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Federal Maritime Commission Decides to Lift Tariff Rate Publication Requirements for Licensed NVOCCs

New Development

On February 16, 2011, after a long-awaited meeting and vote, the Federal Maritime Commission (“FMC”) announced it will publish a final rule that will exempt licensed Non-Vessel Operating Common Carriers (“NVOCCs”) from the tariff rate publication requirements of the Shipping Act of 1984 (the “Shipping Act”). Licensed NVOCCs meeting the conditions of the final rule will be allowed to discontinue the publication of their tariff rates 45 days after the final rule is published. The FMC intends to publish the final rule by February 23, 2011. The final rule will not relieve registered, unlicensed foreign NVOCCs from the tariff rate publication requirements. However, the commissioners said they are prepared to receive input from the public on potential future modifications, including the extension of the exemption to unlicensed foreign NVOCCs. The FMC’s announcement can be accessed at http://www.fmc.gov/economic_and_regulatory_relief_approved_for_more_than_3300_businesses/

Background

The Shipping Act requires NVOCCs, licensed or unlicensed, to publish a tariff setting forth their rates, rules, classifications, charges, and other practices for services between all ports or points. Some NVOCCs and their shipper customers will enter into long term contracts called NVOCC Service

Arrangements (“NSAs”), which provide for minimum volume commitments, service terms and other contractual obligations of the parties. NSAs are filed with the FMC, but only the essential terms of the agreement are required to be published in the NVOCC’s tariff allowing rates to remain unpublished and confidential. Instead of using NSAs, most NVOCCs generally accept cargo on a spot basis from a number of small to mid-size shippers and then arrange for the carriage with multiple Vessel Operating Common Carriers (“VOCCs”). Because VOCCs frequently adjust their rates and surcharges, the NVOCCs contracting with the VOCCs often adjust their rates as well. Each time the NVOCC adjusts its rates, it must publish the new rates in its tariff. The continuous re-publication of freight rates in a tariff can be a costly and burdensome process, but the failure to publish tariff rates can result in even more costly penalties for violating the Shipping Act.

The Proposed Rule

On April 29, 2010, the FMC issued a Notice of Proposed Rulemaking (“NPRM”) to provide an exemption for licensed NVOCCs agreeing to enter into negotiated rate arrangements (“NRAs”) with their shipper customers from certain tariff publication requirements of the Shipping Act and the FMC regulations. The NPRM introduced the concept of the

NRA, which is essentially a contract for cargo carriage on a spot basis for an individually negotiated rate. In order for an NRA to be valid, it would need to be written and signed by the parties on or before the date of receiving the cargo for loading and clearly include the freight rate applicable to the shipment. NRAs will not need to be filed with the FMC and the individually negotiated freight rates will not need to be published by the NVOCC in its tariff if the NVOCC meets the conditions outlined in the NPRM.

In order to be exempt from the tariff rate publication requirements, the NPRM requires that licensed NVOCCs be required to:

- enter into a valid NRA prior to cargo movement;
- publish a notice in its tariff that it is invoking the exemption and opting out of tariff rate publication;
- publish rules tariffs containing terms and conditions governing shipments, including surcharges and fees applicable to freight rates;
- provide the rules tariffs free of charge to the shipping public (this may be done by providing the shipper customer with a copy of the rules tariff along with each NRA or by electronic publication); and
- retain and make available to the FMC the NRA and related documentation for a period of five years.

Any NVOCC that fails to maintain its bond or license or that has had its tariff suspended or cancelled by the FMC for any reason will be ineligible for the exemption. In addition, failure to retain or produce original NRAs and associated records will disqualify the NVOCC from using the exemption and may result in the FMC finding such failure to be a violation of the Shipping Act.

Registered Unlicensed Foreign NVOCCs

The NPRM did not include in the exemption foreign unlicensed NVOCCs. This means that, currently, only licensed NVOCCs meeting the conditions above will be exempt from the tariff publication requirements of the Shipping Act. As a result, the more than 1,100 registered, unlicensed foreign NVOCCs, which are authorized by the FMC to issue their bills of lading for U.S. shipments, will be required to continue to publish their rates-tariff until such time as they become licensed and establish a presence in the U.S. or the FMC adds foreign unlicensed NVOCCs to the exemption.

In its press release on February 16, 2011, the FMC noted that proceedings need to be commenced to address the potential extension of the exemption to foreign unlicensed NVOCCs. These proceedings would call for public comments and input on future modifications of the regulations, which could lead to foreign unlicensed NVOCCs being also exempt from the requirement to publish a rates-tariff.

Conclusion

Licensed NVOCCs should monitor the FMC's website and also the Federal Register for the publication of the final rule later this month. Licensed NVOCCs are required to continue to publish tariff rates until the 45 day waiting period from the date the final rule is published has expired. At that time, licensed NVOCCs will have the choice to avail themselves of the new exemption or they can continue to publish tariff rates and carry cargo at those rates or enter into NSAs with their customers. The option to utilize NRAs and invoke the exemption is voluntary. Unlicensed foreign NVOCCs should continue to monitor the Federal Register for a notice from the FMC calling for public comments related to future modifications of the relevant regulations.

For Additional Information

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