

Magdalene Grant

From: Secretary
Sent: Tuesday, September 30, 2008 2:21 PM
To: Karen Gregory; Magdalene Grant
Subject: FW: DOT comments, Petition P1-08
Attachments: 2008FMC Comments.doc

From: Paul.Smith@dot.gov [mailto:Paul.Smith@dot.gov]
Sent: Friday, September 26, 2008 9:16 AM
To: Secretary
Subject: DOT comments, Petition P1-08

Dear Assistant Secretary:

Attached hereto are the comments of the U.S. Department of Transportation in the above-referenced docket. The comments are in an electronic format (Microsoft Word), and pursuant to the Notice served August 5, 2008, the original and 15 copies will be hand-delivered to the Federal Maritime Commission today. Please contact me if you have any questions.

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exemption authority to remove presently-applicable tariff publication and adherence requirements in a manner that would allow NVOCCs to enter into the same sorts of private and confidential contracts that vessel operators are specifically allowed to utilize under Section 8(c) of the Shipping Act of 1984, 46 U.S.C. § 40502.

The United States Department of Transportation (“DOT” or “Department”) strongly supports the deregulatory relief sought in NCBFAA’s petition. Vessel operating carriers continue to benefit from their ability to enter into one-on-one confidential contracts with shippers, and there is no regulatory reason to restrict the ability of NVOCCs to exercise this same commercial freedom. DOT over the years has urged the Commission to exercise its exemption authority to relieve this class of carriers from the tariff publication and adherence requirements that burden only NVOCCs. As we have pointed out in the past, the FMC has ample basis and authority to exempt all NVOCCs from tariff publication and adherence requirements.

Background

DOT first urged the FMC to exercise its statutory exemption authority to exempt NVOCCs from tariff filing requirements seventeen years ago in FMC Docket No. 91-1, Bonding of Non-Vessel-Operating Common Carriers. Following DOT’s recommendation the International Federation of Freight Forwarders Associations (“FIATA”) filed a petition seeking such an exemption in FMC Docket No. P5-91, Petition for Exemption from the NVOCC Tariff Filing Requirements Under the Shipping Act of 1984. In DOT’s comments in Docket P5-91 we stated as follows:

[T]here is little justification for continuing to require tariff filing by NVOCCs. It has been the shared experience of the Department and other federal transportation agencies that in a competitive environment price and service offerings change rapidly, and that regulatory mechanisms such as

tariff filing requirements can impede innovation by imposing unnecessary financial costs as well as by hampering a firm's ability to respond quickly in the marketplace. Moreover, and as DOT . . . pointed out in its previous comments [in Docket No. 91-1], the burdens of tariff filing weigh disproportionately heavily on NVOCCs, which tend to be small enterprises, and which may lack the administrative capacity to file and maintain tariffs. There is no reason to continue to impose these burdens on NVOCCs since, in today's market, there is no readily discernible public or regulatory benefit to be gained from a continuation of tariff filing by NVOCCs. . . . [S]ubstantially similar exemptions granted by other administrative agencies have already demonstrated the salutary effects of freeing transportation intermediaries such as NVOCCs from the burdens of tariff filing and adherence.

Comments of the United States Department of Transportation dated January 21, 1992 ("1992 DOT Comments") at 2-3.

The FMC denied FIATA's petition for an exemption, but contemporaneously it commenced an Advance Notice of Proposed Rulemaking in Docket 92-22, where the Commission sought comments concerning a proposed more narrow exemption for NVOCCs. DOT again supported these proposals and noted that "exempting NVOCCs from tariff filing altogether would obtain the greatest advantage for the affected firms and their shippers." Comments of the United States Department of Transportation dated July 6, 1992 at 9.

