

FMC TO END NVO TARIFF RATE PUBLISHING

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The U.S. Federal Maritime Commission voted 3-1 Thursday to initiate a rulemaking that would relieve non-vessel-operating common carriers from having to publish in tariffs the rates they charge for cargo shipments.

"I believe this is one of the most significant commission actions since Congress passed the Shipping Act in 1984," said FMC Chairman Richard A. Lidinsky Jr., in a statement. "The bottom line for me was jobs. In a bipartisan vote, the commission has provided thousands of dollars in cost savings to these critical businesses and the hundreds of thousands of exporters and importers they serve."

According to industry statements submitted to the FMC, a number of small NVOs said they would easily save \$10,000 to \$12,000 a year, while larger firms could achieve savings in the "six figures."

"You would assume that if a company is saving \$100,000 they might bring another person on board or have part-time people to help in their sales efforts," Lidinsky said in an interview.

Lidinsky was joined by Commissioners Rebecca F. Dye and Michael A. Khouri in granting the request, which was made in response to a petition filed by the National Customs Brokers and Forwarders Association of America.

Dye, long a proponent of granting the exemption to NVOs, said, "under the current economic conditions, the commission must use its expanded exemption authority to simplify the business processes of American companies, put cash back into businesses, and generate additional American jobs."

Khouri, who voted in his first meeting since recently joining the commission, noted the petition had been the subject to extensive public review and comment.

"It is broadly supported by the intermediary and shipper communities, as well as other Federal agencies," Khouri said. "The commission's action today will foster competition, provide a benefit to the shipping public, and be good for the economy."

They were opposed, however, by Commissioner Joseph E. Brennan, former governor and congressman from Maine, who voiced his opposition to the petition.

He said the petition requested that disputes between NVOs and their shippers be settled solely under contract law and not the tariff provisions of the 1984 Shipping Act.

In a statement, Brennan said he opposed the petition on the basis of both law and policy, and that he saw "no new evidence or argument in the NCBFAA's petition that would justify an outcome different than that reached by the Commission in response to substantially the same petitions in 1991 and 2003."

Brennan cited the Supreme Court case *Maislin Industries U.S. Inc. v. Primary Steel Inc.*, 497 U.S. 116 (1990) as authority prohibiting the FMC from undermining the common-carriage aspects of the Shipping Act that Congress explicitly retained when enacting the Ocean Shipping Reform Act (OSRA) in 1998.

Brennan said granting the petition would give NVOs an unfair advantage over vessel-operating carriers and would effectively exempt NVOs from the regulatory oversight of the FMC.

He also questioned the NCBFAA's claims that tariffs are rarely used to determine ocean-shipping rates, noting assertions by tariff publishers that their Web sites receive thousands of "hits."

At the meeting, the commission directed its staff to prepare a notice of proposed rulemaking that would relieve licensed NVOs from publishing and adhering to rates in tariffs, while imposing several conditions that Lidinsky said would continue to protect shippers. Those conditions include:

- NVOs will continue to publish standard rules tariffs containing contractual terms and conditions governing shipments.
- NVOs will be required to provide those rules to the public free of charge.
- Rates charged by NVOs must be agreed to and memorialized in writing by the date cargo is received for shipment.
- NVOs will have to retain documentation of agreed rates and terms for each shipment for a period of five years, and must make that documentation available promptly to the commission on request.

Brennan, however, argued granting the petition will be a step backwards for consumer protection, frustrating shippers' ability to comparison shop and to prevent "hostage cargo" situations in which a carrier refuses to release a shipper's goods, even though the shipper has paid 100 percent of the legitimate rate.

Brennan also complained that his proposal for a public hearing on the issue was blocked by his fellow commissioners.

Lidinsky said there was an "absolute distinction" to be made between the tariff publishing requirements imposed on NVOs and vessel-operating common carriers.

"Vessel operators receive antitrust immunity for their activities and their rates are foundation of the entire regulated activities and are the basis of NVO rates. I would read nothing into today's decision into vessel operator tariffs. It is a completely separate topic and there has been no request for any sort of activity. There is no linkage," he said.

The National Industrial Transportation League (NITL), an Arlington, Va.-based group that represents many large shippers, backed the NCBFAA's petition to end tariff rate publishing for NVOs.



"Tariff rate publishing is a make-work and costly matter to the NVOs," said Peter Gatti, NIT League's executive vice president. "The commission has been asked to adjust to market changes and that's exactly what happened here."

Gatti

"With this petition we were not looking for total deregulation," said Edward Greenberg, NCBFAA counsel, who praised the FMC's action. "It was a matter that shippers didn't use rate tariffs. So why bother having them?"

The NCBFAA has been seeking tariff rate publishing relief since 2003. The most recent petition was filed by the Washington-based group in July 2008.

Lidinsky said it would take only a few months to complete the regulatory change. The FMC general counsel will prepare the draft rulemaking, commissioners will vote on it, and the public will be given a chance to comment before implementation.



Rodriguez

NVOs are urged to stay tuned to the FMC's upcoming proposed rulemaking and resulting outcome as they conform their operations.

"Our suggestion is for NVOCCs to be alert for the terms of the proposed rulemaking and participate in that process to insure the final rules reflect a realistic and practical approach," wrote attorney Carlos Rodriguez, who represents freight forwarders and NVOs, in his [OTI Corner Newsletter](#).

"Additionally, NVOCCs should be especially alert to instituting tariff rules which will provide them appropriate legal benefits," he said. "Tariffs, even rules tariffs, have the effect of law. Currently drafted tariff rules can be important in disputes between carriers and shippers."

[Source: American Shipper + Shippers' NewsWire]