

The Ocean Shipping Reform Act and Shippers' Associations

Smaller shippers have traditionally been concerned with less bargaining power during ocean freight rate negotiation since rate discounts are frequently offered only to shippers with large volume shipments. However, in an attempt to address this concern, the Shipping Act of 1984 permitted confidential service contracts between ocean carriers and shippers. These service contracts were filed with the Federal Maritime Commission as a tariff. In addition, carriers were required to offer these service contracts to any similarly situated shipper who "me-too's" the same contract terms. Acknowledging that small shippers were not "similarly situated" and, therefore, unable to "me-too" the contract terms, the Shipping Act of 1984 also stated the legality of joining shippers' associations and using non-vessel operating common carriers (NVOCC) services to obtain competitiveness in rate negotiation.

A concern with the Ocean Shipping Reform Act (OSRA), which will take effect on May 1, 1999, is that smaller shippers will have even less bargaining power for negotiating ocean freight rates since shippers had benefited in the past from the services offered by NVOCC's. However, with its enactment, OSRA will reduce the bargaining power of NVOCC's by heavily regulating them. Under OSRA, NVOCC's are permitted confidentiality of service contracts, but are required to resell their contracts to shippers at a published rate. With the new shipping act, NVOCC's are still required to be licensed and bonded, unlike shippers' associations, but are not permitted to have service contracts with exporters, only with ocean carriers. Shippers' associations are permitted confidentiality in their contracts with ocean carriers.

Another concern with OSRA, in terms of the competitiveness of smaller shippers during rate negotiation, is the change in service contract filing. Under OSRA, the terms of service contracts that will be required to be published as a tariff include only the commodities, minimum volumes, geographic ports, and duration of the contract. In existing law, the rates offered are also required to be filed. Also, the right to a "me-too" service contract, if a shipper is similarly situated, has been eliminated in the new shipping act.

Another possible disadvantage to smaller shippers under OSRA is that since individual ocean carriers are allowed to enter into service contracts with large shippers and since the rates offered within the service contract will not be made public, the contract rate negotiated may be well below marginal costs. The question remains as to whether or not the ocean carriers will make up these lost returns by charging higher rates to smaller shippers unable to negotiate high-volume service contracts. There are clauses written in OSRA in an effort to prevent this from happening and to punish by monetary fine ocean carriers that do so; however, they only prevent "unreasonable" discrimination, which is difficult to prove. Therefore, smaller shippers may look toward shippers' associations as a means of achieving economies of scale during rate negotiation.

The ability to better negotiate service contracts will generally exist for all shippers with the new shipping act since, in the past, shippers were required to commit a specific amount of cargo to a carrier while negotiating service contracts. OSRA will allow shippers to guarantee a specific volume *or percentage of volume*. This allows shippers' associations the ability to avoid penalties for not being able to meet contractual commitments due to market fluctuations or, in the case of agricultural shippers, unfavorable weather and other uncontrollable circumstances.