Ultimately the Commission discontinued Docket 92-22 when the four sitting Commissioners deadlocked 2-2 on whether to proceed with the rulemaking. The Commission's notice stated that "[t]he only point of possible agreement was that [either] result was equally unsatisfactory to all concerned." Tariff Filing by Non-Vessel-Operating Common Carriers, 26 S.R.R. 965, 966 (FMC 1993). However the FMC at that time issued the following public statement on behalf of then-Chairman Koch, who favored proceeding with the proposed rule:

So long as there is a reasonable basis to believe that the FMC can bring less regulation, increased flexibility and greater competition to the NVOCC marketplace, I believe we should try to do so. We must be mindful of the Shipping Act's terms and mindful of court precedent, but so long as we can proceed, I believe we should. It might be easier and less bother to tell parties seeking change to go to Congress for relief. But we are the agency empowered with the expertise and authority to address the conditions of our foreign shipping, and we should not tell Congress to make the decisions if we can. I believe we can and I believe we should try to improve the regulatory system.

26 Pike & Fischer Shipping Regulation Reporter at 466-68 (1992).

The Commission next examined this issue in 2003 and 2004 when a number of NVOCCs again filed petitions asking the Commission to exercise its exemption authority to remove applicable tariff publication and adherence requirements in a manner that would allow them to enter into private and confidential contracts with their shippers, the same sorts of contracts that vessel operators are specifically allowed to utilize under 46 U.S.C. § 40502. The Department again participated in the proceeding and urged the Commission to exercise its exemption authority to remove tariff publication and adherence requirements. Comments of the United States Department of Transportation, FMC Petition Nos. P3-03, P5-03, P7-03, P8-03 P9-03 (January 16, 2004).

The Commission agreed at that time that the exercise of its exemption authority in this area was proper and would serve the public interest; however its solution to matters raised in the petitions fell short of full deregulation. Rather, the Commission instituted a rulemaking in Docket 4-12 that culminated in a final rule, issued on December 15, 2004, authorizing NVOCCs to enter into formal written contracts with customers, denominated "NVOCC Service Arrangements" ("NSAs"). While NSAs can be individually negotiated between NVOCCs and their underlying shippers, they are still required to be filed with the Commission and their essential terms must be published in tariff format.

The Instant Petition

NCBFAA's present petition again seeks an exemption from the tariff publication and adherence provisions of the Shipping Act of 1984 to the extent necessary to allow NVOCCs to negotiate and enter into non-tariffed private shipping arrangements with their underlying shippers. As such, NCBFAA's present petition would exempt NVOCCs from the presently-applicable filing requirements relating to NSAs.² DOT supports that request.

The arguments in favor of exempting NVOCCs from statutory tariff requirements that DOT first offered in 1992 remain valid today. Indeed, the case for granting NVOCCs an exemption from the tariff publication requirements of the 1984 Act grows stronger with each passing year. As NCBFAA's petition and the verified statements attached thereto amply attest, particularly since the passage of the Ocean Shipping Reform Act of 1998 ("OSRA"), the marketplace has chosen private contracting over the anachronistic, costly and unwieldy tariff approach. While NSAs are an attempt to accommodate NVOCC practices to the reality of the marketplace, it is evident that the approach does not go far enough and at the same time imposes unnecessary burdens and costs on the forwarding industry. NCBFAA demonstrates that the option is unneeded

^{2/} NCBFAA's proposed exemption would incorporate the following principles: (1) the exemption would be voluntary, (2) the exemption would relate only to rate tariffs, not rules tariffs, (3) disputes concerning exempt contracts would be settled solely under contract law, (4) NSAs, to the extent still utilized, would continue to be filed with the Commission and NSA essential terms would continue to be published, (5) exempt contracts would be required to be memorialized in writing, (6) the Commission would have access to documentation relating to exempt contracts, (7) the exemption would not be construed to extend antitrust immunity to NVOCCs, and (8) only NVOCCs that are duly licensed ocean transportation intermediaries would be able to utilize the exemption.

from a regulatory standpoint, little used³ and imposes costly burdens on the industry in those few circumstances in which NSAs are used. *Id.* At 9.

