

Rate Tariffs, NVOCC Negotiated Rate Arrangements and NVOCC Service Arrangements: Which is Right for You?

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INTRODUCTION

NVOCCs have competed for business by charging rates that are required to be published in rate tariffs and imposing charges that frequently are published in rules tariffs that must be made available to the public. The Federal Maritime Commission has also adopted regulations that allowed NVOCCs the ability to enter into NVOCC Service Arrangements that are the equivalent of service contracts used by ocean common carriers with their shippers. Effective April 18, 2011, the Commission has introduced, for licensed NVOCCs, the option of establishing rates through Negotiated Rate Arrangements called NRAs.

The issue for NVOCCs and shippers is when to use tariffs or NRAs or NSAs. This brief paper discusses the regulations and major benefits and detriments of each approach.

NEGOTIATED RATE ARRANGEMENTS

On April 18, 2011, after much debate and discussion, the Federal Maritime Commission's ("FMC") final rules allowing licensed NVOCCs¹ to use NVOCC Negotiated Rate Arrangements ("NRAs") in lieu of published tariff rates became effective. See 46 CFR Part 532 which can be found at <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr;sid=8e06ab57753974cc688945471db025da;rgn=div2;view=text;node=20110302%3A1.18;idno=46;cc=ecfr;start=1;size=25> for the FMC's regulations governing NRAs.

The NRA is defined as

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¹ Foreign unlicensed NVOCCs are not permitted to use NRAs. Foreign unlicensed NVOCCs continue to have to publish and maintain a tariff showing rates and charges.

a written and binding arrangement between an NRA Shipper and an eligible NVOCC to provide specific transportation service for a stated cargo quantity, from origin to destination, on and after receipt of the cargo by the carrier or its agent (or the originating carrier in the case of through transportation).

The regulations provide that a licensed NVOCC may establish rates either through NRAs or by use of a rate tariff. If a NVOCC is going to use NRAs it must have a tariff rule that clearly indicates that it will use NRAs. Bills of lading for shipments moving under NRAs must indicate that the rates are pursuant to an NRA. The regulations also state that an NRA may not be amended once it is effective., though it can be cancelled by mutual agreement if no shipments have been received by the NVOCC or the originating carrier (in case of through transportation).

The Commission regulations require NVOCCs that use NRAs to allow access to its published rules tariff at no charge.

Rates in a NRA can either be “all-inclusive” or basic freight rate subject to additional charges as set forth in the NVOCC’s rules tariff. The applicable charges applied under an NRA must be those in effect at the time the first shipment under an NRA is received by the NVOCC or the originating carrier (in case of through transportation).

A NVOCC may be a NRA Shipper. In such circumstance the NVOCC Carrier must assure itself that the NVOCC Shipper has a surety bond on file with the FMC and that the NVOCC Shipper has a published tariff.

For each NRA, NVOCCs are required to maintain records for five years from the date of completion of performance under the NRA in a format that can be easily produced to the Commission and the FMC can audit NRA records on demand.

NRAs are not filed with the FMC but the FMC can demand production of NRAs and associated records which must be produced.

Conceptually, the NRAS is intended to take the place of a tariff lien item. As a result it is anticipated that the term of an NRA will be brief ; the stated cargo quantity will be defined and will likely be small because the time frame of the NRA will be short.

NVOCC SERVICE ARRANGEMENTS

Let us compare the foregoing to the FMC's regulations governing NVOCC Service Arrangements ("NSAs") which can be utilized by both licensed NVOCCs and foreign unlicensed NVOCCs. See 46 CFR Part 531 which can be found at <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=e6799c71208bb9ed56c0b026b391854b&rgn=div5&view=text&node=46:9.0.1.2.14&idno=46#46:9.0.1.2.14.1.3.3> for the FMC's regulations governing NSAs.

The NSA is defined as

a written contract, other than a bill of lading or receipt, between one or more NSA shippers and an individual NVOCC² or two or more affiliated NVOCCs, in which the NSA shipper makes a commitment to provide a certain minimum quantity or portion of its cargo or freight revenue over a fixed time period, and the NVOCC commits to a certain rate or rate schedule and a defined service level. The NSA may also specify provisions in the event of nonperformance on the part of any party.

It is noteworthy that NSAs must have a minimum volume, a fixed time period, agreed rates and a defined service level. As the definition notes, the NSA can contain provisions in the event of non-performance, such as liquidated damages, if the shipper fails to meet a minimum volume commitment.

