LEGAL UPDATES

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New Federal Maritime Commission Rules Introduce Significant Changes for Carriers and Shippers

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The Federal Maritime Commission's (FMC) newly revised tariff regulations will be effective February 1, 2024. These rule changes will somewhat significantly change day-to-day practices for both vessel operating common carriers (VOCCs) and non-vessel operating common carriers (NVOCCs). Of course, shippers' contractual strategies may be expected to be impacted as well. Some of the significant changes will be in the "co-load" arena whereby Less Than Container Load (LCL) consolidations may be accomplished on a carrier-to-carrier basis per service agreements instead of the issuance of house bills of lading among the participant NVOCCS. Conversely, on the Full Container Load (FCL) side, "co-loads" will be required to be accomplished on a shipper-to-carrier basis whereby the master-loading NVOCC issues its bill of lading to the tendering NVOCCS. This was an overdue and much needed clarification to the co-load rules.

Another area of concern addressed in detail by the new rules concerns the required format for the passthrough by NVOCCs of surcharges and accessorials, with some changes on General Rate Increases (GRIs) and other categories of pricing. These are all items of special interest to all components of the supply chain. As you will note below, the new rules as to GRIs will take on special meaning in light of the very recent FMC special permissions granted to various ocean carriers for immediately circumventing hostilities in the Red Sea, i.e., without having to provide the 30-day notice for increasing rates.

Tariff access fees

Basically, this removes any fee impediments for the shipping public to view tariff provisions of ocean common carriers (VOCCs and NVOCCs) without any intervening cost impediments. While traditionally it has been understood that

the tariff systems in place were under-scrutinized by the shipper customers, this should encourage more reviews from that sector without much of a downside to any of the industry sectors. There may be a revenue impact to tariff publishers who may still be providing services to NVOCCs as these seem to be moving on from tariff rates to Negotiated Rate Arrangements (NRAs).

Cross-referencing tariffs

Per this new rule, NVOCCs may cross-reference vessel operating common carrier tariffs to capture accessorial charges and surcharges charged by ocean common carriers per their tariffs. While it seems burdensome, this new rule does not require that the NVOCC identify the ocean common carrier tariff by name, but rather generally requires citing the categories of charges from the VOCC which will be passed through by the NVOCC. These statements can be included in the NRA quotations and/or the NVOCC Rules Tariffs.

Third party charges to VOCCs passed through

Any charges imposed on VOCCs (such as canal charges) which are passed on to the NVOCC may likewise be passed on to the shipper by including such outside entity charges in the cross-referencing tariff or in the NRA quotation language.

General rate increases (application to Red Sea hostilities to commercial vessels)

While GRIs are currently allowed to be passed through as imposed by VOCCs by NRAs quoted by NVOCCs, they were not previously allowed to be otherwise passed through by the FMC since the FMC did not consider GRIs to be a charge or surcharge, but rather a part of the base ocean freight; therefore, the FMC will now allow GRIs to be passed through in the same manner as surcharges as noted above which may preclude the imposition of the 30-day wait period for rate increases upon special request to the FMC. This new development will get special attention immediately in light of the current FMC special permission granted to Maersk, Hapag-Lloyd, MSC, CMA CGM, ONE, and APL; these carriers may waive the 30-day notice period to implement new container charges to recoup the cost of transiting around southern Africa or to pay for “feeder” vessels.

Fees connected to pass-through charges

The FMC clarifies that NVOCCs may charge fees for services provided. The rules now specify that such charges are acceptable to the extent that they are designated as separate line items on the invoicing of these from the underlying pass throughs of the VOCCs and are specifically identified for the service provided by the NVOCC, while the fees being passed through must be identified without mark up. For example, if the NVOCC is advancing funds for the pass throughs or other charges, the line item would be indicated as an “advance payment charge.”

Co-loaded cargo

The FMC has now removed any ambiguity to the term "co-loading" to include the co-loading of both LCL cargo in a container, as well as combining full containerloads (FCLs). The main differences to the current rules are as follows.

LCL cargo

The NVOCCS may enter carrier-to-carrier agreements among the tendering NVOCCs, and more importantly, this now will establish that the agreements between these NVOCCs are pursuant to separate agreements on how the NVOCCs will share the space for the consolidated cargo. The major difference is that these carrier-to-carrier agreements will no longer require that the NVOCCs issue house bills to the participating NVOCCs. The NVOCCs, to the extent that they are offering these services to Beneficial Cargo Owner shippers must, of course, issue house bills to their shipper customers. It appears that the current NVOCCs which provide the containers, and which deal with the vessel operating common carriers, will be dealt with as the contracting party with the other participating NVOCCs. But they themselves will no longer structure those relationships as a carrier to the other NVOCCs; i.e., they need not issue a house bill to the participating NVOCCs. This is a new regulatory twist. The service agreements take on a new, important legal role.

