

Magdalene Grant

From: Secretary
Sent: Tuesday, September 30, 2008 2:13 PM
To: Karen Gregory; Magdalene Grant
Subject: FW: Petition P1-08
Attachments: Petition P1-08 - NITL Comments.DOC; Petition P1-08 (NITL Comments).pdf

From: DePew, Aimee [mailto:Aimee.DePew@thompsonhine.com]
Sent: Friday, September 26, 2008 3:00 PM
To: Secretary
Cc: Booth, Karyn
Subject: Petition P1-08

Dear Secretary,

Please find attached The National Industrial Transportation League's comments to be filed in the above referenced proceeding. An original and fifteen (15) copies have also been filed with the Secretary's Office at the Federal Maritime Commission.

Also note that Karyn Booth is electing to receive service of the Commission's issuances in this proceeding through e-mail at the following address: karyn.booth@thompsonhine.com.

Regards,

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ORIGINAL

BEFORE THE
FEDERAL MARITIME COMMISSION

Petition P1-08

PETITION OF THE NATIONAL CUSTOMS BROKERS
AND FORWARDERS ASSOCIATION OF AMERICA, INC.
FOR EXEMPTION FROM MANDATORY RATE TARIFF PUBLICATION

COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
IN SUPPORT OF THE PETITION

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Dated: September 26, 2008

**BEFORE THE
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Petition P1-08

**PETITION OF THE NATIONAL CUSTOMS BROKERS
AND FORWARDERS ASSOCIATION OF AMERICA, INC.
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**COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
IN SUPPORT OF THE PETITION**

The National Industrial Transportation League ("League") respectfully files its comments in support of the Petition of the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") to exempt non-vessel-operating common carriers ("NVOCC"s) from the provisions in the Shipping Act of 1984, as amended, that require NVOCCs to publish ocean transportation rates in public tariffs, and to charge only such rates to customers that ship under common carriage arrangements. The League believes that the NCBFAA's proposal readily meets the exemption standards set forth at 49 U.S.C. § 40103 and would lead to substantial commercial benefits for NVOCCs and their customers. The League agrees with NCBFAA that the deregulatory changes adopted since 1984 and, more recently, in the Ocean Shipping Reform Act of 1998 ("OSRA"), have dramatically changed ocean shipping business practices such that carriers (both VOCCs and NVOCCs) and their customers negotiate rates and service terms that will apply to ocean transportation movements. Tariffs are rarely reviewed or consulted by shippers to determine ocean transportation pricing and function more as a costly regulatory afterthought that must be prepared or updated by NVOCCs after a negotiation has occurred. Thus, the League believes that the FMC should seek to align the regulation of ocean shipping more closely to the actual operations of the marketplace.

As explained further herein, although the League supports the granting of an exemption from the publication and enforcement of NVOCC tariff rates, it also believes that the exemption should be extended to specific services that are negotiated simultaneously between an NVOCC and its customer. This would avoid confusion and uncertainty that would occur if the exemption is applied only to rates but the Parties have also agreed upon specific service terms for the same shipment. Alternatively, another means of the risk addressing of confusion over the service terms that apply to exempt NVOCC shipments would be to require NVOCCs to include a disclosure statement on the written communications containing exempt rates that would inform the shipper that the terms of service are contained in published rules tariffs, as well as where to access such terms.

I.

INTEREST OF THE LEAGUE

The League is an organization of companies that conduct industrial and/or commercial operations throughout the United States and internationally. The League is composed of approximately 700 member companies that tender goods for shipment, and transport or arrange for the transportation of freight of all kinds in both interstate and international commerce. The League's members include multinational corporations as well as small- to medium-sized companies that span a multitude of industries, and they ship both raw materials and finished products using all modes of transportation, including ocean transportation by vessel. Thus, manufacturers, commercial retailers, logistics services providers, freight forwarders, and carriers comprise a sample cross-section of the League's membership. However, the vast majority of the League's members are companies that tender goods to carriers for transportation in international and interstate commerce.

II.

COMMENTS OF THE LEAGUE

Post-OSRA, the ocean shipping industry has been transformed into a system where carriers and their customers no longer rely on regulated price lists to move international cargo by sea, but rather the needs of the marketplace are met through negotiated rates and service terms that are tailored to specific business requirements and transactions. The League believes that the sweeping shift from common carriage to a system based primarily on contract carriage, resulted from the contractual freedoms in OSRA allowing shippers and vessel operators to customize shipping arrangements in individual confidential service contracts. The success and impact of OSRA is evidenced by the nearly two million service contracts entered since the adoption of OSRA, and the fact that tens of thousands of service contracts are entered into on an annual basis.

