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August 13, 2009

Karen V. Gregory, Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Room 1046
Washington, DC 20573-00015

Re: Notice of Proposed Rulemaking – Repeal of Marine Terminal Agreement Exemption, Docket No. 09-02

Dear Secretary Gregory:

We are counsel for the National Customs Brokers and Forwarders Association of America ("NCBFAA") and, in that capacity, are providing comments on the above Notice of Proposed Rulemaking.

The NCBFAA is the national trade association representing the interests of freight forwarders, NVOCCs and customs brokers in the ocean shipping industry. NCBFAA's members are integrally linked to approximately 90% of the cargo that moves into and out of the United States via ocean transportation. And, as particularly relevant here, freight forwarders and NVOCCs handle the transportation interests of the vast majority of U.S. importers and exporters who rely upon and need a competitive and efficient ocean shipping industry. As such, the NCBFAA members and their underlying customers are necessarily affected by the actions and policies of the nation's ports, not just the steamship lines and other carriers that physically transport the goods being imported into or exported out of the country.

In the July 2, 2009 edition of the Federal Register (74 Fed. Reg. 31666), the Commission published a Notice of Proposed Rulemaking ("NPRM") that proposes to partially repeal the exemption from the 45-day waiting period requirement applicable to certain marine terminal

agreements ("MTA's") that had been granted in Docket No. 85-10. In particular, the Commission now proposes to revoke the exemption as to the class of agreements that are defined in 46 C.F.R. § 535.308. As discussed below, the NCBFAA supports the Commission's proposal.

In Docket No. 85-10, the Commission exempted certain MTA's - - even those involving agreements among competing marine terminal operators ("MTO's") - - from the forty-five day waiting period requirement, and determined that the exemption would not be unjustly discriminatory or detrimental to commerce or negatively effect commercial competition because the MTAs entered into at that time generally related to landlord-tenant agreements or other "innocuous, purely operational" agreements.[1] Consequently, all such agreements are totally immunized from the antitrust laws immediately upon filing.

As the Commission's NPRM indicates, however, more recently the nature of the agreements involving MTO's have evolved. While there are still many of the standard landlord/tenant agreements, on occasion MTO's have begun using the antitrust immunity conferred by having these "approved" agreements to discuss issues of mutual interest with other ports and collectively adopt polices, procedures and regulations that clearly do have an affect upon the shipping industry. MTA's have become more complex, dealing with issues such as the sale and lease of cranes from the Port of Los Angeles to private companies who wish to use the cranes on Guam[2] to agreements imposing concession agreements on the types of operators and vehicles allowed to enter ports or transport goods inside a port facility.[3]

Regardless of where one stands on the merits of any particular multi-port agreement, the granting of antitrust immunity prior to any public comment or even governmental review of the arrangement is rather extraordinary. Due to the exemption, any party adversely affected by a proposed MTA is essentially disenfranchised, and is given no opportunity to complain either about the agreement's substance or the fact that competing MTO's may have collectively established policies that arguably have adverse consequences on competition or transportation costs. Similarly, even the FMC is effectively estopped in all but the most extreme cases from considering the consequences of any MTA, as its only avenue for inquiring into the consequences of any filed MTA is to institute a proceeding under former Section 6(g), now 46 U.S.C. § 41307, seeking to enjoin its continued operation.

Now that MTO's have exercised this antitrust immunity to go beyond the basic landlord/tenant type of agreement, their more complex arrangements that may have some far reaching affect on commerce should at least be subjected to the same scrutiny by which carrier agreements are viewed. This type of review would likely have the benefit of exposing any anticompetitive or patently unreasonable provisions to the light of day, in which case the

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[1] FMC Docket No. 85-10, 24 S.R.R. 192, 195 (1987).
[2] FMC Agreement No. 201176.
[3] FMC Agreement No. 201170, the Los Angeles/Long Beach Port Infrastructure and Environmental Programs Cooperative Working Agreement.

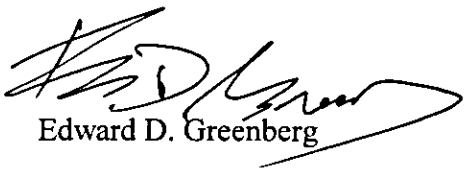
Commission would have time to seek more information and, if necessary, signal its intention to challenge any particularly egregious MTA before they go into effect.

Review by the industry and the Commission is often beneficial and can, in many cases, result in modifying proposed multiparty arrangements so as to eliminate provisions that raise issues of particular concern. By way of example, on June 22, 2009 the NCBFAA filed comments challenging a proposed amendment to the US Pacific Coast – Oceania Agreement, FMC Agreement No. 011741-013, because of its concern that a proposal to limit competition by establishing a policing/liquidated damages mechanism was anticompetitive and would likely result in increasing costs in that trade. When the Commission sought additional information from the carriers pertaining to the possible consequences of the proposal on competition and costs, the carriers withdrew the problematic provision - - apparently out of some concern that the challenged article might have overreached and been impermissibly anticompetitive. Thus, public scrutiny of these types of arrangements, particularly where the parties to the proposal are seeking the extraordinary benefit of antitrust immunity, is both helpful and essential to maintaining an efficient and competitive shipping industry.

In summary, the NCBFAA does not here dispute the continued existence of the antitrust immunity provisions of the Act. Rather, the NCBFAA believes that MTA agreements that could have competitive consequences on the shipping industry should not be permitted to go into effective immediately upon filing, but should instead be subject to review by the industry so that the Commission can make an informed decision as to whether the MTA raises issues under Section 41307 of the Act. Parties seeking antitrust immunity should at least have the modest burden of being required to justify their proposals, if questions are raised about their potential adverse consequences. For this reason, the type of agreements identified in 46 C.F.R §535.308 should no longer be exempted from the 45-day waiting period established by Section 40303 of the Act.

Accordingly, the NCBFAA believes the Commission should repeal the 45-day waiting period exemption requirement applicable to MTAs filed under 46 C.F.R. §535.308.

Respectfully submitted,



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