

RECEIVED

04 JAN 16 AM 11:45

BEFORE THE
FEDERAL MARITIME COMMISSION

OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

)
Petitions of United Parcel Service, Inc.,)
National Customs Brokers and Forwarders)
Association of America, Inc., Ocean World)
Lines, Inc., BAX Global, Inc., and C.H.)
Robinson Worldwide, Inc. for Exemptions)
Pursuant to Section 16 of the Shipping Act)
of 1984)

FMC Petition Nos. P3-03,
P5-03, PI-03, P8-03 and
P9-03

COMMENTS OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION

JEFFREY N. SHANE
Under Secretary of Transportation
for Policy

JEFFREY A. ROSEN
General Counsel

ROSALIND A. KNAPP
Deputy General Counsel

DALE C. ANDREWS
Deputy Assistant General Counsel
for Litigation

PAUL SAMUEL SMITH
Senior Trial Attorney

U.S. Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590

Dated: January 16, 2004

BEFORE THE
FEDERAL MARITIME COMMISSION

_____) Petitions of United Parcel Service, Inc.,) National Customs Brokers and Forwarders) Association of America, Inc., Ocean World) Lines, Inc., BAX Global, Inc., and C.H.) Robinson Worldwide, Inc. for Exemptions) Pursuant to Section 16 of the Shipping Act) of 1984) _____)	FMC Petition Nos. P3-03, P5-03, P7-03, P8-03 and P9-03
--	---

COMMENTS OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION

Currently pending before the Federal Maritime Commission (“FMC” or “Commission”) are five petitions that, while advocating differing approaches, collectively seek an exemption from Section 8 of the Shipping Act of 1984, 46 U.S.C. § 1707, which presently requires that non-vessel-operating common carriers (“NVOCC”s) may only carry cargo pursuant to published tariffs. While the precise relief sought in each petition varies, in broad brush the petitions ask the Commission to exercise its exemption authority to remove presently-applicable tariff publication and adherence requirements in a manner that would allow NVOCCs to enter into private and confidential contracts with their shippers, the same sorts of contracts that vessel operators are specifically allowed to utilize under Section 8(c) of the 1984 Act, 46 U.S.C. § 1707(c).’

¹/ In Petition No. **P3-03**, United Parcel Service, Inc. has sought an exemption specifically allowing it to enter into confidential service contracts. In Petition No. **P5-03**, the National Customs Brokers and Forwarders Association of America, Inc. (“NCBFAA”)

The United States Department of Transportation (“DOT” or “Department”) strongly supports the deregulatory relief sought in each of these petitions. Vessel operating carriers have already benefited from their ability to enter into one-on-one confidential contracts with shippers, and similar benefits would flow from allowing non-vessel operating carriers the same freedom of contracting. For the reasons discussed below, the Commission has ample basis and authority both to exempt all NVOCCs from the tariff publication and adherence requirements of Section 8 of the Shipping Act of 1984, and to allow NVOCCs to enter into confidential contracts to the same extent that vessel operating common carriers can now offer such contracts to their shipper customers.*

Background

As the Commission is aware, DOT first urged the FMC to exercise its exemption authority to exempt NVOCCs from tariff filing requirements in FMC Docket No. 91-1, Bonding of Non-Vessel-Operative Common Carriers. In that proceeding DOT recommended such an exemption, and that recommendation, in turn, led to a formal

has sought an exemption from all tariff requirements for all NVOCCs, or alternatively requests that the Commission allow NVOCCs to establish “range” tariff rates. In Petition No. P7-03, Ocean World Lines, Inc. has sought an expansion of “special contract” authority now utilized by ocean freight forwarders so that such authority could be exercised by NVOCCs. In P8-03, BAX Global, Inc. has sought exemption authority for large NVOCCs to enter into confidential service contracts. And finally, in Petition P9-03, C.H. Robinson Worldwide, Inc. seeks an exemption to permit it, as an NVOCC, to offer confidential service contracts to its customers.