More recently, in December of 2004, the FMC extended formal contracting rights to NVOCCs by authorizing NVOCC Service Arrangements ("NSA"). NSAs were permitted in response to petitions from large NVOCCs that requested contracting authority to meet the demands of their customers and to compete more effectively with VOCCs that benefitted from OSRA's contracting freedoms. The League supported the adoption of NSAs which are subject to similar regulatory requirements as VOCC service contracts (i.e. filing with the FMC, essential terms publication, etc.), in order to facilitate integrated logistics contracts that have proliferated in the industry and to further the deregulatory policies of OSRA.¹ Unlike VOCC service contracts, the NSA authority has not been utilized substantially by the NVOCC industry. As noted by NCBFAA, less than 2,000 NSAs were filed as of April 2008, and only 106 NVOCCs

¹ At the time that the FMC granted the NSA authority, the agency denied NCBFAA's request for an exemption from tariff publication.

have entered into NSAs, although more than 4,000 NVOCCs are licensed by the FMC.

NCBFAA Petition, p. 7.

Nearly four years after the NSA authority was granted, the NCBFAA is asking the FMC to exercise its exemption power to respond to the changing needs and existing practices of the marketplace and take the next step in advancing the deregulatory purpose of OSRA by exempting NVOCCs from the tariff publication and enforcement requirements. In particular, the proposed exemption is intended to address NVOCC business which is not conducted under longer-term volume contracts but rather the more common circumstance in which shipments are handled on an individual or "spot" basis. The spot market for reselling vessel space is dynamic and the Parties need the flexibility to respond to changing market conditions. Shippers do not rely on published tariff prices to obtain competitive rates for the movement of their cargo. Instead, they prefer the faster, cheaper and more responsive method of contacting NVOCCs via phone, email or fax and negotiating a movement specific rate.

A. The Proposed Exemption Meets the Exemption Standards and Would Result in Significant Benefits to Shippers and NVOCCs

The NCBFAA's proposed exemption includes the following elements:

- The exemption would be voluntary and not mandatory, and could be utilized only by licensed and bonded NVOCCs
- The exemption would apply only to tariff rates, but rules tariffs would continue to be maintained and subject to all provisions of the Shipping Act
- Rates negotiated between NVOCCs and their customers would be required to be set forth in writing
- Negotiated rates would not be subject to the tariff requirements or enforcements provisions in the Shipping Act (49 U.S.C. §§ 40501 (a)-(e) and (g), 40503, and 41104(2), (4) and (8))
- Disputes concerning negotiated rates would be governed by contract law

- The exemption would not affect NVOCC Service Arrangements and would not convey antitrust immunity on NVOCCs
- The FMC would retain access to the negotiated rate agreements and communications

NCBFAA Petition, p. 11.

Under OSRA, the FMC may exempt "any specified activity" from regulation if the exemption "will not result in substantial reduction in competition or be detrimental to commerce." 49 U.S.C. §40103(a). The proposed tariff exemption would clearly meet the statutory exemption criteria. First, the exemption is likely to promote competition by eliminating substantial regulatory costs for NVOCCs, thereby increasing their potential to offer competitive ocean rates to their customers. In addition, because relatively few NVOCCs have chosen to take advantage of NSAs, the proposed exemption will allow the vast majority of the NVOCC industry to compete more effectively with VOCCs that operate predominantly in a more flexible contract environment, in which rate amendments can be achieved efficiently. Furthermore, the primary purpose of tariff publication, which is to prevent discriminatory pricing among shippers, is no longer a protection that is required or desired by shippers. This is because of the abundance of ocean transportation intermediaries that operate in the U.S. foreign commerce, as well as VOCC and shippers' association options, which provide shippers with many service choices and allows shippers to obtain competitive pricing in most cases. Also, the vast majority of shipments transported internationally move under contracts which permit different and customized pricing.

The League does not believe that granting the proposed tariff exemption for NVOCCs will create a competitive disadvantage for VOCCs. The operations of VOCCs and NVOCCs are substantially different. VOCCs tend to contract with large multi-national shippers for the movement of full container loads of cargo under longer-term arrangements, whereas, many NVOCCs handle less-than-containerload shipments for small to mid-sized companies frequently

on a spot basis. Allowing NVOCCs to negotiate rates with their customers that do not get subsequently published in a tariff will not undermine the competitiveness of VOCCs who already offer confidential contract rates to their customers. Also, the regulatory structure already distinguishes NVOCCs from VOCCs based on the licensing and bonding requirements applicable only to NVOCCs, as well as the grant of antitrust immunity provided solely to VOCCs.

