

**BEFORE THE
FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.**

ORIGINAL

**REPLY COMMENTS OF SCHENKER, INC.
IN SUPPORT OF THE
PETITION OF THE NATIONAL CUSTOMS BROKERS AND
FORWARDERS ASSOCIATION OF AMERICA ("NCBFAA") FOR
EXEMPTION FROM MANDATORY RATE TARIFF PUBLICATION**

FMC Petition No. P1-08

September ~~26~~, 2008

I. Introduction.

The following comments are submitted by Schenker, Inc. ("Schenker"), a Federal Maritime Commission ("FMC" or "Commission") licensed Ocean Transportation Intermediary ("OTI"), FMC license number 000911F. Schenker, Inc. maintains forty-two (42) branch offices throughout the United States, in addition to a headquarters operation. Its affiliated company, Schenker Ocean Limited ("Schenker Ocean"), FMC Org. No. 020495 is a registered non-vessel operating common carrier (NVOCC). Schenker Ocean maintains a bond with the Commission in the amount of \$150,000.00. These companies are subject to the tariff-publishing requirements as set forth in Commission regulations 46 CFR § 520. Schenker is fully supportive of the Petition of the National Customs Brokers and Forwarders Association of America (NCBFAA), FMC Petition No. P1-08, submitted pursuant to 46 C.F.R. §§ 502.67 and 502.69 for a limited exemption of mandatory rate tariff publication.

While fully in accord with the Exemption in the NCBFAA's Petition. Schenker provides further limited comments on the Principles in support of the Exemption regarding the requirement of written memorializing of negotiated rates. Schenker is concerned that this Exemption will unwittingly result in equally or more onerous documentation requirements than those involving tariff publishing, or that it may, without meaning to, result in regulatory ambiguities to the detriment of common carriers and shippers. Schenker, in order to address these concerns, submits in its comments below that disputes among commercial parties involving documentation memorializing negotiated rates be addressed exclusively by application of contract law principles. Further assurances should be given by the Commission that once parties have opted to utilize the Exemption, the sufficiency of memorialized documentation will not become an enforcement issue. Without those assurances, the Exemption might just mean that another layer of regulatory burden has been added to the regulatory structure, rather than lifted. Obviously that is a consequence not intended by the NCBFAA Petition.

Lastly, while the NCBFAA focuses on rate tariffs, the Exemption presumably would also be applicable to charges---i.e. rates and charges. In the discussion, it is clear that the NCBFAA intends to also include charges, and Schenker would submit that the Commission consider this Petition as one for Exemption of both rates and charges. In the same vein the NCBFAA does not provide for the option of NVOCCs and its customers also opting to exempt tariff Rules. Schenker further submits that in a marketplace where common carriers and its customers would have the ability to exempt rates and charges from tariff publishing, they should also have the flexibility of exempting individual Rules. This latter exemption of individual Rules should, of course, be specific and in writing. It would not make any sense for carriers and shippers to have the flexibility

to negotiate and exempt rates and charges without a corresponding ability to exempt specific Rules.

II. Schenker Supports the Relief Requested by the NCBFAA For All the Reasons Noted in the Petition, and Below

Schenker agrees with the NCBFAA that the deregulatory changes in Congressional policy initiated in the 1984 Act and expanded in OSRA have transformed the ocean shipping marketplace and rendered many rate tariffs meaningless. Schenker concurs with the NCBFAA and others that shippers do not review or otherwise rely on freight rate tariffs in determining how or when to ship or in selecting a carrier or intermediary. Schenker is in agreement that NVOCC freight rates are almost always separately negotiated with each shipper, and rates and charges are tailored to the specific movements, the number of containers at issue, commodities and other circumstances involved in each specific transaction. Schenker is also aware that shippers contact intermediaries to obtain rate quotes and service commitments and then negotiate the commercial terms of carriage specific to their requirements. There is no institutional recollection among Schenker staff where shipper customers actually consult with existing Schenker tariff rates and charges or those of its competitors for purposes of structuring or negotiating their individual shipments with Schenker. Tariff publishing exists merely to meet current regulatory requirements, and never to facilitate the underlying commercial transactions. Generally, applicable rates and charges, as provided in transportation tariffs, which were historically the cornerstone of common carriage, have no current meaning in today's marketplace. NVOCCs must constantly amend their tariffs on a shipper-by-shipper basis to reflect the specific rates negotiated with each customer. Common carriage is no longer

"common" in the current marketplace. Generally speaking, ocean transport is individually tailored on a shipper-by-shipper basis. Additionally, different surcharges which are applied by the underlying vessel operators, which change almost on a daily basis, make it difficult, if not impossible, for NVOCCs to properly set up tariff models which reflect these dynamic changes. Flexibility provided by this Exemption in establishing these changes is a step in the right direction.

In addition to all the above reasons, tariff publication carries with it a very significant cost factor with no corresponding commercial benefit. Schenker agrees with the NCBFAA Petition that it is time for a change to a more reasonable, less rigid paradigm---a flexible marketplace-driven pricing model.