NSAs must be agreed in writing between the NVOCC and the shipper and must be filed with the FMC. NSAs can be amended by mutual agreement as many times as the parties agree during the term of the NSA. Rates in NSAs can be subject to governing tariffs and when those governing tariffs are amended, the amended charges would apply to shipments made after the amendment became effective unless the NSA specifically precluded this.

The NSA is intended to have a meaningful commitment of cargo over a specified period of time and because it can be amended it provides some ability to adjust to market conditions if the parties mutually agree in writing to an amendment. NSA records must be maintained by the NVOCC and are subject to audit by the FMC.

² NSAs may be entered into by any NVOCC, whether a licensed NVOCC or an unlicensed foreign NVOCC.

SELECTING THE RIGHT NVOCC PRICING OPTION

With the effectiveness on April 18, 2011 of the regulations to allow licensed NVOCCs to use NRAs, the licensed NVOCC has three means by which to provide rates and charges for shippers:

1. Tariff Rates and Charges:

- a. Rates published in rate tariffs and charges published in rules tariffs are the traditional way all NVOCCs, licensed and foreign unlicensed, have done business with their shipper customers.
- b. Every NVOCC is required to maintain a rules tariff.
- c. Rates in the rate tariff and charges in the rules tariff apply as published in the tariff at the time cargo is received by the NVOCC or the originating carrier (in case of through transportation).
- d. Rates and charges published in rate and rules tariffs are available to all shippers requesting service under such published rate and the public can be charged to access such tariffs. Rates may not be confidential.
- e. Tariff records are already being data-based by tariff publishers, so all NVOCCs need to do is retain bills of lading and related documents for five years from the date of shipment. The FMC can audit tariff records and shipments under tariffs of licensed NVOCCs virtually on demand.
- f. NVOCCs must not engage in unjust or unreasonable discrimination with respect to treatment of shippers under tariffs.

2. NVOCC Service Arrangements - NSAs

- a. NSAs are complex contracts with a shipper providing a minimum quantity commitment to be shipped during a defined period between defined ports or points. NSAs can contain provisions for liquidated damages for non-performance. NSAs also contain service commitments by the NVOCC.
- b. NSAs may be used by all NVOCCs, licensed and foreign unlicensed.

- c. NSAs are capable of being amended by written agreements.
- d. NSAs can be subject to changes in charges published in a NVOCCs rules tariff.
- e. Each NSA is unique. Rates do not have to be provided to another shipper and one could have NSAs for the same commodity, between the same ports, with the same volume commitment, and have different rates. In short, anti-discrimination laws do not apply to NSAs.
- f. NSAs make sense for longer term arrangements.
- g. NSAs and any amendments must be filed with the FMC and cannot be effective until the date they are filed. The FMC keeps the terms of NSAs confidential. If the NSA has a confidentiality provision then the parties must keep the terms confidential.
- h. The NVOCC must maintain records associated with NSAs for five years.

3. Negotiated Rate Arrangements - NRAs

- a. NRAs are simple rate agreements that specify the commodity or commodities, the service to be provided and the period that the rates will be effective. There is no volume commitment by a shipper in a NRA though an NRA could contain rates that go down as the amount of cargo increases, like a time/volume rate published in a tariff.
- b. NRAs may only be used by licensed NVOCCs.
- c. NRAs may not be amended.
- d. NRAs do not have to be filed with the FMC but NVOCC must maintain records of NSA for five years after completion of performance under NRA.
- e. Rates in NRAs may be subject to charges in rules tariff but changes in rules tariff after NRA has become effective will not be applicable to such NRA.

- f. NVOCCs using NRAs do not have to publish rate tariffs but must publish a rules tariff and must the rules tariff available to the public free of charge.
- g. NRAs may contain confidentiality provisions.
- h. NVOCCs could be liable under provisions of the Shipping Act for unjust or unreasonable discrimination as between shippers. The FMC may eventually decide to exempt NRAs from these statutory requirements.

CONCLUSION

The NRA may be a perfect tool to use for agreeing with specific shippers confidentially on short term rates. It provides great flexibility in changing rates by entering into multiple NRAs with the same shippers increasing or decreasing rates in relation to the market. But for longer term commitments of cargo by shippers, NSAs make much more sense and, because they can be amended, give substantial flexibility. Ultimately the market will likely decide whether a NVOCC relies on tariffs, NSAs or NRAs, and it seems likely that for some NVOCCs, all three will be utilized.