From: "Craig, Ashley" <ACRAIG@thompsoncoburn.com>
To: "ZZFMC - Secretary" <secretary@fmc.gov>
Date: 10/4/04 5:30PM
Subject: Reply Comments of the Topocean Group (Topocean Consolidation Service)

Mr. VanBrakle:

Please find attached the reply comments of the Topocean Group (Topocean Consolidation Service) in response to the Joint Supplemental Comments submitted in Dockets Nos. P3-03, P5-03, P7-03, P8-03, P9-03, P1-04, P2-04, and P4-04.

As discussed, we understand that the comment period has closed for this matter but kindly ask that the Commission consider Topocean's comments for the record in the above proceedings.

Thank you for your cooperation and assistance. Please contact us with any questions.

Regards,

Ashley Craig

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<<Picture (Metafile)>>
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October 4, 2004

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Via E-Mail and Express Courier

Bryant L. VanBrakle, Secretary
Federal Maritime Commission
800 North Capitol Street, N.W., Room 1076
Washington, D.C. 20573

Re: **Reply Comments to the Joint Supplemental Comments Requesting Expedited Adoption of a Conditional Exemption from Tariff Publication**
FMC Dkt Nos. P3-03, P5-03, P7-03, P8-03, P9-03, P1-04, P2-04, and P4-04

Dear Mr. VanBrakle:

On behalf of our client, Topocean Consolidation Service ("Topocean"), we enclose for filing with the Commission a PDF version of Reply Comments in the above-referenced matters. The original and 15 copies will be filed with the Commission via Federal Express. While the comment period closed on September 30, 2004, we respectfully request that the Commission consider Topocean's comments as part of the administrative record for these proceedings.

Should you need additional information, please do not hesitate to contact the undersigned.

Very truly yours,

Thompson Coburn LLP

By
Richard K. Bank
Ashley W. Craig

Enclosure

cc: Robert Wang, President
Topocean Consolidation Service

2404684

BEFORE THE
FEDERAL MARITIME COMMISSION

Washington, D.C.

Petition of United Parcel Service, Inc.
Petition No. P3-03

Petition of the National Customs Brokers and Forwarders Association of American, Inc.
Petition No. P5-03

Petition of Ocean World Lines, Inc.
Petition No. P7-03

Petition of Bax Global Inc. for Rulemaking
Petition No. P8-03

Petition of C.H. Robinson Worldwide, Inc.
Petition No. P9-03

Petition of Danzas Corporation d/b/a Danmar Lines Ltd., Danzas AEI Ocean Services, and DHL Danzas Air and Ocean
Petition No. P1-04

Petition of BDP International, Inc.
Petition No. P2-04

Petition of FedEx Trade Networks Transport & Brokerage, Inc.
Petition No. P4-04

REPLY COMMENTS TO THE JOINT SUPPLEMENTAL COMMENTS REQUESTING EXPEDITED ADOPTION OF A CONDITIONAL EXEMPTION FROM TARIFF PUBLICATION

Submitted by

The Topocean Group (Topocean Consolidation Service)

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Counsel to the Topocean Group (Topocean Consolidation Service)

Dated: October 4, 2004

REPLY COMMENTS OF THE TOPOCEAN GROUP (TOPOCEAN CONSOLIDATION SERVICE) TO THE JOINT SUPPLEMENTAL COMMENTS REQUESTING EXPEDITED ADOPTION OF A CONDITIONAL EXEMPTION FROM TARIFF PUBLICATION

I. Introduction

The following comments are submitted by the Topocean Group (Topocean Consolidation Service)[1] (collectively referred to herein as "Topocean") supporting the relief requested in the Joint Supplemental Comments filed on August 2, 2004, by BAX Global Inc., BDP International, Inc., C.H. Robinson Worldwide, Inc., FedEx Trade Networks Transport & Brokerage, Inc., the Transportation Intermediaries Association, United Parcel Service, Inc., and the National Industrial Transportation League ("NIT League"). Topocean believes that the Joint Supplemental Comments present the Federal Maritime Commission ("FMC" or the "Commission") with a sound, rational, and much-needed means for providing proper tariff publication reform and service contract authority for non-vessel-operating common carriers ("NVOCCs") operating in U.S. foreign commerce. Adopting and implementing the relief requested will benefit all segments of the international ocean shipping public and industry—ocean carriers, shippers, intermediaries, and others. Accordingly, Topocean calls upon the FMC to consider the Joint Supplemental Comments and initiate the necessary administrative actions to implement the regulatory reforms requested.

