

BEFORE THE
FEDERAL MARITIME COMMISSION

PETITION OF UNITED PARCEL SERVICE, INC.
FMC Petition No. P3-03

PETITION OF C.H. ROBINSON WORLDWIDE, INC.
FMC Petition No. P9-03

PETITION OF NATIONAL CUSTOMS BROKERS
AND FORWARDERS ASSOCIATION OF
AMERICA, INC.
FMC Petition No. P5-03

PETITION OF DANZAS CORPORATION D/B/A/
DANMAR LINES LTD., DANZAS AEI OCEAN
SERVICES, AND DHL DANZAS AIR AND OCEAN
FMC Petition No. P1-04

PETITION OF OCEAN WORLD LINES, INC.
FMC Petition No. P7-03

PETITION OF BDP INTERNATIONAL, INC.
FMC Petition No. P2-04

PETITION OF BAX GLOBAL INC.
FMC Petition No. P8-03

PETITION OF FEDEX TRADE NETWORKS
TRANSPORT & BROKERAGE, INC.
FMC Petition No. P4-04

RESPONSE OF WORLDLINK LOGISTICS, INC. TO JOINT SUPPLEMENTAL
COMMENTS REQUESTING EXPEDITED ADOPTION OF A CONDITIONAL
EXEMPTION FROM TARIFF PUBLICATION

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Pursuant to the Order of the Federal Maritime Commission (“Commission”) served on September 2, 2004, Worldlink Logistics, Inc. (“Worldlink”) hereby submits its response to the Joint Supplemental Comments Requesting Expedited Adoption of a Conditional Exemption from Tariff Publication (“Joint Supplemental Comments”) filed in the above-referenced dockets on August 2, 2004 by the National Industrial Transportation League, United Parcel Service, Inc., BAX Global, Inc., FedEx Trade Networks Transport & Brokerage, Inc., Transportation Intermediaries Association, C.H. Robinson Worldwide, Inc., and BDP International, Inc. (hereinafter jointly referred to as the “Joint Commenters”).

Worldlink is a licensed NVOCC that has been in business for over fifteen years. Worldlink strongly believes, based on its long experience in the industry, that tariff filing is a competitive burden on NVOCCs. It is costly and requires management resources that could better be used elsewhere, as more fully discussed below. Further, Worldlink’s customers do not use tariffs for pricing information or rate comparisons. Its experience is that NVOCC rates are individually negotiated with customers and memorialized in the tariff only after the negotiation to comply with regulatory requirements. Worldlink’s customers “rate shop” among NVOCCs and vessel operators and choose the best combination of cost and service options for each given shipment or series of shipments. In sum, its customers are already relying on the marketplace to ensure they obtain the best prices and services for their shipments and do not find tariffs to be at all useful.

While Worldlink agrees with the Joint Commenters that NVOCCs should have pricing flexibility, it does not find their proposal to be a solution to the problems faced by NVOCCs subject to the current tariff filing regime. For this reason, as more specifically discussed below, Worldlink urges the Commission to reject this proposal.

The “Tariff Exemption Proposal” submitted by the Joint Commenters would establish a regulatory structure for “NVOCC Agreements” virtually identical to that which currently exists for service contracts of vessel operating common carriers (“VOCCs”). “NVOCC Agreements” would be defined in language identical to that used for the

definition of “service contracts” in the Shipping Act of 1984; 46 App. U.S.C. §1702[19]. NVOCC Agreements would be required to have the same essential terms as are required for service contracts in Section 8(c)(2) of the Shipping Act; 46 App. U.S.C. §1707(c)(2); and the identical essential terms would be required to be published by NVOCCs in a tariff format. *Id.* at §1707(c)(3). Finally, the Tariff Exemption Proposal makes it explicit that the Commission would have the same power over NVOCC Agreements that it currently has over service contracts.

The real problem faced by NVOCCs is the cost and expense imposed on them by the outmoded and meaningless tariff requirements. These tariff requirements are meaningless and outmoded for a number of reasons. As Congress clearly recognized in OSRA, common carriage is no longer a serious basis of U.S. maritime regulatory policy. Thus, there is no longer a meaningful public interest in preventing discrimination among shippers. Indeed, both VOCCs and NVOCCs long ago devised numerous mechanisms within the context of filed tariffs to individualize rates and terms of service for their customers. Moreover, as Worldlink’s own experience demonstrates, tariffs are meaningless because no shipper uses them to make real world pricing decisions. Nevertheless, the continuing burdens of tariff filing on NVOCCs are real and punishing.