² / Such a class-wide exemption is clearly in the public interest and should be granted based on the record before the Commission. If, for whatever reason, the Commission does not pursue such a course, DOT urges that, at the very least, as an initial step, the Commission should either institute a proceeding aimed at assembling more record evidence concerning the relief sought in the petitions or grant the alternative exemption sought in the NCBFAA petition and exempt NVOCCs from the requirements of Section 8 of the 1984 Act to the extent necessary to publish range tariffs.

request by the International Federation of Freight Forwarders Associations (“**FIATA**”) seeking an exemption in FMC Docket No. **P5-91**, Petition for Exemption from the NVOCC Tariff Filing Requirements Under the Shipping Act of 1984. In DOT’s comments in Docket **P5-91** we stated as follows:

[T]here is little justification for continuing to require tariff filing by NVOCCs. It has been the shared experience of the Department and other federal transportation agencies that in a competitive environment price and service offerings change rapidly, and that regulatory mechanisms such as tariff filing requirements can impede innovation by imposing unnecessary financial costs as well as by hampering a firm’s ability to respond quickly in the marketplace. Moreover, **and as DOT . . .** pointed out in its previous comments [in Docket No. **91-1**], the burdens of tariff filing weigh disproportionately heavily on NVOCCs, which tend to be small enterprises, and which may lack the administrative capacity to file and maintain tariffs. There is no reason to continue to impose these burdens on NVOCCs since, in today’s market, there is no readily discernible public or regulatory benefit to be gained from a continuation of tariff filing by NVOCCs. . **[S]ubstantially** similar exemptions granted by other administrative agencies have already demonstrated the salutary effects of freeing transportation intermediaries such as NVOCCs from the burdens of tariff filing and adherence.

Comments of the United States Department of Transportation dated January 21, 1992 (“1992 DOT Comments”) at 2-3.

The FMC denied **FIATA**’s petition for an exemption, but contemporaneously it commenced an Advance Notice of Proposed Rulemaking in Docket 92-22, where the Commission sought comments concerning a proposed more narrow exemption for NVOCCs. DOT again supported these proposals and noted that “exempting NVOCCs from tariff filing altogether would obtain the greatest advantage for the affected firms and their shippers.” Comments of the United States Department of Transportation dated July 6, 1992 at 9.

Ultimately the Commission discontinued Docket 92-22 when the four sitting Commissioners deadlocked 2-2 on whether to proceed with the rulemaking. The Commission's notice stated that "[t]he only point of possible agreement was that [either] result was equally unsatisfactory to all concerned." Tariff Filing by Non-Vessel-Operating Common Carriers, 26 S.R.R. 965,966 (FMC 1993). However the FMC at that time issued the following public statement on behalf of then-chairman Koch; who favored proceeding with the proposed rule:

So long as there is a reasonable basis to believe that the FMC can bring less regulation, increased flexibility and greater competition to the NVOCC marketplace, I believe we should try to do so. We must be mindful of the Shipping Act's terms and mindful of court precedent, but so long as we can proceed, I believe we should. It might be easier and less bother to tell parties seeking change to go to Congress for relief. But we are the agency empowered with the expertise and authority to address the conditions of our foreign shipping, and we should not tell Congress to make the decisions if we can. I believe we can and I believe we should try to improve the regulatory system.

The Instant Petitions

The arguments in favor of exempting NVOCCs from statutory tariff requirements that DOT offered in 1992 remain valid today. Indeed, the case for granting NVOCCs an exemption from the tariff publication requirements of the 1984 Act is significantly stronger now than it was in 1992, when the Commission last visited this issue. This is so for two basic reasons.

First, as a commercial matter, international maritime commerce has already evolved in a manner that now clearly underscores the lack of utility of continued tariff publication and adherence requirements. As more fully discussed below, continuing to require NVOCCs to publicly disclose their rates in tariffs serves no regulatory purpose and reduces competition.

Second, as a statutory matter, the Commission's exemption authority is now broader than it was in 1992. Moreover, Congress has expressed its clear desire that the Commission, as the expert agency overseeing international maritime commerce, should exercise that authority so as to remove unnecessary and counter-productive regulatory burdens.

I. Tariff Publication and Adherence Requirements for NVOCCs Inhibit Competition and Are Not in the Public Interest

As the various petitioning NVOCCs in these proceedings have pointed out, whatever remaining regulatory purpose was served by requiring NVOCCs to publish tariff rates covering their transportation arrangements with shippers has disappeared in the years following the enactment of the Ocean Shipping Reform Act of 1998 ("OSRA"), Public Law 105-258. While OSRA left tariff publication as an option for vessel operating common carriers, it greatly deregulated the alternative option of carrying cargo pursuant to service contracts. Specifically, OSRA for the first time allowed service contracts to be entered into by vessel operators on a confidential basis and eliminated the previous right of similarly-situated shippers to demand "me too" contracts. As a result, since 1998 vessel operating carriers have had two options in carrying cargo -they can do so pursuant to published tariffs, or they can do so pursuant to confidential one-on-one service contracts.