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[1] The Topocean Group companies include: Topocean Consolidation Services (Los Angeles) (FMC OTI License No. 014097); Topocean Consolidation Service (Seattle) Inc. (FMC OTI License No. 018382); Topocean Consolidation Service Ltd. (OTI License No. 012067); and Topocean Consolidation Services (New York), Inc. (FMC OTI License No. 018526). Each respective companies' NVOCC tariff is published in electronic format in accordance with FMC regulations at <www.oceantariff.com> and is also a licensed Ocean

Overview of the Topocean Group

By way of background, Topocean was established in 1990 via a network of offices throughout Asia and the United States. Over the past 12 years, Topocean has experienced continuous growth, and in 2001, Topocean's NVOCC operations handled over 50,000 TEUs from Asia to the U.S. Topocean's primary trade lanes include Asia to the U.S., Intra-Asia, and the U.S. to Asia. Topocean provides end-to-end transportation pipeline services in a seamless environment and is one of the leading ocean freight forwarders and NVOCCs in the Trans-Pacific trades. In 2002, Topocean was voted one of the best sea freight forwarders in the Asia Pacific region at the 14th Asia Freight Industry Award (AFIA) annual ceremonies. While Topocean is a leading NVOCC in the most-important Trans-Pacific trade lanes, the company provides more than simply "traditional NVOCC services" to shippers. As a result of customer demands and the evolving face of supply chain management, Topocean has diversified over the years into other related international logistics fields. This diversification creates true value-added supply chain services for point-to-point intermodal (including ocean transport) shipments. For example, Topocean operates consolidation facilities in most countries in Asia and currently manages approximately 200,000 square feet of warehouse facilities in order to support the NVOCC clientele with crossdock, distribution, and "pick-and-pack" services.

Transportation Intermediary ("OTI"), as defined at § 3(17)(A) and (B) of the Shipping Act of 1984, as amended, 46 U.S.C. app. § 1702(17)(A) and (B).

As of late 2004, Topocean operates a network of owned and agent offices throughout the Asian Pacific rim, North America, and Europe.[2] Topocean only partners with overseas agents that have a proven track record of providing superior ocean transportation-related services to shippers and have a history of regulatory compliance with U.S. maritime laws and regulations. In essence, Topocean represents the next generation of "ocean transportation intermediary" by providing specialized services and expertise to customers, including: multiple ocean carrier options, multiple cutoffs and sailing schedules, specific bullet rates (door-to-door options), and access to carrier schedules via a secure Internet connection.

II. Topocean Supports and Urges Expedited Consideration of the Joint Supplement Comments

The Joint Supplemental Comments present the following regulatory reform proposal that, once implemented, would enable NVOCCs to enjoy increased tariff publication flexibility and a form of contract (or agreement) rate authority:

- Pursuant to Section 16 of the Shipping Act, the FMC should grant exemptions for certain NVOCC agreements with shippers from the following statutory and regulatory requirements:
  - (i) tariff publication, adherence, and enforcement requirements set forth in Section 8(a), (b), (d) and (e) of the Shipping Act,
  - (ii) FMC regulations relating to tariff publication included in 46 C.F.R. § 520, and
  - (iii) the Prohibited Acts set forth in Section 10(b)(1), (2), (4) and (8) of the Shipping Act to the extent that those provisions relate to tariff requirements.
- The exemption would permit any NVOCC that moves cargo under a written agreement (other than a bill of lading, receipt or similar transport document) with one or more shippers under which the shipper(s) commits to provide a

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[2] Topocean has either a corporate affiliated branch office or authorized agent in the following countries: Bangladesh, Cambodia, Canada, China, India, Indonesia, Japan, Korea, Malaysia, Myanmar, The Netherlands, Pakistan, Philippines, Singapore, Sri Lanka, Thailand, Taiwan, United Kingdom, United States, and Viet Nam.

volume or portion of cargo over a fixed time and the NVOCC commits to a certain rate and defined service level to offer and enter into a rate agreement.

- The NVOCC agreement would be filed confidentially with the FMC. As with vessel-operating common carrier service contracts with shippers, the NVOCC agreement would be subject to publication of certain "essential terms" relating to the agreement.[3]
- The FMC would retain jurisdiction over the NVOCC agreement to the same extent that it maintains jurisdiction over service contracts regulated under the Shipping Act.

