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FEDERAL MARITIME COMMISSION

**BEFORE THE  
FEDERAL MARITIME COMMISSION**

**FMC Docket No. P1-08**

**Petition of National Customs Brokers and Forwarders Association of  
America, Inc. for Exemption from Mandatory Rate Tariff Publication**

**COMMENTS**

**SUBMITTED BY THE**

**TRANSPORTATION INTERMEDIARIES ASSOCIATION**

TRANSPORTATION INTERMEDIARIES ASSOCIATION  
1625 N. Prince Street  
Suite 200  
Alexandria, VA 22314  
703-299-5700  
[www.tianet.org](http://www.tianet.org)

Robert A. Voltmann  
President & CEO

September 18, 2008

The Transportation Intermediaries Association (TIA) submits these comments in support of the Petition of the National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA) for an exemption from tariff rate publications currently applicable to non-vessel-operating common carriers (NVOCCs).

#### **IDENTITY AND INTEREST OF THE TRANSPORTATION INTERMEDIARIES ASSOCIATION**

TIA is the professional organization of the \$162 billion third party logistics industry. TIA is the only U.S. organization exclusively representing transportation intermediaries of all disciplines doing business in domestic and international commerce. TIA is the voice of transportation intermediaries to shippers, carriers, government officials, and international organizations.

TIA members include approximately 1200 motor carrier property brokers, surface freight forwarders, international ocean transportation intermediaries (ocean freight forwarders and non-vessel-operating common carriers), air forwarders, customs brokers, warehouse operators, logistics management companies, intermodal marketing companies, and motor carriers.

TIA is also the U.S. member of the International Federation of Freight Forwarders Associations (FIATA), the worldwide trade association of transportation intermediaries representing more than 40,000 companies in virtually every trading country.

#### **THE ROLE OF TRANSPORTATION INTERMEDIARIES**

Transportation intermediaries or third party logistics professionals act as the "travel agents" for freight. They serve tens of thousands of shippers and carriers, bringing together the

transportation needs of the cargo interests with the corresponding capacity and special equipment offered by rail, motor, air, and ocean carriers. Transportation intermediaries play a key role in cross border transportation.

Transportation intermediaries are primarily non-asset based companies whose expertise is providing mode and carrier neutral transportation arrangements for shippers with the underlying asset owning and operating carriers. They get to know the details of a shipper's business, then tailor a package of transportation services, sometimes by various modes of transportation, to meet those needs. Transportation intermediaries bring a targeted expertise to meet the shippers' transportation needs.

Many shippers in recent years have streamlined their acquisition and distribution operations. They have reduced their in-house transportation departments, and have chosen to deal with only a few "core carriers" directly. Increasingly, they have contracted out the function of arranging transportation to intermediaries or third party experts. Every Fortune 100 Company now has at least one third party logistics company ("3PL") as one of its core carriers. Since the intermediary or 3PL, in turn, may have relationships with dozens, or even thousands, of underlying carriers, the shipper has many service options available to it from a single source by employing an intermediary.

Although intermediaries are described in the business and trade literature as "non-asset-based," many intermediaries in fact own some assets, broadly defined. These include local pick up and delivery vehicles, over the road trucks, warehouses and cargo consolidation centers, complex computer and telecommunications systems, dispatching centers and sales offices.

Past studies submitted by FIATA in earlier FMC tariff exemption proceedings (*see, e.g.*, Tariff Filing by Non-Vessel-Operating Common Carriers, Docket No. 92-22, Statement of Paul Unsworth), and included in testimony before Congress when it was considering the legislation that became the Ocean Shipping Reform Act of 1998 (OSRA), have shown that there are thousands of companies in the intermediary industry. Despite this fragmentation and intense competition, approximately 80% of the non-vessel-common carrier (“NVOCC”) business is controlled by 20% of the companies. Most of those 20% are very large companies that move many thousands of containers annually. The rest are small to medium size companies, many owned and run by their founders, who aspire to the success of their larger counterparts, and compete head-to-head with the majors in niche or specialized markets where they can gain a competitive edge.

