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FEDERAL MARITIME COMMISSION

46 CFR PARTS 560 AND 580

[DOCKET NO. 92-22]

TARIFF FILING BY NON-VESSEL-OPERATING COMMON CARRIERS

AGENCY: Federal Maritime Commission.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Federal Maritime Commission is considering the publication of a proposed rule that would exempt certain small non-vessel-operating common carriers from the tariff filing requirement of section 8 of the Shipping Act of 1984 and would also amend its tariff rules to permit all NVOCCs a greater degree of flexibility in their methods of pricing. The purpose of this Advance Notice is to solicit comments and information from the public on the feasibility and desirability of such a proposed rule.

DATE: Written comments in response to this Advance Notice are to be submitted within 60 days of publication in the Federal Register.

ADDRESS: Comments (original and 15 copies) are to be submitted to:

Joseph C. Polking, Secretary
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5725

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

BACKGROUND

In Petition No. P5-91 the International Federation of Freight Forwarders Associations ("FIATA")¹ and twenty-two individual non-vessel-operating common carriers ("NVOCCs") petitioned the Federal Maritime Commission ("Commission"), pursuant to section 16 of the Shipping Act of 1984 ("1984 Act"), for an exemption for all NVOCCs from the tariff filing requirement of section 8 of the 1984 Act, 46 U.S.C. app. § 1707. The Commission subsequently issued a Notice of Filing of the petition, which included a list of 23 questions, and requested interested persons to submit their views. Sixty-eight comments were received in response to the Notice.

After a thorough review of the petition and the comments, the Commission has by separate Order issued this date in Petition No.

¹FIATA is a trade association consisting of 68 national associations of companies engaged in international forwarding by land, air, and sea. FIATA members offer a variety of services, including: NVOCC, freight forwarder, customs broker, shipper's agent, warehousing, document preparation, local pick-up and delivery, consolidation, packing, and unstuffing.

P5-91 denied the FIATA petition. The basis of this denial is that Petitioners had not met their burden of proof under section 16 by demonstrating by convincing and reliable evidence that the petition satisfied the standards of that section. Nonetheless, the record in Petition No. P5-91 suggests that relief from the tariff filing requirement for some NVOCCs may be warranted. The comments raise several areas of concern that might be addressed with something short of the total, across-the-board, exemption from tariff filing sought by FIATA.

One of the principal complaints about the effects of tariff filing on NVOCCs is that these entities must operate on a flexible basis responsive to shippers' needs, but that tariffs impose a rigidity in pricing contrary to the needs and desires of most shippers. NVOCCs purportedly are on the leading edge of responding to the rapid changes in the competitive worldwide marketplace for transportation. Unlike vessel-operating common carriers ("VOCCs"), which are tied to their own operating schedules, NVOCCs are not tied to the schedule or capacity of their own assets, but are free to shop around in an attempt to meet shipper needs. Accordingly, there may be good reasons to encourage flexibility and speed of response in meeting shipper needs.

The record in Petition No. P5-91 indicates that NVOCCs, particularly those that act as consolidators of less-than-containerload ("LCL") cargoes, and their shipper customers, do place a premium on flexibility and speed of response. The present tariff filing system could unnecessarily restrict NVOCC pricing

flexibility and, in certain instances, may be of little benefit to shippers. The Commission is, therefore, exploring possible approaches to provide greater flexibility for NVOCCs consolidating LCL cargo.

One possible approach would be to allow NVOCCs to file LCL rates with the Commission after the cargo has been shipped. NVOCCs could provide shippers whatever rate they agree upon, so long as the actual rate is filed with the Commission within a certain time frame. It would appear that one week from the effective date of the rate could provide NVOCCs sufficient flexibility. This would allow NVOCCs to charge existing tariff rates or, if they choose, meet the special needs of a shipper on an expedited basis. It would also eliminate complaints that NVOCCs are prevented from handling cargo on terms acceptable to both the NVOCC and shipper solely because of tariff rules implementing the 1984 Act.

Permitting LCL rates to be filed a short time after cargo is received would still provide the level of "transparent pricing" that is one of the benefits of the current tariff filing system. The information would be slightly dated; however, all carriers and shippers would know the actual rates charged. Moreover, the prohibitions against rate discrimination contained in section 10 of the 1984 Act, 46 U.S.C. app. § 1709, would still apply and could be readily enforced.

