

BEFORE THE  
FEDERAL MARITIME COMMISSION

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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

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

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Date: September 30 2004

Pursuant to the Order of the Federal Maritime Commission (“Commission”) served on September 2, 2004, Landstar System Inc. (“Landstar”) 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”). Landstar has previously filed comments in a number of these proceedings on January 16, 2004.

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)<sup>1</sup>; 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.

While Landstar fully supports the need for greater pricing flexibility for NVOCCs, and also supports the Joint Commenters’ plea for expeditious action by the Commission in this area, it vigorously opposes the substance of this proposal for the reasons set forth below.

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<sup>1</sup> There appears to be a single difference between the essential terms required of a service contract and the essential terms the Joint Commenters would require of an “NVOCC Agreement.” That is, NVOCC Agreements would be required to have liquidated damages provisions, whereas such provisions are optional in service contracts.

**A. The Proposal Does Not Solve - - and, in fact, Exacerbates - - the Problem.**

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 two basic reasons. First, the concept of common carriage upon which they are based no longer exists in the international ocean shipping industry. Congress explicitly recognized this in the Ocean Shipping Act of 1998 (“OSRA”). Further, as a matter of operational reality, both VOCCs and NVOCCs long ago devised numerous mechanisms within the context of filed tariffs to individualize rates and terms of service for their shippers. Second, as evidenced by virtually all of the petitions and comments submitted in these proceedings, tariffs are meaningless because no shipper uses them to make real world pricing decisions. While tariffs themselves are vestigial regulatory anachronisms, the costs and expenses of tariff filing are real. NVOCCs spend real money and devote real time and energy every month to file rates nobody looks at.

The Tariff Exemption Proposal of the Joint Commenters seeks to replace the single requirement of filing rates in a tariff with a new, dual requirement of filing NVOCC Agreements with the Commission and filing synopses of those Agreements in NVOCC tariffs. This would, in fact, impose greater burdens on NVOCCs with no corresponding regulatory benefit. 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 thousands of NVOCC Agreement filings that would be filed under the Joint Commenters’ proposal. 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, Landstar believes the Tariff Exemption Proposal would be unworkable.

**B. There is No Commission Oversight Interest Protected by an NVOCC Tariff or Agreement Filing Requirement.**

Tariff filing does not provide the FMC with effective oversight of anything other than the filing of rates themselves. Since common carriage no longer exists, there is not an interest in preventing discrimination among shippers. Further, NVOCCs 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?

In this regard, the filing of service contracts by VOCCs serves a far different and much more relevant function. VOCCs have antitrust immunity and VOCCs control the means of transportation and therefore 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. Through the exercise of their market power, VOCCs can inflict competitive harm in the marketplace. Congress has instructed the Commission to act promptly when necessary to forestall such harm. 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 filing of VOCC service contracts with the Commission.

There is, however, no similar regulatory need for the filing of NVOCC pricing arrangements. In this regard, the Joint Commenters' proposal is based on a false proposition; that is, that NVOCCs and VOCCs require parallel regulatory oversight. In fact, VOCCs are capable of market distorting anti-competitive behavior and need far

closer ongoing regulatory supervision than do NVOCCs who have very little market power. For NVOCCs, the real dangers arise from rogue companies that engage in consumer fraud to the detriment of individual shippers. Commonly, these types of fraudulent companies take shippers' money without performing the services they promise. This type of fraudulent activity is in no way related to, or could be prevented by, the filing of tariff rates or "NVOCC agreements." The Commission has, indeed, a long and honorable tradition of pursuing these companies and holding them accountable for their fraudulent activities. (See, *e.g.*, *Martyn Merritt, et al. -- Possible Violation of The Shipping Act of 1984*, 26 SRR 1084 (1993); *Wilfred Garcia, et al. -- Possible Violations of The Shipping Act of 1984*, 26 SRR 649 (1992).) For this purpose, the Commission has typically relied on the prohibitions of the Shipping Act against unfair and unreasonable practices. Moreover, with the licensing of NVOCCs as a result of OSRA, the Commission also has additional power to regulate such companies through its licensing powers. There is, in short, no real need for a filing regime for "NVOCC Agreements" similar to that which exists for VOCC service contracts.

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

As numerous NVOCC submissions in these proceedings have made clear, there is a real cost to tariff filing, both in terms of monetary expense and the expenditure of management time and effort. There is, therefore, an opportunity cost to NVOCC filing (whether of tariffs or "NVOCC Agreements") that the Commission should recognize in considering the tariff exemption requests. Given the lack of economic or regulatory utility of NVOCC rate or agreement filing, there are clearly more critical and important areas for NVOCCs to employ their money, time and energy.

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 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, a substantial number of NVOCCs have taken 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.

#### **D. Summary and Conclusion.**

For all of these reasons, Landstar respectfully submits that the request of the Joint Commenters for a Conditional Tariff Exemption providing for the double filing of “NVOCC Agreements” should not be granted 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, Landstar 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 30<sup>th</sup> day of September, 2004, served a copy of the foregoing Response Of Landstar System, 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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