Second, granting the proposed exemption would not be detrimental to commerce. To the contrary, it would result in substantial benefits to NVOCCs and their customers. In particular, the exemption would enable NVOCCs to respond more efficiently to changing market conditions by eliminating the regulatory burdens associated with tariff publication. Replacing tariff publication with the more flexible system of negotiated rates would also benefit NVOCCs and shippers by aligning the regulatory system more closely with the businesses practices in the industry. Furthermore, as tariff filing and enforcement have been virtually eliminated from the international air and domestic air, truck and rail modes, a granting of the proposed exemption would establish a regime for NVOCC pricing that is more consistent with the regulation of intermediaries in other U.S.-based transportation industries, as well as the systems of nearly all of our major international trading partners.

Moreover, as shippers rarely review published tariffs to determine NVOCC pricing, the publication obligations have largely become a make-work exercise that is costly and burdensome. Shippers obtain limited benefits from tariff publication but are required to bear the regulatory expenses that are passed through to NVOCC customers. The proposed exemption would not be detrimental to the U.S. foreign commerce because it would eliminate requirements and costs that are impediments to achieving more competitive and efficient transportation

services. The proposed exemption would also further the commerce of the nation by advancing the policy of OSRA to “promote the growth and development of United States exports through competitive and efficient ocean transportation and *by placing a greater reliance on the marketplace.*” 49 U.S.C. § 40101(4) (emphasis added).

Accordingly, the League believes that the tariff publication exemption proposed by NCBFAA meets the statutory exemption criteria, and should be granted by the FMC, along with the modifications proposed herein.

B. The FMC Should Apply the Exemption to Service Terms Negotiated in Conjunction with Ocean Rates

Under the NCBFAA's proposal, negotiated rates between NVOCCs and their customers would be exempt from regulation but the service terms for such shipments would continue to be set forth in published rules tariffs that are subject to regulation under the Shipping Act. The League is concerned that this dichotomy within a shipment that contains deregulated rates but regulated service terms has the potential to create uncertainties between the NVOCC and its customer as to the total "package" of applicable terms and conditions. This potential for uncertainty exists because, in some cases, rate negotiations with NVOCCs also include negotiations over service terms, such as vessel capacity, cargo loss and damage rules, equipment needs, and delivery requirements, among other terms. Thus, the shipper would reasonably expect that the negotiated service terms would apply to the transportation service. However, that would not appear to be the case under the propose exemption, if the NVOCC rules tariff is inconsistent with the negotiated terms. Because the proposed rate exemption is intended primarily to address smaller volumes of shipments moving in the spot market, it is not reasonable to expect that the NVOCC will modify its rules tariff each time it negotiates alternative service terms with a shipper, especially for shipments that are time sensitive.

Accordingly, in order to eliminate the potential for uncertainty and disputes between the NVOCC and its customer over the service terms applicable to a shipment involving exempt rates, the League requests that the proposed exemption be applied to service terms that are negotiated between NVOCCs and their customers in conjunction with rates, as long as the services terms are also memorialized in writing. Applying the exemption to negotiated service terms would reflect the actual commercial dealings that occur between NVOCCs and shippers and would meet the statutory exemption criteria (i.e. no substantial reduction in competition and not detrimental to commerce) for the same reasons that exempt rates satisfy the standards (*see* Section II.A., *supra*). This would provide a more workable approach for smaller and mid-sized shippers that use NVOCC services but do not have larger volumes that would justify the negotiation of a longer-term NSA.

C. Alternatively, NVOCCs Should Include a Disclosure Statement in the Written Communication Containing Exempt Rates

Alternatively, if the FMC decides not to apply the exemption to negotiated service terms, then the FMC should require NVOCCs to include in the written communication or document containing exempt rates a disclosure statement informing shippers that the applicable service terms are set forth in a published rules tariff, and setting forth the means to access such service terms. This would at least ensure that shippers have notice of the applicable service terms and would eliminate the potential for disputes over conflicting terms. The League believes that the disclosure statement would be necessary to protect the interests of small and mid-sized shippers that may be less sophisticated with respect to international transportation movements and may not be familiar with the tariff publication requirements. Requiring the disclosure statement would help to provide clarity over which terms of service are to apply if conflicting service terms exist.

III.

CONCLUSION

For the foregoing reasons, the League respectfully requests that the FMC grant the exemption proposed by the NCBFAA, and that the agency extend the exemption to service terms negotiated between NVOCCs and their customers simultaneously with rates. Alternatively, the FMC should require NVOCCs to include a disclosure statement on written communications containing exempt rates that informs shippers of the location and access of rules tariffs that contain the applicable service terms.

Respectfully submitted,

THE NATIONAL INDUSTRIAL
TRANSPORTATION LEAGUE

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