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WRITER'S DIRECT DIAL
FEDERAL MARITIME COMMISSION (202) 463-2510

October 20, 2005

VIA HAND DELIVERY

Mr. Bryant VanBrakle
Secretary
Office of the Secretary
Federal Maritime Commission
Room 1046
800 North Capitol Street, N.W.
Washington, D.C. 20573

Re: Docket No. 05-06; Non-Vessel-Operating
Common Carrier Service Arrangements

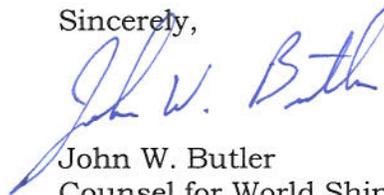
Dear Mr. VanBrakle:

Enclosed please find the original and fifteen (15) copies of the World Shipping Council's comments in FMC Docket No. 05-06, Non-Vessel-Operating Common Carrier Service Arrangements.

A copy of this letter and its enclosure have been provided for your acknowledgement of receipt.

Should you have any questions regarding the foregoing, please do not hesitate to contact me at (202) 463-2510.

Sincerely,



John W. Butler
Counsel for World Shipping Council

/jmb
Enclosure

Before The
FEDERAL MARITIME COMMISSION

NON-VESSEL-OPERATING COMMON CARRIER SERVICE ARRANGMENTS
Docket No. 05-06

COMMENTS OF THE WORLD SHIPPING COUNCIL

The World Shipping Council (“WSC” or the “Council”) submits these comments in response to the Commission’s Notice of Inquiry (NOI) published in the Federal Register on September 2, 2005 (70 *Fed. Reg.* 52345).

The Council commends the Commission for seeking information necessary to understand more clearly the proposal for joint NVOCC Service Agreements (NSAs) by unaffiliated NVOCCs. There are threshold questions of the need for and commercial benefit that could result from jointly offered NSAs. Presumably, the specific responses to the NOI’s questions regarding how such NSAs would be structured and used in the marketplace will provide some insight into these and other factual issues.

In addition to the factual issues that the Commission has properly posed in the NOI, there is also a legal issue that would need to be addressed in the event that the Commission decided to issue a notice of proposed rulemaking with respect to joint NSAs. That question is whether such joint NVOCC action, which would involve agreements on NSA rates and related price discussions, may be considered immune from the antitrust laws under section 7 of the Shipping Act.

This antitrust immunity issue is not a new one. The Commission itself raised the point in its notice of proposed rulemaking in Docket No. 04-12, the docket in which the Commission adopted the basic NSA framework and granted a limited tariff publication exemption for services covered by NSAs. There, the Commission explained that:

The proposed regulation specifically does not permit two or more NVOCCs to offer NSAs in concert, as there is reason for concern that doing so may cause substantial reduction in competition due to the inability of either the Department of Justice under the antitrust laws or the Commission under the Shipping Act to oversee such concerted behavior. Section 7(a)(2)(B) of the Shipping Act provides that the antitrust laws do not apply to “any activity or agreement within the scope of this Act, undertaken or entered into with a reasonable basis to conclude that * * * it is exempt under section 16 of this Act from any filing or publication requirement of this Act.” 46 U.S.C. app. 1706(a)(2)(B). It could be argued that operating under an NSA would constitute activity that has been exempted under section 16 from the tariff publication requirement, and that such activity should therefore be exempt from the antitrust laws. This would mean that NSAs offered by two NVOCCs acting in concert would enjoy immunity from antitrust enforcement, even though their collusive activity is not monitored by the Commission.

69 *Fed. Reg.* 63981, 63986 (Nov. 3, 2004).

The Commission returned to this topic in its final rule in Docket No. 04-12, holding that “in order to ensure that the exemption as proposed will not result in substantial reduction in competition, [the Commission] must limit the exemption to individual NVOCCs acting in their capacity as carriers.” 69 *Fed. Reg.* 75850, 75851 (December 20, 2004). In a related proceeding that addressed the ability of NVOCCs to be “shipper” parties as well as “carrier” parties to NSAs, the Commission found that “recent case law gives us some assurance that courts are not likely to find that NVOCCs acting concertedly in NSAs to be [sic] immune from the prohibitions

of the antitrust laws.” 70 *Fed. Reg.* 56577, 56579 (September 28, 2005) (citing *United States v. Gosselin World Wide Moving, N.V.*, 411 F.3d 502 (4th Cir. 2005)).

WSC agrees with the Commission that the existence or not of antitrust immunity is related to the “substantial reduction in competition” standard under section 16. Accordingly, this is an issue that the Commission must address in the event that it decides to issue a proposed rule regarding joint NVOCC NSAs; however, the NOI does not address it. Should the Commission choose to proceed with a proposed rulemaking or an advance notice of proposed rulemaking, the Council respectfully suggests that the Commission has the ability and the need to resolve the immunity question itself, rather than having to await further guidance from the courts. In this regard, neither *United States v. Tucor*, 189 F.2d 834 (9th Cir. 1999), nor *Gosselin*, 411 F.3d 502, involved review of an FMC decision. As such, neither case prevents the Commission from interpreting section 7(a)(2) in the first instance. See *NCTA v. Brand X Internet Services, Inc.*, 125 S.Ct. 2688 (2005).

The Commission’s reasonable interpretation of section 7(a)(2) should be granted deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Accordingly, should the Commission decide to propose a change to its regulations lifting the condition that the tariff publication exemption is available only to NSAs offered by single or affiliated NVOCCs acting as carriers, then it may and should at the same time explain that there is no antitrust immunity for unaffiliated NVOCCs jointly offering service under an NSA, just as there would be no such immunity today if two NVOCCs discussed or agreed on rates and service terms and published those rates and terms in their respective tariffs.