FCL cargo

This is pretty much the usual state of affairs since it will now explicitly require that the Master NVOCC structure this as a shipper-to carrier-relationship, i.e., a master NVOCC will issue its house bill of lading to the tendering NVOCCs. The Master NVOCC will assume responsibility as a shipper vis a vis VOCCs with whom it has service contracts. The tendering NVOCCs assume shipper relationships with the master loading NVOCC and will, of course, maintain their carrier relationship with their shipper customers to whom they have issued house bills of lading. In fact, by restructuring the co-load rules to require a shipper-to-carrier relationship, the FMC removed the ambiguity in the old rules which led to substantial penalties to certain NVOCCs over the years which had (with good reason) decided then that they could enter FCL relationships with other NVOCCs without issuing a house bill of lading. This was based on the presumption that they could enter carrier-to-carrier arrangements instead as the regulations indicated and not issue house bills to the participating NVOCCs. These were lessons hard learned that, notwithstanding the reference in the co-load regulations to carrier-to-carrier relationships, the FMC enforcement perspective prevailed for some time that those were not permissible in the FCL model. Now those are days gone by since finally the matter has been clarified that co-loaded FCL cargo may only be dealt with on a shipper-to-carrier basis.

Applicable to both LCL and FCL transactions

The FMC makes it clear that, whether the transaction is for LCL or for FCL transactions, the requirement will remain with the tendering NVOCC to designate on its house bill of lading to its shipper customer the identity of the Master loading NVOCC to whom the Shipper's cargo has been tendered. This has been a little exercised requirement by NVOCCs, but on the other hand, this has not been a major area of concern to the FMC staff either. Whether this latter condition will change remains to be seen.

Various other NVOCC tariff requirements

Since many NVOCCs are publishing their own Rules Tariffs when utilizing NRA and NSA pricing mechanisms, there are various other NVOCC tariff requirements that may be of interest to these NVOCCs. Note that it is permissible for an NVOCC to retain a tariff publisher for inputting tariff rates, but it may also act as its own publisher of its Rules Tariff for purposes of utilizing NRAs and NSAs.

Note, as well, an NVOCC's tariff which lapses out of compliance will result in the revocation of a license or if it is a registered NVOCC, its registration will be suspended.

Additionally, the Commission also made a variety of other changes to sections 520.5 through 520.14, including:

Section 520.5 (standard tariff terminology): updates the source for geographic names listed in tariffs.

Section 520.6 (retrieval of information): revises the search capability requirement for the retrieval of tariff information to specify that a search for a commodity description must result in a commodity or retrievable commodity index list.

Section 520.7 (tariff limitations): clarifies the date on which a new conference member's participation in the conference tariff becomes effective; specifies that the minimum time allowed to file an overage claim with a common carrier applies to claims filed by a shipper; removes a provision stipulating the methods to be used to compute the weight of green salted hides, in light of requirements mandated by the International Maritime Organization; adds a new paragraph (h) to § 520.7 to specify that NVOCCs may pass through certain charges received from ocean common carriers that are not under the control of the ocean common carrier or conferences; and clarifies that the charges must be clearly listed in the NVOCC's tariffs and not marked up above cost.

Section 520.8 (effective dates): replaces the term "destination grouping" with "destination scope" in § 520.8(b)(3) to be consistent with other references to "destination scope" used in 46 CFR part 520.

Section 520.9 (access to tariffs): updates this section to remove references to obsolete technologies.

Section 520.10 (integrity of tariffs): revises the requirement to maintain historical tariff data in § 520.10(a) by defining the time period that data must be made available to the Commission as generally being within 45 days of a request and making certain grammatical corrections to the requirement that common carriers provide tariff access to the Commission.

Section 520.11 (non-vessel-operating common carriers): removes as unnecessary the requirement that an NVOCC must note in its tariff that it does not tender cargo for co-loading; removes as unnecessary the requirement in 520.11(c) that an NVOCC may not offer special co-loading rates for the exclusive use of other NVOCCs, since published tariff rates are available to all shippers.

Section 520.12 (time/volume rates): clarifies the time/volume rate requirements and that common carriers or conferences may cancel time/volume rates when no shipper accepts these rates within 30 days after the rates are published.

Section 520.13 (exemptions and exceptions): updates the governing rules of this part and the requirements for Department of Defense cargo, updating references to a military component.

Section 520.14 (special permission): specifies the documents required when requesting confidential treatment of an application for special permission and updates the process for submission and payment of applications for special permission.

Contact us

If you have questions regarding the new FMC rules, contact Carlos Rodriguez or your Husch Blackwell attorney.