTIs) have had quite enough of the “deregulation” purportedly graced by the Ocean Shipping Reform Act (OSRA) four years ago. If this is the era of deregulated shipping, ask OTIs, why are we more controlled now than we were four years ago?

It's really the non-vessel operating common carrier (NVOCC) segment of the OTI industry at issue here – those “carriers to shippers and shippers to carriers” who buy up space on vessels and resell it to their own customers. OSRA freed the steamship lines from the century-old yoke of virtually mandatory common carriage, the tariff system whereby carriers had to offer “one price fits all” freight rates to shippers regardless of their volumes and desirability as long-term partners. Remember it?

Now, the vast majority of ocean shipping contracts are tailor made to the parties' particular circumstances, and are legally kept under the vest. OSRA's nixing of “me-too” rights – empowering any shipper to demand the same terms a carrier has given another customer – removed another huge road block to customized service contracts.

Word on the waterfront is that NVOCCs missed the OSRA boat. The OTI industry may have thought OSRA would never pass, and intermediaries didn't do such a good job protecting their interests during the half decade of horse trading prior to OSRA's passage. In any event, NVOCCs remain largely subject to mandatory common carriage in their customer relationships. They live and die by the tariff. Any separate deals struck with OTI customers must be aired to the public, and are subject to other shippers applying index fingers to sternums and saying, “me too.”

When President Clinton signed OSRA into law on October 14, 1998, the jaws of some 1,000 National Customs Brokers and Forwarders Association (NCBFAA) members involved in NVOCC operations simultaneously dropped. The new law's passage also precipitated a number of OTI efforts designed to mitigate OSRA's negative impacts on intermediaries. Some headway was made on such matters as OTI ability to form shippers associations.

But the root of the problem remains firmly imbedded in OSRA's statutory soil: NVOCCs still must operate pursuant to tariffs that are expensive and an administrative pain in the neck to deal with. Operationally, many NVOCCs have kept within the strict letter of the law simply by modifying their tariffs *ad hoc* to reflect essentially customized agreements with individual shippers. It's arguably become a silly (and costly) game intermediaries have to play.

Well, NCBFAA has stepped up to the plate, asking the U.S. Federal Maritime Commission (FMC) to even the playing field between NVOCCs and actual carriers. NCBFAA recently petitioned the FMC to issue a new reg abolishing NVOCC tariff requirements. Alternatively, the intermediary organization asks the feds to allow NVOCCs to publish “range rates” in their tariffs. These would include service descriptions and two rates – a ceiling and a floor between which a customer’s actual price would be negotiated.

In its petition, NCBFAA makes largely historical and pragmatic arguments, pointing out how the tariff system is antiquated. Originally designed to counter ocean carriers’ antitrust immunity and to prevent them from discriminatorily getting in bed with certain shippers (thereby imposing business hardship on others), a mandatory tariff system for OTIs never made sense. OTIs don’t hold Sherman Act get-out-of-jail-free cards, and can’t keep carriers from contracting with any class of shippers.

Shippers hardly ever look to OTI tariffs anyway, preferring to shop around by phone, fax or e-mail until the best deal is quoted. The services intermediaries provide usually extend to numerous aspects of the transportation process in addition to ocean freight rates. These must be incorporated into the final tab. Thus, OTIs continued adherence to mandatory common carriage is an anomaly that prevents intermediaries from efficiently performing their tasks.

Curiously enough, NCBFAA’s petition was filed almost concurrently with a similar one from United Postal Service (UPS). NCBFAA wants clearer skies for the forest of its intermediary membership, while UPS is a huge oak tree seeking sunshine for its own unique circumstances. UPS swallowed transnational intermediary Fritz a few years ago, incorporating the latter’s NVOCC activities into UPS’ global strategy. The gist of UPS’ petition centers around a description of its enormous integrated operations, including plans for future development of its ocean intermediary arm. In making a “virtue of necessity,” UPS argues it cannot proceed efficiently shackled by mandatory common carriage. It portrays itself as one of the big boys of ocean transportation; much like any of the consolidated carriers. Don’t worry, FMC, UPS is good for its debts and obligations under service contracts.

Both petitions cite OSRA provisions empowering the FMC to issue and enforce interpretational regs, which arguably include the right to exempt a class or particular player from certain statutory terms. The rub, not addressed in either petition, is that Congress specifically bounced a proposed statutory term during OSRA’s negotiations that would have dropped the NVOCC tariff requirement. It’s one thing for a regulatory agency to issue interpretational regs; it’s quite another for the FMC to thumb it’s nose at Congress by essentially reversing the legislature’s decision. The petitioners may put have a different view of that issue, but it’s certainly one they’ll ultimately have to deal with. The range rate proposal may be procedurally less complex, but it begs the question of whether a range rate is form over substance. Isn’t specificity and certainty what a tariff is all about?

Per standard practice, the FMC has requested public commentary on the two petitions (hurry, the periods end this month unless extended). This will be followed by the usual study, investigation, and additional argument from the petitioners (as well as anyone else who speaks up). No question, OTIs bear the biggest downside of OSRA. Given the crucial role intermediaries play in the ocean transportation process, something should be done to fix the situation. Hopefully, these two petitions will, at least, make progress.

***Ref: NCBFAA and United Postal Service petitions to the Federal Maritime Commission, available from the FMC by request at (202) 523-5760.***