There are at least two reasons for such a Commission construction of section 7(a)(2). First, section 4(a) provides that “[t]his Act applies to agreements by or among ocean common carriers. . . .” 46 U.S.C. app. § 1703(a). The Shipping Act distinguishes an “ocean common carrier,” defined at section 3(16) as “a vessel-operating common carrier,” 46 U.S.C. app. § 1702(16), from a “non-vessel-operating common carrier,” which does not operate vessels. 46 U.S.C. app. § 1702(17)(B). Section 5 deals with the filing of agreements identified in section 4, *see* 46 U.S.C. app. § 1704, and sections 6 and 7 deal with the effectiveness and antitrust implications of such filed agreements. *See* 46 U.S.C. app. §§ 1705, 1706.

Reading these provisions together, it is clear for present purposes¹ that the “agreements” and “activities” with respect to which the Act provides antitrust immunity are those undertaken by vessel operating common carriers. Indeed, the entire structure of the Act is built around the concept that the filing and Commission oversight of VOCC agreements replaces antitrust regulation for the international liner shipping industry. To find antitrust immunity outside of that comprehensive agreement filing and FMC oversight regime (there is no question that NVOCCs may not obtain antitrust immunity by filing agreements under sections 4-7) would be to disregard the structure of the Shipping Act.

Second, given the structure of the Act, there is a strong argument that the language in section 7(a)(2) relating to agreements or activities “within the scope of this Act” is limited to the agreements and activities within the ambit of sections 4-6. Moreover, the section 7(a)(2) provisions dealing with activities and agreements that are “exempt under section 16 of this Act from any filing or publication requirement of this Act” is most naturally read to apply to the

¹ The Act also applies to certain marine terminal agreements. 46 U.S.C. app. § 1703(b).

filing requirements under section 5 and the publication requirements under section 6. Even absent such a construction, however, the nature of the activity being exempted from a “filing or publication” requirement is critical to the immunity analysis. Here, the activity conditionally exempted is the publication of tariffs under section 8 of the Act, 46 U.S.C. app. § 1707. That limited exemption simply does not speak to the issue of whether joint NSAs are immune from the antitrust laws. Put differently, the exempted “activity” is tariff publication, not the entering into joint NSAs. As noted above, the tariff publication requirements today say nothing about whether NVOCCs could agree on rates and publish those common rates in their respective tariffs, but nobody has suggested or could suggest that such a possibility has any bearing on antitrust immunity. The fact that tariff publication has been replaced with NSA filing similarly has no bearing on antitrust immunity.

Finally, Commission precedent and legislative history make clear that the Commission has the authority to condition a section 16 exemption on a withholding of antitrust immunity. In *Exemption of Certain Marine Terminal Arrangements*, Docket No. 91-20, 57 *Fed. Reg.* 4578 (Feb. 6, 1992), the Commission conditioned an exemption from filing requirements for certain marine terminal operator agreements on a withdrawal of antitrust immunity for such unfiled agreements. In doing so, the Commission relied in part on legislative history that spoke directly to the issue of withholding of antitrust immunity as a condition of granting a section 16 exemption. Specifically, the Commission said:

We refer to an explanatory statement published in the Congressional Record at the request of the leadership of the House Judiciary and Merchant Marine and Fisheries committees to record “important changes” made as a result of certain compromises made by the two committees (Cong. Rec. H 8124 and 8125, October 6, 1983). The explanatory statement recites that the compromise

resulted in new wording which “closely tracks that of section 35 of the Shipping Act of 1916,” adding, “(t)he change permits the Commission to impose conditions upon such an exemption, including the partial or total removal of antitrust immunity for agreements or conduct that might be exempted from filing requirements.”

57 Fed. Reg. 4578, 4580 (quotations and modifications in original).

In sum, both through statutory construction and as a condition to a section 16 exemption, the Commission has the authority to make clear that antitrust immunity does not attach to NSAs jointly offered by more than one unaffiliated NVOCC.

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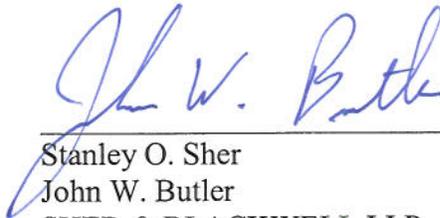
Throughout these related proceedings dealing with NVOCC tariff publication, the Council has accepted regulatory changes that allow NVOCCs to enter into service agreements with their customers. These comments are not intended to signal any change in the Council’s approach to these issues, but to facilitate the Commission’s consideration of how to appropriately address an issue that is obviously presented by the NOI. While the Act may authorize the Commission to extend the tariff publication exemptions granted to date, as well as the conditions applicable to those exemptions, the Commission has not been granted the statutory authority to replicate for NVOCCs the agreement filing and oversight regime that Congress adopted for VOCCs in lieu of antitrust regulation. Accordingly, in the event that the factual information developed through the NOI process convinces the Commission that a change to its existing rules may be warranted, and that to do so would not harm competition, then the Commission should make clear that any removal of the existing prohibition on joint NVOCC NSAs does not confer

antitrust immunity on such activities, both by explaining the reasons for that statutory interpretation and, as a precaution against the hypothetical event that a court might disagree with the interpretation, by conditioning any exemption on the absence of Shipping Act antitrust immunity.

Respectfully submitted,

WORLD SHIPPING COUNCIL

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