#### **SHIPPERS AND CARRIERS RELY ON TRANSPORTATION INTERMEDIARIES**

Shippers rely upon transportation intermediaries to arrange for the smooth and uninterrupted flow of goods from origin to destination, and many carriers rely upon them to keep their equipment filled and moving. It is, therefore, difficult to describe a typical intermediary, or to divide them into fixed categories. Most in international trade offer a mix of land, sea, and air services, customs brokerage (either directly or through subcontractors), warehousing, consolidation and deconsolidation, electronic tracking and tracing and trade advisory services (advice on letters of credit, commercial shipping terms, export administration requirements, transportation security and the like) adapted to the needs of their specific customer base or market niche.

## THE FMC SHOULD GRANT THE REQUESTED EXEMPTION FROM TARIFF PUBLICATION

TIA strongly supports the general concept that the Commission should consider using its exemption authority under the Shipping Act of 1984 to relieve NVOCCs from the burden and expense of tariff publication. Indeed, FIATA and the International Conference of TIA (previously the American International Freight Association) first petitioned the FMC for such an exemption in 1991, and they were active in the legislative efforts that led to the expansion of the FMC's exemption authority under OSRA.

OSRA gave the Commission clear legal authority grant such an exemption. Under 46 USC 40103, the Commission may grant an exemption from any requirement of the Act if it finds that the exemption "will not result in substantial reduction in competition or be detrimental to commerce." OSRA repealed the parts of the statutory standard that acted as an obstacle to FMC action in an earlier exemption proceeding on the FIATA petition: there is no longer a requirement that it must find that the proposed exemption would not substantially impair effective regulation by the Commission or be unjustly discriminatory. Thus, in considering an exemption, the Commission now is directed by Congress to decide only whether it would reduce competition or otherwise be harmful to commerce.

To remove any doubt whatsoever about the FMC's authority to grant tariff exemptions, OSRA amended the tariff enforcement provisions of the Act, 46 USC 41104 (2)(A), to provide that no common carrier may "provide service in the liner trade that is not in accordance with the rates, charges, classifications, rules and practices contained in a tariff published . . . under Chapter 405 of this Title . . . *unless . . . exempted under Section . . . 40103 . . . of this Title.*" (Emphasis

added) This cross reference to the statutory exemption authority, which did not exist in the pre-OSRA statute, makes clear that the exemption authority in Section 40103 applies to the tariff requirements in Chapter 405 of the statute.

Since the Commission has the authority to grant exemptions from tariff publication, the only remaining question is one of public policy: should the Commission grant such an exemption? TIA endorses and agrees wholeheartedly with the grounds set forth in the NCBFAA petition. TIA members report that their customers never check the published tariff rates or complain about rate discrimination. Indeed, in a Statement of Common Principles Concerning a Section 16 Exemption for NVOCCs, agreed to by TIA, the NCBFAA and the National Industrial Transportation League on January 12, 2004 and submitted to the Commission in support of the earlier exemption petition, trade associations representing both shippers and intermediaries stated: "The administrative cost incurred by NVOCCs to publish tariffs far exceed any consumer benefits, since very few NVOCC customers rely on published tariffs to obtain NVOCC pricing information."

Because the FMC has no authority to regulate the level or reasonableness of NVOCC rates, the publication of rates in a tariff has become a pointless exercise in regulatory compliance serving no useful public policy or commercial purpose. Furthermore, NVOCCs are required by the FMC's regulations to keep complete accounting records for every shipment, so the existing tariff publication requirement merely duplicates that effort at significant additional cost. If there is a dispute with a customer or a need for an audit, those records are readily available to both parties. Rail, truck and air freight forwarders have been operating under such a system for many years,

handling millions of shipments without any complaint from their customers or the underlying service providers about the need for a published tariff. The time is long past when ocean transportation intermediaries should be permitted to adopt the same practices for sea transportation that many of them are already using when it comes to arranging transportation by all of the other modes.

