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Taking aim at NRAs

NVOs begin to implement Negotiated Rate Arrangements.

By CHRIS DUPIN

Non-vessel-operating common carriers are beginning to take steps to enter into negotiated rate arrangements with shippers, and some experts believe NRAs will eventually become the industry's preferred way to book cargo.

U.S. Federal Maritime Commission rules went into effect April 18 allowing licensed NVOs to enter into NRAs with their customers instead of having to publish rates in a publicly available tariff (NVOs will still have to publish so-called rules tariffs). There are about 3,330 licensed NVOs in the United States.

The FMC describes NRAs as "written and binding arrangements between a shipper and a licensed NVOCC to provide specific transportation service for a stated cargo quantity, from origin to destination, on and after a stated date or within a defined time frame."

As of May 6, 45 NVOs had posted rules in their tariffs to allow them to use NRAs and another 28 had indicated they plan to do so by the end of May, said **Gary Kardian, director of the FMC's Office of Service Contracts and Tariffs.**

He said another two major NVOs had indicated plans to do so in coming months and another six have updated their FMC Form-1, saying they will self-publish their rules tariffs.

Now that NVOs have finished negotiating transpacific contracts, he expects even more to look at getting ready to use NRAs.

The 1,157 foreign-based registered but unlicensed NVOs cannot use NRAs, though another 57 that are licensed can.

That's brought complaints by the International Federation of Freight Forwarders' Associations (FIATA) and the National Customs Brokers and Forwarders Association of America, which fear retaliation against U.S.-licensed NVOs doing business in China.

In a letter to the FMC, NCBFAA General Counsel Edward Greenberg praised the creation of NRAs, saying they will "result in a significantly more efficient and competitive environment for NVOCCs and their customers."

But he added it was "just a matter of time before the PRC does react and takes actions

that would create the same if not greater disadvantages for U.S.-licensed NVOs doing business in China as this restriction imposes on their nationals."

The change in the rules, which had been sought by the industry for about two decades, was controversial among the members of the commission itself, which voted 3-1 for approval (Commissioner Mario Cordero did not participate, having not been confirmed by the Senate until April).

Commissioner Joseph E. Brennan voted against NRAs, saying the FMC was creating an "overly complicated and bureaucratic new contract system" where NVOs will offer an "alphabet soup of contract options" — traditional tariffs, NRAs and NVO service arrangements or NSAs, which are similar to service contracts entered into by steamship lines and their customers.

"No one has explained how doing away with NVO tariffs would benefit shippers," Brennan said.

On the other hand, while Chairman Richard A. Lidinsky Jr. and commissioners Rebecca F. Dye and Michael A. Khouri voted to allow NRAs, Khouri and Dye indicated they were willing to go further and allow foreign NVOs to enter into NRAs.

Lidinsky said the rule would relieve licensed NVOs "from the costs and burdens of publishing in tariffs the rates they charge," and "save many of these supply chain businesses up to \$200,000 per year."

FMC staff raised concerns about foreign NVOs, saying they "often ignore commission proceedings" and orders to furnish answers to discovery requests.

Still, Lidinsky said he was willing to have the FMC examine "how the exemption is working and whether we can fashion appropriate safeguards that allow us to extend this exemption to foreign unlicensed NVOs without harming the shipping public."

In the meantime, "the path to licensure is readily available to foreign-based NVOs to the same extent as United States-based entities," he said.

But consultant Albert Saphir said that idea was "out of the question," and that opening an office in the United States would make sense to a foreign NVO only "if you had hundreds of thousands of dollars in

tariff-filing costs a year," and that would raise a variety of legal issues.

"If somebody needs to cut down on tariff-filing expenses, there are better options than opening a U.S. office," he said, noting some electronic services offer free tariff filing as a value-added tool.

NCBFAA, in its letter to the FMC, also raised concerns about:

- Not being able to include certain economic issues in NRAs, such as general rate increases imposed by underlying vessel operators and other items such as credit, minimum quantities, penalty provisions and similar economic terms.

- Not being able to modify NRAs when "many fundamental components of rates such as BAFs (bunker adjustment formulas) and other surcharges and ancillaries, change daily, if not hourly."

- Continued prohibitions against discrimination in the Shipping Act of 1984. "There hasn't been a case brought against an NVO for discrimination in my lifetime," Greenberg said. "The whole purpose of the NRA is specifically to let NVOs and shippers discriminate in their dealings."

Speaking at a seminar in late April sponsored by the New York-New Jersey Foreign Freight Forwarders & Brokers Association, Washington-based attorney Carlos Rodriguez, told NVOs the NRAs "should definitely save you money," and were a "user friendly system," though he allowed at very large companies "there will be a lot of implementation issues."

He noted that with tariffs, NVOs have to give 30 days notice of rate changes, and that NRAs would allow NVOs to be "much more responsive."

While amendments to NRAs are not allowed, that is "not as bad as it sounds," he said. "If every transaction is an NRA, the next NRA you can implement the changes that you want."

Kardian said NVOs have the ability before cargo is picked up of withdrawing their offer and then generating a new NRA.

Still, Saphir felt the NRA is a "half-measure," and that "it is not clear the new system of the NRA is that much easier and much less costly."

While NRAs must be memorialized and kept on file for five years, they do not have to be a single document, and may be a series of e-mail exchanges between the shipper and NVO. Memorializing can be as simple as printing out an e-mail exchange and putting it in a file, Kardian said.

Saphir noted that a number of firms like Cargosphere, Catapult and Descartes have developed electronic systems that allow NVOs and shippers to develop an NRA and memorialize it. ■