Another alternative would be to permit NVOCCs to file their LCL tariff rates as minimum and maximum rates. There have been allegations that rates for consolidated cargo space may vary

depending on a number of factors, e.g., the time of the week, how full the container is on day of pickup, the type of cargo and other factors. The tariff system may inhibit the natural movement of these rates. It appears that many NVOCCs would support some method of accommodating these market forces while still being able to pay the ocean carrier's tariff or service contract rate. Minimum-maximum rates may accomplish these ends and could also reduce the number of tariff filings NVOCCs make. If this approach is pursued, it may be advisable to confine the range of the minimum and maximum rates to some percentage variance in order to provide a greater degree of precision to such rate offerings and to prevent some rate filers from defeating the intent of the concept by publishing extremely low minimum rates and high maximum rates.

Another area of concern raised by the comments is that many of the NVOCCs subject to the requirements of the 1984 Act are small businesses. It has been alleged that smaller NVOCCs are disproportionately affected by the costs and burdens of tariff filing. These NVOCCs have argued that because they are of limited size and without substantial impact on the market for ocean transportation, they can be exempted from the tariff filing system without otherwise jeopardizing the system. The Commission has found similar arguments persuasive in other regulatory contexts. In the domestic offshore trades, the Commission exempts NVOCCs from filing information about proposed rate changes, and VOCCs from detailed reporting requirements if their annual revenues are less than \$10 million in a trade. In this regard, we also note that the

European Community ("EC") has previously raised concerns to the Commission about small freight forwarders who also consolidate cargo for ocean transportation, particularly the impact of the tariff filing requirement.

Unlike tariff filing for NVOCCs as a class, Congress has never specifically considered the concerns raised above, i.e., that tariff filing may be a relatively costly and cumbersome requirement for some NVOCCs in relation to their size and impact on the market. In addition, some relief from tariff filing for small NVOCCs may be warranted on international comity grounds, as suggested above by the EC concern.

The Commission is accordingly seeking comment on whether small business NVOCCs should be exempted from tariff filing. A key issue in any such inquiry is defining what is a "small business NVOCC." One possible definition is an NVOCC that ships, pursuant to its bills of lading, less than 100 TEUs (or equivalent space of cargo) per calendar year in U.S. trades. Another option might be to refer to the definition used by the U.S. Small Business Administration, which requires entities to be independently owned and operated and not dominant in a market, with features such as revenues or number of employees to be later determined. The Commission solicits comments on these and any other methods of defining a "small business NVOCC."

The Commission believes that the above-mentioned concepts can best be explored through the issuance of an Advance Notice of

Proposed Rulemaking to solicit the views of governmental bodies, shippers, carriers, NVOCCs and the interested public.

We are, therefore, seeking comment on the general areas of increased pricing flexibility for NVOCCs, through (1) the use of minimum - maximum rates or (2) permitting rates on LCL cargoes to be submitted subsequent to the cargo movement, and (3) exempting certain smaller NVOCCs from tariff filing.

Specific comments also are sought on the following subsidiary issues, as well as on any other matter deemed to be relevant.

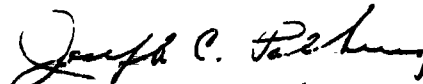
1. How much cargo handled by NVOCCs moves on an LCL basis, either in all U.S. trades or in specific trades?
2. Do NVOCCs consolidating LCL cargo need greater pricing flexibility to respond to the demands of their shipper customers?
3. If you answered yes to #2, what methods would provide such NVOCCs greater pricing flexibility?
4. If such NVOCCs were permitted to file rates after the cargo has moved, how long a period should be provided?
5. What would be the effects of permitting NVOCCs consolidating LCL cargo to use minimum - maximum rates?
6. If minimum - maximum rates are permitted, should they be confined to a particular percentage range?
7. Does the 1984 Act tariff filing requirement impose disproportionate costs and burdens on small NVOCCs?
8. What will be the costs and administrative burden of the Commission's Automated Tariff Filing and Information system on small NVOCCs?
9. If the Commission were to exempt small business NVOCCs from the tariff filing requirement, what would be the most effective and appropriate way to define such an NVOCC?
10. If the Commission exempted small business NVOCCs from the tariff filing requirement, how could it ensure that the NVOCC financial responsibility and Resident Agent

Requirements (if applicable) are met?

The foregoing request for comment on general areas and subsidiary issues does not in any way preclude comment that no exception to tariff filing for NVOCCs regardless of size is warranted.

The Commission can best determine whether additional action is warranted if commenters provide it with a sufficient and reliable factual basis upon which to act. In this regard, any commenter that submits factual allegations on significant and material issues is encouraged to support those allegations by affidavits, exhibits or other reliable materials.

By the Commission.


Joseph C. Polking
Secretary