October 2018

Legal Lookout

By Steve Block

The evolution continues: FMC accommodates NVOCC contracting by revising regs governing NSAs and NRAs.

Can you believe it's been 20 years since President Clinton signed the Ocean Shipping Reform Act of 1998 (OSRA) into law? You can be a seasoned and tenured transportation professional and not recall the days of mandatory, tariff-based ocean shipping! But as this column proclaimed since before OSRA was on the books (yes, it's been around that long, too), the statute really was just a phase, if a really big one, in an evolutionary process that's been in process for centuries.

The National Industrial Transportation League spearheaded the push through the 1990s to get reform legislation aimed at freeing ocean transportation from the yoke of mandatory common carriage. But the intermediary industry didn't successfully keep its interests in the forefront. Some say the middlemen just didn't think deregulation would ever happen, and there was internal dissent about what positions the trade should take. When OSRA passed, ocean carriers became free to enter into service contracts with shippers which, by and large, were market driven as to the shipper-carrier relationship, cargo volumes, general economic factors, and circumstances particular to shippers' needs and carrier's capacities. Gone were the days of antiquated one-price-fits-all pricing and service options, enforced by a government watchdog, in favor of an environment that accommodated the realities of our evolving industry.

Except, that is, as to intermediaries. Non-vessel operating common carriers (NVOCCs) in particular still struggled under mandatory tariff-based pricing, and for years, government and industry's focus remained on the carrier-shipper transition. Some said the intermediary industry's days were numbered in light of a new system they couldn't compete in.

Only in 2005 did the U.S. Federal Maritime Commission enact regs that freed NVOCCs from tariff requirements under the Shipping Act by allowing them to enter into NVOCC Service Arrangements (NSAs), filed with FMC, the essential terms of which had to be published in their tariffs. NSAs were pretty much the equivalent of service contracts steamship lines have with their shippers, but designed for carriers who don't run boats.

This was a huge step, with NVOCCs moving out of the Stone Age and enjoying market-realistic options in contracting with their customers. But differences between carrier and NVOCC business models left our friends in the middle with severe disadvantages. NVOCCs frequently are more focused on more smaller, discreet shipments than are vessel operators, such that volume intensive contracts don't always provide necessary contracting latitude.

Thus, the evolution continued in 2011, when FMC allowed licensed NVOCCs the option of establishing rates for individualized shipments through Negotiated Rate Arrangements (NRAs). NRAs are agreements between NVOCCs and shippers for a stated number of shipments of specific cargo volumes over a designated time period, i.e., much shorter terms than NSAs. With this, NVOCCs could operate with economic efficiency based on market circumstances within their unique business model.

Foster Pepper PLLC © 2018

But circumstances still were far from ideal. While they still may not be perfect, FMC just passed a new set of regs that rightly amount to yet a new phase in the evolution of law and regulation keeping up with industry. With input from various trade associations representing both sides of the NVOCC equation, and after a petition some three years ago from the National Customs Brokers & Forwarders Association of America, FMC modified a number of provisos, conditions and onerous requirements which NVOCCs were subject to under the original NSA and NRA regs.

Now, NSAs and NRAs don't have to be published or filed with FMC. Confidentiality is kind of a big deal in this world, and filing requirements can be a pain. A *quid pro quo* is that NVOCCs have to allow free public access to their tariffs which have to provide notice that they use NSAs.

Under the new regs, NSA deals are sealed just by both shipper and NVOCC signing them; and NRAs kick into force by a shipper sending its NVOCC a signed agreement, by sending the NVOCC an email accepting the NRA's provisions, or just by booking a load with an NVOCC after an NRA's prominent notice allows the shipper to accept it by doing so.

Recognizing business realities, FMC regs now allow amendment to NRAs midstream, and parties can include economic terms other than rates such as pass-through and accessorial charges. This can be a biggie when ocean carriers kick in General Rate Increases in their contracts with NVOCCs.

A few other regulatory revisions designed to maximize efficiency, reduce some government burden, and ensure fairness are included in the new regs. Yes, some said the intermediary industry would go the way of the dinosaur with OSRA's deregulated environment, but as FMC's latest rulemaking demonstrates, NVOCCs are here to stay as an integral and crucial part of the ocean transportation industry.

Ref: Amendments to Regulations Governing NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements, available at https://www.fmc.gov/assets/1/Documents/17-10_fnl_rl.pdf

For more information about Foster Pepper or to register for other firm communications, visit www.foster.com.

This publication is for informational purposes only and does not contain or convey legal advice.

Foster Pepper PLLC © 2018