The Tariff Exemption Proposal of the Joint Commenters does not address these problems. Rather, it seeks to replace the current requirement of a single filing for each rate in a tariff with new requirements for one filing of NVOCC Agreements with the Commission and a completely separate filing of a few essential terms from those Agreements in the NVOCC tariffs. The essential terms filed in the tariff would not include the rates. The Joint Commenters’ proposal would, in fact, impose greater burdens on NVOCCs. There would also be no benefit to shippers. Since it is clear that shippers do not look at NVOCC tariffs to find out what the rates are, why would the shippers look at NVOCC tariffs to see synopses of “NVOCC Agreements” that contain no rates? It is, in addition, highly doubtful the Commission itself would - - or could - - review the literally thousands of NVOCC Agreement filings that would be produced by the Joint Commenters proposal. (There are over three thousand NVOCCs licensed by,

or registered with, the Commission.) Thus, instead of eliminating regulatory burdens, the Joint Commenters' proposal would increase regulatory burdens on NVOCCs and impose an additional burden on the Commission itself. For this reason alone, Worldlink Logistics believes the Tariff Exemption Proposal would be unworkable.

A. There is No Public Interest Protected by any NVOCC Tariff or Agreement Filing Requirement.

The Joint Commenters' proposal is based on a false premise; that is, that NVOCCs and VOCCs require identical forms of regulatory oversight. NVOCCs, however, do not have market power and are not immunized from the antitrust laws, as are VOCCs. Therefore, there is no need for the Commission to have volumes of pricing material from NVOCCs to perform any economic monitoring functions to ensure NVOCC's are not distorting the ocean shipping market. The Commission does not currently use NVOCC tariffs to monitor competitive conditions in the ocean shipping industry or even the NVOCC portion of the industry. Why, then would there be a need to accumulate thousands of "NVOCC Agreements" in the Commission's files?

The filing of service contracts by VOCCs serves a necessary and Congressionally mandated function. VOCCs both have antitrust immunity and can control the means of transportation through their operation of the vessels. They can, if they wish, impose competitive bottlenecks on the shipping market. This is the reason why agreements among VOCCs must be filed with the FMC and why the VOCCs' pricing arrangements in the form of service contracts must also be filed with the Commission. Further, Congress has instructed the Commission to act promptly when necessary to forestall such harm.¹ Having VOCC agreements and service contracts readily and instantly available in its own files gives the Commission the necessary tools to perform this function. Thus, there is a legitimate regulatory need for the filings of VOCC service

¹ See e.g., S. Rep. No. 105-61, 105th Cong., 1st Sess. 14 (1997) ("The agency must be prepared and able to address and rectify such anti-competitive conditions before they take their toll on importers, exporters and U.S. ocean borne trade.")

contracts with the Commission. There is, however, no similar regulatory need for the filing of NVOCC pricing arrangements.

B. The Money and Time Spent on Tariff Filing Could Be Better Spent in Other Areas.

There is an opportunity cost to NVOCC filing (whether of tariffs or “NVOCC Agreements”) that the Commission should recognize in considering this proposal and, indeed, all of the tariff exemption requests. A prime example of this is in the area of security. As the Commission and other government agencies; notably, U.S. Customs and Border Protection (“CBP”), recognize NVOCCs perform critical functions in the international supply chains in which they participate. Since 9/11, CBP has adopted new regulations permitting NVOCCs to file their shipment information directly in the Vessel Automated Manifest System (“Vessel AMS”) so as to enable them to comply with the 24 Hour Advance Manifesting Rules. A significant number of NVOCCs, including Worldlink, have opted to do this by filing international carrier bonds with CBP and investing in the technology necessary to electronically file their manifests in Vessel AMS. CBP has made it clear that advance manifest filing is a critical component of its efforts to protect the United States from the introduction of weapons of mass destruction, other terrorist supplies or weapons, or terrorists themselves, into the United States in ocean shipping containers.

CBP has also included NVOCCs as one of the first groups of entities to be eligible to participate in the Customs-Trade Partnership Against Terrorism (C-TPAT). Again, Worldlink and a substantial number of other NVOCCs have welcomed this opportunity to join CBP and other C-TPAT participants in a massive voluntary effort to upgrade security policies and procedures throughout the international supply chains serving the United States. Through their participation in C-TPAT, NVOCCs are being asked to continually upgrade their security arrangements and the security arrangements of their supply chain partners and to develop and adopt best practices in the area of security. All of these security activities require money, time and management effort and attention. To the extent these factors are engaged in a wholly meaningless and sterile regulatory

activity such as tariff (or “NVOCC Agreement”) filing, they cannot be devoted to these more pressing and important activities.

C. Summary and Conclusion.

For all of these reasons, Worldlink Logistics submits that the proposal of the Joint Commenters should not be adopted by the Commission. Rather, the Commission should adopt the proposal of the National Customs Brokers and Forwarders Association of America (NCBFAA), which calls for the total elimination of tariff filing. This is the most sensible and efficient way to address the real problems created by the outmoded NVOCC tariff filing requirements. Moreover, Worldlink Logistics urges the Commission to take this step as soon as possible. In this regard, it agrees with the contentions of the Joint Commenters that there is no need to institute any further regulatory proceedings before taking this action. The Commission already has a complete record fully justifying the total elimination of NVOCC tariff filing. This is the course it should take with no further delay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 30th day of September, 2004, served a copy of the foregoing Response Of Worldlink Logistics, Inc. To Joint Supplemental Comments Requesting Expedited Adoption Of A Conditional Exemption From Tariff Publication, on the following persons listed below via first-class mail, postage pre-paid:

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