III. Description of Exemption Requested and Corresponding Principles: Schenker Supports All Principles and Suggests Clarifications to Principles 3 and 5.

The NCBFAA stated its Petition as follows: "The NCBFAA requests that NVOCCs be exempted from the 1984 Act requiring NVOCCs to publish and/or adhere to rate tariffs for ocean transportation in those instances where they have individually negotiated rates with their shipping customers and memorialized those rates in writing." Schenker fully supports this request, if the language is taken to include exemption of both rates and charges, but would comment further on Principles 3 and 5 with regard to their portion of the Petition that individually negotiated rates be memorialized in writing. (Page 11, NCBFAA Petition).

As previously noted, Schenker is concerned that the requirement that individually negotiated rates be memorialized in writing, might unwittingly result in onerous documentation requirements that could, if not initially clarified, lead to unintended disputes between ocean carriers and shippers, and even of more concern, could result in an additional layer of agency

regulation, and regulatory exposure to the shipping community. In other words, once a shipper and a carrier have opted to transact business through this Exemption, there should be some assurances that this election will not lead them into a regulatory quagmire---i.e. second-guessing by the Commission staff as to the sufficiency of the documentation memorializing the negotiated rates. If questions of this nature do arise they should only be between the parties---i.e. the shippers and the common carriers that opted for the Exemption, and disputes, if any, should be settled in accordance with contract law principles. This question----sufficiency of the documentation memorializing the negotiated rates---should never become a matter of regulatory concern to the parties. If these assurances are not articulated in the Exemption or the corresponding Principles, their absence could have a chilling effect in the application of the Exemption. Schenker would suggest that Principles 3 and 5 be modified as indicated below, and that they be considered by the Commission when reviewing this Petition.

Note the suggested changes below by Schenker. Additions are underlined and bolded. Schenker believes that the following modified Principles would address its concerns as articulated herein:

3. Negotiated NVOCC rates/charges and any disputes relating thereto between the parties, including but not limited to, issues of the sufficiency of the documentation memorializing the negotiated rates/charges would be governed solely by contract law considerations. As such, these negotiated rates would be specifically exempted from former sections 8(a), (b), (d), (e) and (g); and 10(b)(2), (4), and (8) (now 46 U.S.C. §§40501(a) - (c) and (g); 40503; and 41104(2), (4) and (8)).
5. All negotiated rates and charges would need to be memorialized in writing, so that there would be some written documentation in the event of a dispute. The NCBFAA does not believe, however, that it is necessary or appropriate for the Commission to dictate the particular form that should be used. The parties to such negotiated rate agreements are fully capable of appropriately memorializing the freight rates under which traffic moves and already do so, which helps explain the fact as to why there are so few rate disputes between shippers and the NVOCCs that serve them. If there are ambiguities and omissions in the memorialized writings that

cannot be resolved by reference to the four corners of those writings or to the mutual statements of the parties, the course of performance between the parties shall be evidence of the intent of the parties.

IV. Schenker Suggests Clarification to Principle 2.

As noted above, the NCBFAA does not provide for the option of NVOCCs and their customers opting to exempt Rules. In a marketplace where the shipping industry would have the ability to exempt rates and charges from tariff publishing, it would seem odd and unnecessarily restrictive if they would not also have the commercial flexibility of exempting individual Rules. This latter exemption of individual rules should be specific and in writing.

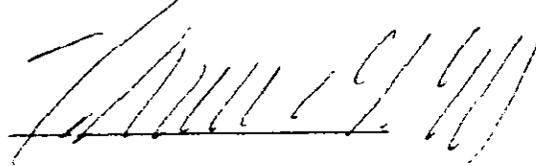
Note the suggested change to Principle 2 below. Additions are underlined and bolded. Schenker believes that the following modified Principle would address its concerns. The following modification to Principle 2 of the NCBFAA Petition is recommended:

2. The Exemption would relate only to rate **and charges** tariffs; rule tariffs would still be maintained by NVOCCs and still be subject to all of the provisions of the Shipping Act, **unless the parties otherwise agree in writing to specifically exempt a particular rule(s) in the NVOCCs tariff.**

The ability to exempt rates, charges, and rules from tariff publishing is a significant step in providing the NVOCC and its customers marketplace flexibility and commercial freedom to structure their relationship so they can efficiently respond to a dynamic competitive marketplace.

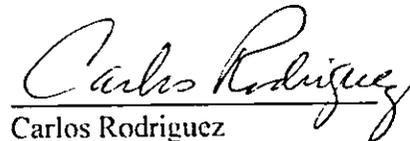
For all of the foregoing reasons, Schenker supports the NCBFAA Petition, and joins in requesting that the Commission initiate a formal proceeding under Section 16 of the Shipping Act of 1984, as amended, to consider exempting NVOCC's from the specified tariff obligations currently required by the Commission's rules and regulations.

Respectfully submitted,



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