

From: Robert.McGeorge@usdoj.gov  
Sent: Friday, December 03, 2004 3:47 PM  
To: Secretary  
Cc: General Counsel Office  
Subject: FMC Dkt. 04-12

Attachments: TEA\_36608\_1.WPD; TEA\_36584\_1.WPD

Dear Mr. Van Brakle:

I am attaching a copy of the Department of Justice's Comments on the above-captioned Notice of Proposed Rulemaking, and our Motion for Leave to File an Otherwise Unauthorized Document (i.e., our motion for leave to submit these comments three days after the deadline). We will also mail paper copies of these documents to you. If you have any questions, please give me a call at 202-307-6361.

Sincerely,

Robert L. McGeorge  
Attorney  
U.S. Department of Justice  
Antitrust Division  
Transportation, Energy & Agriculture Section

BEFORE THE  
FEDERAL MARITIME COMMISSION

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Notice of Proposed Rulemaking	)	
	)	Docket No. 04-12
46 CFR Part 531	)	
	)	RIN 3072-AC30
Non-Vessel-Operating Common Carrier	)	
Service Arrangements	)	
	)	
_____	)	

Comments of  
the U.S. Department of Justice

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Dated: December 3, 2004

On July 25, 2003, United Parcel Service (“UPS”) initiated this proceeding by filing a petition requesting that the Commission exercise its exemption authority under Section 16 of the Shipping Act of 1984 to relieve it and similarly situated non-vessel-operating common carriers (NVOCCs) from the tariff publication requirements of the Shipping Act and allow them to enter into confidential service contracts with their shipper-customers. With UPS’s proposed exemption, NVOCCs would be authorized to utilize the same contractual arrangements as vessel-operating carriers (VOCCs) now use for most of their shipping business. Six other individual NVOCCs and an NVOCC trade association subsequently submitted petitions seeking similar authority. Although some of these petitions sought somewhat different exemptions, in principle they all sought an exemption that would allow some or all NVOCCs to enter into service contracts. The National Customs Brokers and Forwarders Association of America sought an exemption from all tariff publication requirements.

The Department of Justice (“the Department”) submitted comments in support of an exemption that would authorize all NVOCCs to depart from tariffs and enter into confidential service contracts with their shipper-customers.

The Commission recently issued a notice of proposed rulemaking (the “Notice”) in which it proposed an exemption from the tariff publication requirements of the Act authorizing NVOCCs to enter into NVOCC Service Arrangements (“NSAs”) – defined as “a written contract, other than a bill of lading or receipt, between one or more NSA shippers . . . and an individual NVOCC in which the NSA shipper makes a commitment to provide a certain minimum quantity or portion of its cargo or freight revenue over a fixed time period, and the NVOCC commits to a certain rate or rate schedule and a defined service level.”

The Department submits these comments in support of the Commission's proposed regulations.

1. The Commission's proposal would promote competition in ocean transportation. As noted in the Department's comments in support of the UPS petition, exempting NVOCCs from all tariff-publication requirements would produce the greatest competitive benefits. The more limited approach of exempting NVOCCs from the current tariff-publication requirements and allowing them to enter into confidential service contracts, however, would create important benefits for NVOCCs, their customers, and ultimately American consumers, by fostering competition, lowering costs, and improving service in U.S. liner trades.

This proposal is an entirely appropriate exercise of the Commission's exemption authority. In addition to the authority noted in the Commission's Notice, the proposed exemption from tariff publication requirements may also be supported by analogy to the courts' support of similar actions by the Interstate Commerce Commission in *American Trucking Ass'ns v. ICC*, 656 F.2d 1115 (5th Cir. 1981), based on exemption authority now found in the ICC Termination Act, 49 U.S.C. 10502, and by the Federal Communications Commission in *MCI WorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000), based on section 10 of the Communications Act, 47 U.S.C. 160 (added by the Telecommunications Act of 1996).

2. The Department agrees with the Commission that the NVOCC service arrangements should not be exempted from the antitrust laws, and that the Commission must take into account judicial precedent in crafting its exemptions to ensure against an inadvertent grant of immunity. Such precedent includes decisions such as *United States v. Tucor International, Inc.*, 189 F.3d

834 (9<sup>th</sup> Cir. 1999), with which we disagree. Even if one agreed with the *Tucor* decision, however, it does not support immunity here.

The immunity at issue in *Tucor* was derived from section 7(a)(4) of the Shipping Act, which applies to agreements or activities “concerning the foreign inland segment of through transportation that is part of transportation provided in a United States import or export trade.” The *Tucor* court held only that section 7(a)(4) applied to an agreement among foreign firms providing inland services in a foreign country to common carriers that are transporting goods in through movements in the import or export trade of the United States.

The question of immunity here, on the other hand, involves only section 7(a)(2). To the extent the *Tucor* court addressed that provision, it agreed with our view that the provision is limited by its terms to “activities and agreements within the scope of the Act” as defined by section 4. 189 F.3d at 837. In any event, the provisions of section 8 refer to the tariffs of individual carriers and conferences. The “activity” of publishing rates under section 8 is an entirely different “activity” from agreeing with competitors on the rates, so an exemption from the requirements of section 8 would not (and could not) exempt concerted action from the antitrust laws.

In sum, the holding of the *Tucor* court is quite narrow. It provides no support for a claim that exempting NVOCCs from tariff publication requirements when they enter into NSAs would exempt agreements among NVOCCs from the antitrust laws pursuant to Section 7(a)(2) of the

Shipping Act. The Commission should make clear that it does not contemplate granting such an immunity.

Respectfully submitted,

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