Not surprisingly, the overwhelming trend in international maritime commerce since 1998 has been toward individual contracts and away from tariff rates. In its important report, "The Impact of the Ocean Shipping Reform Act of 1998" ("FMC Report"), the Commission noted that as of 2001 "carriers generally report that 80 percent or more of their liner cargo . move[d] under service contracts" and that there had been

a “200 percent increase in the number of service contracts and amendments filed since May, 1999 . . .” FMC Report at 2. The Commission also noted that “the across-the-board surge in service contracting (as reflected in the number of contracts, the cargo volume, and the percentage of cargo moved under such contracts)” was “greater and more sudden than most expected” following enactment of OSRA. FMC Report at 44.

The FMC Report attributes this contracting shift “primarily to the confidentiality and flexibility achieved through individual contracts” and the advantage of being able “to engage in one-on-one negotiations with greater flexibility to structure contracts as needed.” FMC Report at 18. The Commission notes that prior to the passage of OSRA

carriers were more reluctant to grant specific contract concessions for a particular shipper since their other customers could request equal treatment. The transparency of information constrained the commercial benefits of contract specialization for both carriers and shippers.

FMC Report at 21 (emphasis supplied). The Commission specifically addressed the advantages of confidential contracting as follows:

[C]onfidentiality under OSRA has provided shippers and carriers with the privacy they deem necessary to freely transact business. With the ability to shield such information, the contracting process is not constrained by the previous standards of meeting benchmarks and matching terms identically. Commercially sensitive issues and business requirements can be discussed more freely and accommodated more easily with specific contract terms. Carriers and shippers are more focused on achieving their individual rate and business objectives through contract negotiations.

FMC Report at 23.

The Commission’s 2001 conclusions and observations are particularly relevant to its analysis of the instant petitions. As the Commission has recognized, confidential one-on-one contracting is advantageous to shippers and carriers alike. And as the Commission has also reported, the ability of vessel operating carriers to enter into such

arrangements post-OSRA has resulted in the 200 percent increase in the use of confidential contracting.

It is clear from the Commission's own experience administering the Shipping Act of 1984 post-OSRA that allowing NVOCCs similarly to contract privately and confidentially with shippers without tariff publication requirements would have beneficial commercial effects. Exempting NVOCCs -the only ocean common carriers currently precluded from carrying cargo pursuant to confidential contracts – from the tariff publication requirements set forth in Section 8 of the 1984 Act will benefit shippers and carriers by allowing them universally to enter into precisely the types of confidential shipping arrangements that the post-OSRA market demands. The marketplace has demonstrated that the tariff mechanism is simply too inflexible to accommodate the wide range of agreements that shippers and carriers may be **willing to** enter into in one-on-one negotiations.

Granting an exemption from tariff publication and adherence requirements for NVOCCs would also clearly enhance competition among NVOCCs and vessel operating carriers. At present, tariff requirements -imposed on NVOCCs alone-clearly reduce competition. A vessel operator armed with an NVOCC's tariff information potentially can target that NVOCC's business by setting rates that render the NVOCC's pricing structure unprofitable, or by soliciting NVOCC customers directly when the customer's identity can be surmised from information contained in the tariff publication. Moreover, and as the Commission noted at page 18 of its 2001 report, the transparency of information that results from tariff publication requirements constrains the commercial benefits of contract specialization for both carriers and shippers.

Finally, as NCBFAA has noted in its petition, tariff publication requirements are, in any event, a burdensome business expense to NVOCCs. NCBFAA points out that, on average, 3 to 5 percent of the administrative costs of its members are devoted to tariff publication requirements. NCBFAA Petition at 9-10. As all of the pending petitions demonstrate, those costs can adversely affect the amounts NVOCCs need to collect and shippers must ultimately pay. This practice is particularly wasteful since it serves no regulatory purpose: petitioners report that tariff publication data bases maintained by NVOCCs are rarely referenced by the general public. See, e.g., NBCFAA Petition at 9.

It is therefore clear that no commercial benefits flow from leaving the status quo in place. Indeed, as discussed above, a continuation of tariff publication requirements constrains rather than promotes competition and commerce.