Tariffs are not required in any other mode of transportation. According to the Council of Supply Chain Management Professionals (CSCMP) and their 18<sup>th</sup> Annual State of Logistics Report, logistics expenditure represents nearly 10 percent of the gross domestic product of the United States, or \$1.31 trillion. International water transportation accounted for only \$32 billion according to the report. When compared to the \$635 billion in truck transport, \$54 billion in rail transport, and \$38 billion in air transport, all of which is conducted without government required tariff filing or publication, it is clear that tariff requirements in ocean transportation have outlived their usefulness. Shippers in U.S. domestic trade and shippers around the world have shown the ability to manage their supply chain without the need of tariffs.

The complexity of the global supply chain has required the development of new sources of information beyond the antiquated tariff system. Shippers, carriers, and 3PLs are now engaged in a complex global supply chain that must change and react to changes around the world at a moment's notice. The CSCMP report's author, Rosalyn Wilson, stated, "There are more resources available to know how to plan a move. Shippers are now armed with enough knowledge to discuss things with their 3PL providers. They can now set some realistic expectations, and shippers are taking the responsibility to know that. There's a much higher

degree of collaboration. Shippers are now willing to share information that they didn't want to share before, so everybody can make better decisions." Ms. Wilson further stated that, "The complexity has increased but we're beginning to master it."

Not only are tariffs no longer necessary, the supply chain has become too complex for isolated government regulation of a single mode. A single shipment may originate in multiple foreign inland points and deliver to multiple inland U.S. points. Shippers often rely on a single 3PL partner to manage this complex supply chain from origin to destination. The requirement to isolate a relatively small portion of the movement for inclusion in an ocean tariff, when the U.S. government does not require tariffs for the other modes of transportation, is often as complex as the overall supply chain execution. And, the filing or publication of the tariff adds cost without benefit to the shipper, 3PL, or consumer. It is for this very reason that tariffs were eliminated in air, rail, and highway transportation, and Congress gave the Commission the authority to end tariffs in ocean freight as well.

TIA would also note that the outdated system of tariff publication, which was originally intended to guarantee certainty and uniformity in the assessment of rates and charges, has evolved into a complex system that often has the opposite effect, and that inhibits the ability of shipper and intermediary to state the terms of their commercial arrangements in easily understood, plain language. For example, intermediaries often act as both forwarder (agent) and carrier (NVOCC) on different segments of a transportation movement. While the commercial arrangements between the parties may be clear to them both, the way that those arrangements are expressed in tariff language can give rise to confusion never intended by the parties. The Congress attempted

to remedy this and similar problems by adding language in Section 13(f) of the Shipping Act, 46 USC 41109(d), that makes the “amount billed and agreed upon in writing” between carrier or NVOCC and shipper controlling, even if the tariff for whatever reason does not conform to that rate. By exempting written rate agreements from the tariff publication requirement, as the petition requests, the Commission would eliminate this potential source of confusion altogether.

For the reasons set forth above and in the NCBFAA petition, the Transportation Intermediaries Association supports prompt Commission action to exempt NVOCCs from the statutory tariff publication requirements.

Respectfully submitted,

GARVEY SCHUBERT BARER

By:



Richard D. Gluck  
1000 Potomac Street, NW  
5<sup>th</sup> Floor  
Washington, DC 20007  
(202) 965-7880  
Attorneys for Transportation Intermediaries  
Association

Robert A. Voltmann  
President & CEO  
Transportation Intermediaries Association  
1625 N. Prince Street  
Suite 200  
Alexandria, VA 22314  
(703) 299-5700

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**CERTIFICATE OF SERVICE**

I, Richard D. Gluck, hereby certify that on September 18, 2008, a copy of the attached Comments submitted by the Transportation Intermediaries Association was served via first class mail, postage prepaid upon the following counsel for petitioners:

Edward D. Greenberg  
Galland Kharasch Greenberg Fellman & Swirsky, P.C.  
1054 Thirty-First Street. NW  
Washington, DC 20037-4492  
Counsel for The National Customs  
Brokers and Forwarders Association of America, Inc.

  
Richard D. Gluck