Even more importantly, the costs and burdens of continued tariff publication and adherence requirements demonstrably are serving no public benefit. As NCBFAA points out, shippers in today's market seek to enter into individually negotiated carriage arrangements. This process is no longer driven by any vestigial notion that shippers need, or depend upon, the regulatory structure and publication requirements imposed on NVOCCs. Particularly telling is the evidence supplied by NCBFAA indicating that the rate tariffs maintained by its members are not utilized by shippers and that in some instances these "rate tariffs have never been accessed by a shipper." NCBFAA Petition at 9, note 11.

Exempting NVOCCs – the only ocean common carriers currently precluded from carrying cargo pursuant to confidential contracts – from the tariff publication requirements set forth in Section 8 of the 1984 Act will benefit shippers and carriers by allowing them universally to enter into precisely the types of confidential shipping arrangements that the post-OSRA market demands. The marketplace has demonstrated that the tariff mechanism is simply too inflexible to accommodate either the wide range of agreements that shippers and carriers may be willing to enter into in one-on-one negotiations or the pace of the ever-changing industry.

It is also clear that the Commission has ample authority to grant the exemption sought by NCBFAA. Indeed, the Commission's exemption authority has already been

³ / As NCBFAA's petition attests, in the 3-1/2 years that the NSA option has been available to the over 4,000 licensed NVOCCs, only a total of 1,860 NSAs have in fact been filed with the Commission. NCBFAA Petition at 8, and note 8.

exercised in this area when it agreed four years ago to impose NSA requirements by exemption.

DOT argued in 1992 that it would have been completely proper for the Commission, in the public interest, to have exercised its authority under Section 16 of the 1984 Act to remove NVOCC tariff filing requirements. We noted then that “[e]xemption provisions similar to Section 16 are commonplace in federal regulatory schema, and . . . have been utilized often by regulatory agencies in the past to exempt classes of parties from otherwise applicable statutory constraints.” 1992 DOT Comments at 5. See Central & Southern Motor Freight Tariff Ass’n. v. United States, 757 F.2d 301 (D.C. Cir.) cert. denied 474 U.S. 1019 (1985) (upholding an Interstate Commerce Commission decision to exempt motor contract carriers from tariff filing requirements); Brae Corp. v. United States, 740 F.2d 1023 (D.C. Cir. 1984) (holding that the Interstate Commerce Commission’s general exemption of boxcar freight rates from regulation was proper use of exemption authority); National Small Shipments Traffic Conference v. CAB, 618 F.2d 819 (D.C. Cir. 1980) (upholding the Civil Aeronautic Board’s exercise of exemption authority to exempt all cargo air carriers from tariff filing requirements).

The case for the exercise of the Commission’s exemption authority has only grown stronger over the years. Thus, the 1998 OSRA amendments to the 1984 Act expressly made the requirements of Section 16 more flexible, requiring only that an exercise of exemption authority “will not [1] result in substantial reduction in competition or [2] be detrimental to commerce.” In fact, Congress stated that the 1998 OSRA amendment to Section 16 that established this more flexible two-prong test was intended to encourage the FMC to exercise its exemption authority more freely in order to remove

unnecessary and obsolete regulatory constraints. The legislative history of OSRA explains that “while Congress has been able to identify broad areas of ocean shipping commerce for which reduced regulation is warranted, the FMC is more capable of examining through the administrative process specific regulatory provisions and practices . . . [that] can be deregulated” Senate Report No. 61, 105th Cong., 1st Sess. at 30 (1997).

The exemption standard is clearly met in the context of this petition. Removing the remaining tariff publication and adherence requirements imposed currently on NVOCC rates would enhance competition and commerce and would free NVOCCs from a burdensome and unnecessary regulatory requirement.

Conclusion

For the foregoing reasons DOT supports the exemption petition filed by NCBFAA. The Department urges the Commission to issue an exemption that would free NVOCCs from the remaining tariff publication and adherence requirements of Section 8 of the 1984 Act.

Respectfully submitted,

D.J. Gribbin
General Counsel

September 26, 2008

CERTIFICATE OF SERVICE

I certify that the foregoing document has been served on the following party by
email as well as by United States Postal Service, First Class delivery:

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Dated: September 26, 2008