II. The Arguments Offered by Opponents of the Petitions Are Unpersuasive

The policy arguments raised by those parties opposing the pending petitions do not provide a basis for refusing to grant an exemption from tariff publication requirements for NVOCCs. Specifically, DOT does not agree that NVOCCs should be required to continue to publish tariffs simply because they, unlike their vessel operator competitors, neither own nor operate ships. See, e.g., Comments of American President Line, Ltd. at 18.³ Tariff publication requirements should only be maintained if they provide a public benefit. Without a clear and compelling justification for doing so, there

³ /The various Congressional floor statements accompanying the enactment of OSRA in no respect stand for the proposition that the Commission should be constrained in the exercise of its exemption authority in order to address the post-OSRA evolution of international maritime transportation. See American Trucking Ass'n v. ICC, 659 F.2d 452,459 (5th Cir. 1981) (recognizing minimal weight to be accorded Congressional floor commentary concerning intended scope of legislation); National Small Shipments Traffic Conference v. CAB, 618 F.2d 819,828 (D.C. Cir. 1980) (same).

is no valid basis to maintain regulatory constraints simply to impose a disadvantageous burden on one sector of carriers that is not imposed on another.

Contrary to the position of the World Shipping Council (“WSC”), Comments at 10, an exemption would not remove NVOCCs from most regulation by the Commission. The Commission’s major regulatory oversight of NVOCCs (such as licensing and bonding) does not in **any** respect depend on tariff publication.

Similarly, APL’s argument that NVOCCs desire to offer comprehensive contracts, covering all aspects of logistical services “a large number of which have not historically been deemed subject to . . . the Shipping Act,” **APL Comments** at 7, provides no basis to deny an exemption. Vessel operators already offer a host of services that may not individually be subject to **FMC** regulation. There is no regulatory reason to preclude NVOCCs from being equally free to offer a comprehensive package of the services shippers demand.

WSC and the American Maritime Congress state that if NVOCCs want to offer service contracts they should simply acquire vessels and commence operations as vessel operating carriers. WSC Comments at 5, American Maritime Congress Comments at 1. This suggestion is wholly unresponsive to the petitions before the Commission, which explicitly seek to place non-vessel operators on the same footing as vessel operators. If continued tariff requirements constrain a carrier’s ability to enter into the confidential contract arrangements demanded by the marketplace, and if those requirements provide no discernible public benefit, they should be removed regardless of whether the carrier at issue operates a vessel.

DOT is not unmindful of the needs and concerns of vessel operators and of the investments vessel operators have made in international ocean transportation. But it has been the Department's experience that removing unnecessary regulatory constraints is, in the long run, good for all competitors, and doing so here should similarly be beneficial to all sectors of international shipping. To the extent that international ocean commerce grows as a result of the ability of all carriers freely to enter into the types of contracts shippers demand, those increased cargo movements will ultimately be transported in the holds of vessel operators, regardless of whether the cargo is initially booked by vessel operators or by NVOCCs.

Simply put, the parties objecting to the various exemption petitions seek to prevent the competitive advantage associated with the ability to negotiate confidential one-on-one contracts with shippers – currently enjoyed exclusively by vessel operators – from being extended to non-vessel operators. The underlying intention, clearly, is avoidance of the incremental competition vessel operators might face from NVOCCs if NVOCCs were exempted from tariff requirements. It is well established, however, that the purpose of economic regulation is to “protect competition, not competitors.” See Brown Shoe Co. v. United States, 370 U.S. 294,320 (1962). Tariff publication and adherence requirements should be continued only if they deliver public benefits. Under that test an exemption is completely warranted.

III. The FMC has Ample Authority to Exempt NVOCCs from the Tariff Requirements of the 1984 Act

The principal legal argument advanced by the parties objecting to the pending petitions is that the Commission lacks authority under Section 16, 46 U.S.C. § 1715, to exempt NVOCC from tariff publication and adherence requirements. See APL

Comments at 14 et seq., WSC Comments at 5-6, American Maritime Congress

Comments at 1. The argument is incorrect. There is ample basis for the Commission to exercise its Section 16 authority in the present circumstances.

