

One arm out of the stockade: FMC appears poised to grant NVOCCs contract freedom

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It's been over a year since one; then three; then ultimately eight non-vessel operating common carrier (NVOCC) companies and trade groups petitioned the U.S. Federal Maritime Commission (FMC) for equal treatment under the Ocean Shipping Reform Act (OSRA). NVOCCs, those cargo-consolidating, ocean transportation intermediaries who sign on as carriers of record to their shipper customers, and as shippers of record to steamship lines from whom they purchase bulk space, missed out in Congress' 1998 adoption of OSRA. They're pretty much watching from the sidelines as everyone else enjoys the benefits of OSRA's revolutionary program, which transmuted international water transit from a tariff-based, one-freight-rate-fits-all common carriage system to one whereby players negotiate customized deals.

Unlike their vessel operating cousins, NVOCCs were forbidden under OSRA from entering into tailor-made service contracts cloaked by confidentiality and unencumbered by "me-too" rights asserted by other shippers (envious of their competitors' freight rates and service options). Rather, NVOCCs still operate in the dark ages, forced to publish tariffs which (theoretically, at least) offer the same options at the same rates under the same terms to any shipper who wants them. Ocean shipping's prevailing business environment isn't friendly to those who have to publicize their deals and duplicate them to anyone who asks. As predicted early on, the NVOCC industry is suffering business losses and administrative costs and inconveniences.

Beginning in the summer of 2003, NVOCCs began pounding on FMC's door (see September 2003 Legal Lookout article). FMC is statutorily empowered to grant "exemptions" from "requirements" of OSRA shipping legislation in the agency's discretion (based on its shipping industry expertise). An array of substantive and procedural issues suggested intermediaries would face difficulty convincing the feds to allow them to enter into the same confidential service contracts steamship lines can. For example, a proposed amendment to the OSRA bill before its passage would have allowed NVOCCs to enter into service contracts, but Congress specifically rebuffed it. Opponents of the intermediaries' position urge that a government agency can't undo by regulatory rulemaking what Congress explicitly intended.

Opponents also pointed out that NVOCCs aren't really looking for an "exemption" from any part of OSRA as much as they're seeking affirmative authorization to undertake currently prohibited activities. Thus, they argue, FMC can't do an end-around Congress' intent by "exempting" NVOCCs from their statutory obligation "not to operate strictly by tariff."

Attorneys representing NVOCC interests recently made compelling counterarguments. The circumstances under which Congress rejected the proposed amendment allowing

NVOCCs contractual freedom have changed tremendously. The earlier concern was that NVOCCs, by and large, are not as heavily capitalized and fiscally responsible as are carriers, rendering them less reliable service contract partners. But six years of mergers and expanded NVOCC operations by larger logistics companies, as well as by steamship lines themselves, have changed the waterfront significantly. Now, the intermediary industry is financially more stable even than certain sectors of the carrier business.

Regarding FMC's regulatory authority, the petitioners persuasively point to numerous precedents in which snuffed statutory amendment proposals effectively have been implemented by subsequent regulatory rulemaking. Congress can always be specific as to statutory provisions it doesn't want regulatory agencies to tinker with; here it took no such action. Moreover, many of these precedents survived challenges that requested relief was "affirmative" in nature, as well as scrutiny by federal courts which have viewed the alleged distinction as an attempt to put form over substance.

Perhaps the most compelling argument in favor of allowing NVOCCs business parity with carriers is the fact that required NVOCC tariffs don't even play the role Congress and FMC contemplated they would back in 1998. Statistically, hardly anyone even refers to them in deciding whether to purchase shipping through an NVOCC. Intermediaries fiddle around with their tariffs constantly, essentially rendering their uniform reliability an immaterial and academic concept. The National Industrial Transportation League, in its expanded role as a forum for all transportation players, supports the pending petitions. Even a few larger carriers are for it, and the World Shipping Council, representing ocean carriers as an industry, has withdrawn its previous objections. The concept of intermediary-based service contracts still troubles a few larger shipper associations and the carriers who run NVOCC operations, but proponents of regulatory reform urge that those entities are just afraid of added competition.

It appears FMC is leaning toward the petitioners. The agency recently announced that its commissioners have unanimously agreed to grant NVOCCs "conditional authority" to service contract with their shipper customers under the cloak of confidentiality and unhindered by me-too rights. The intermediaries still must file their contracts with FMC. The announcement was made by way of a notice of proposed rulemaking inviting potentially affected players to chime in about the issue's ups and downs before the edict becomes final.

Forwarders and NVOCCs play a critical role in the international water transit process. The five-year old business disadvantage under which NVOCCs have operated should be eradicated. The ultimate losers in the current system are shippers, and therefore the American public. Shippers will enjoy a wider range of less-expensive shipping options when intermediaries are able to operate on the same par as carriers. The savings will be passed along.

Ref: FMC's Notice of Proposed Rule Making, available at <http://www.fmc.gov/Dockets/04-12%20Proposed%20Rule.htm>