In 1992, when DOT last supported the exercise of FMC exemption authority to free NVOCCs from tariff filing requirements, Section 16 of the 1984 Act allowed the Commission to exercise its exemption authority in the following circumstances:

If [the Commission] finds that the exemption will not [1] substantially impair effective regulation by the Commission, [2] be unjustly discriminatory, [3] result in a substantial reduction in competition, or [4] be detrimental to commerce:

At that time, for the reasons discussed in our 1992 comments filed in support of Petition No. P5-91 and Docket No. 92-22, we urged that it would have been completely proper for the Commission, in the public interest, to have exercised its Section 16 authority to remove NVOCC tariff filing requirements. We noted that “[e]xemption provisions similar to Section 16 are commonplace in federal regulatory schema, and . . . have been utilized often by regulatory agencies in the past to exempt classes of parties from otherwise applicable statutory constraints.” 1992 DOT Comments at 5. See Central & Southern Motor Freight Tariff Ass’n. v. United States, 757 F.2d 301 (D.C. Cir.) cert. denied 474 US. 1019 (1985) (upholding an ICC decision to exempt motor contract carriers from tariff filing requirements); Brae Corn. v. United States, 740 F.2d 1023 (D.C. Cir. 1984) (holding that the ICC’s general exemption of boxcar freight rates from regulation was proper use of exemption authority); National Small Shipments Traffic Conference v. CAB, 618 F.2d 819 (D.C. Cir. 1980) (upholding exercise of CAB’s exercise of exemption authority to exempt all cargo air carriers from tariff filing requirements).

The case for an exemption is even stronger today. As noted in the various petitions now pending, the 1998 OSRA amendments to the 1984 Act removed the first two requirements of Section 16. Thus, under Section 16 the Commission now may exercise its exemption authority if it concludes that the requested exemption:

[W]ill not [1] result in substantial reduction in competition or [2] be detrimental to commerce.

As discussed in the preceding section of these comments, freeing NVOCCs of tariff publication constraints and allowing NVOCCs to negotiate confidential contracts will not reduce competition – in fact, that freedom will increase competition. And, as also explained above, granting the exemption would be beneficial -not detrimental -- to competition and to commerce. As such, the instant **petitions unquestionably** satisfy the two-prong test currently set forth in Section 16, as amended by OSRA.

Importantly, Congress expressly stated that the 1998 OSRA amendment to Section 16 that established the new two-prong test was intended to encourage the **FMC** to exercise its exemption authority more freely in order to remove unnecessary and obsolete regulatory constraints. The legislative history of OSRA explains that “while Congress has been able to identify broad areas of ocean shipping commerce for which reduced regulation is warranted, the FMC is more capable of examining through the administrative process specific regulatory provisions and practices . . . [that] can be deregulated. . .” Senate Report No. 61, 105th Cong., 1st **Sess.** at 30 (1997).

The opponents of the pending petitions argue that because Congress considered relieving NVOCCs from statutory tariff publication and adherence requirements but ultimately did not do so, the Commission somehow lacks the authority under Section 16 to exempt NVOCCs from tariff requirements. The argument is clearly wrong. The fact

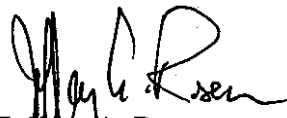
that Congress considered authorizing NVOCCs to enter into confidential service contracts in 1998 but ultimately did not establish that authority when OSRA was enacted in no respect precludes the Commission from exercising its exemption authority today. In National Small Shioments Traffic Conference v. CAB, for example, and in substantially identical circumstances, the D.C. Circuit upheld the Civil Aeronautics Board's decision to grant cargo carriers an exemption from tariff filing requirements even in the face of an express decision by Congress several years earlier not to exempt such carriers from the same requirements. The court noted that merely because Congress did not itself exempt a class of carriers from tariff filing requirements did not preclude the CAB from doing so under its statutory exemption authority. The court went on to hold that "the literal language" of the Board's statutory exemption authority "authorizes the Board to exempt carriers from the [statutory] tariff filing requirement" and concluded that "we see no reason why the plain language of the statute, which authorizes the Board to grant exemptions from any provision of the Act, should not control." 618 F.2d at 827, 832.

The same reasoning applies here. The plain meaning of the newly broadened Section 16 exemption provision leaves no doubt that the Commission can exempt NVOCCs from the tariff publication requirements of the Shipping Act of 1984. National Small Shioments Traffic Conference makes clear that Congress's decision not to do so itself in 1998 in no way restricts the Commission's exercise of its clearly stated exemption authority to free NVOCCs from regulatory constraints that no longer serve the public interest.

Conclusion

For the foregoing reasons DOT urges the Commission to issue an exemption that would free NVOCCs from the tariff publication and adherence requirements of Section 8, **and that** would allow NVOCCs, as a result, to enter into confidential contracts with shippers in the same manner that vessel operating carriers presently are allowed to enter into such contracts.

Respectfully submitted



Jeffrey A. Rosen
General Counsel

January 16, 2004