In the Joint Supplement Comments, the FMC is urged to: (1) use its statutory authority found in Section 16 of the Shipping Act of 1984, as amended, and extend to *all* NVOCCs a "conditional exemption" from the tariff publication, adherence, and enforcement provisions of the Shipping Act and corresponding FMC regulations;[4] (2) hold that the conditional exemption is justified based on the extensive record that has been developed over the past 14 months in the individual NVOCC petitions asking for tariff reform and/or service contract authority as referenced above; and (3) consider and adopt the conditional exemption as expeditiously as possible.

Simply put, Topocean wholeheartedly endorses and supports the above proposal, and believes that it will enable NVOCCs to respond timely and effectively to shipper demands for *confidential* rate requests in U.S. foreign commerce. Additionally, the above proposal will likely also result in increased competition among the NVOCC and ocean carrier communities—a true commercial benefit for the American shipping public. Topocean notes

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[3] The Joint Supplemental Comments state that an NVOCC agreement with a shipper would include the following "essential terms:" origin and destination port ranges, origin and destination geographic areas in the case of through intermodal shipments, commodity or commodities, minimum volume or portion, the line-haul rate, the duration of the agreement, service commitments, and liquidated damages or indemnity provision for non-performance. Under the proposal, some of the essential terms, *i.e.*, origin and destination port ranges, commodity or commodities, minimum volume or portion, and the duration of the agreement, would be required to be published in tariff format.

that both the U.S. Department of Justice and the U.S. Department of Transportation support increased competition among NVOCCs and ocean common carriers, support tariff publication reform, and have endorsed contracting authority for NVOCCs.[5]

Topocean is especially pleased to see that the Joint Supplemental Comments do not include any asset-based criteria that might be used as a means of providing only certain types of NVOCCs with the conditional tariff exemption. While some petitioners initially raised an "asset-based argument" in their prior comments before the Commission, the submission of the Joint Supplemental Comments indicates that leading NVOCCs (asset-based and non-asset-based) and the principal trade association representing U.S. shippers (NIT League), no longer believe that the FMC should consider the question of asset or asset-free operations when deciding how to implement tariff publication reform and NVOCC contract-rate authority. Topocean applauds this change in the positions of its fellow NVOCCs and others.

The Joint Supplement Comments represent a unified position of both the NVOCC and shipper communities. This "united front" provides the FMC with a simplified and common means of providing NVOCCs (and shippers) with increased ocean transport pricing flexibility and commercial options. Shippers (represented by the NIT League) and leading NVOCCs recognize that the conditional exemption—coupled with a form of "contract authority" as requested in the Joint Supplemental Comments—will provide *immediate* commercial benefits to the ocean shipping industry and public. As a significant NVOCC serving major U.S. trade lanes, Topocean understands the importance of being able to offer

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4 *See* 46 C.F.R. § 520 *et seq.*

5 *See generally* Comments of the U.S. Department of Transportation (Jan. 16, 2004) and the U.S. Department of Justice, Antitrust Division (Oct. 10, 2003).

shipper-customers an individually tailored package of transportation solutions—including *confidential* ocean transportation rates and charges. In the end, this is the underlying reason why Topocean supports the Joint Supplemental Comments.

Ocean common carriers have embraced the new-found commercial freedoms of the Ocean Shipping Reform Act ("OSRA") and now move (in certain trade lanes) over 90%[6] of all oceanborne cargoes under confidential service contracts—this includes both NVOCC and proprietary shipper traffic. Topocean agrees with the Joint Supplement Commenters that the time has finally arrived for the FMC to extend the pro-competitive and deregulatory benefits of OSRA to the ocean transportation intermediary sector.[7] Part of OSRA's deregulatory scheme is a further expansion of the Commission's authority to recognize the changing face of international ocean shipping and to respond to these developments without the need for additional legislative amendments. Expeditiously implementing the "conditional tariff exemption" for NVOCCs and enabling confidential rate agreements with shippers will settle the issues presented by the pending and related NVOCC petitions.

In conclusion, Topocean supports the Joint Supplemental Commenters' proposal and believes that Commission should act quickly to implement this regulatory reform initiative.

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6 *See* FMC, The Impact of the Ocean Shipping Reform Act of 1998 (Sept. 2001) at 16-20.

7 In the Joint Supplemental Comments, it was noted that the requested relief is supported by the FMC's recent decision to grant three Chinese controlled carriers an exemption from the 30-day waiting requirement to reduce tariff rates subject to the Controlled Carrier Act. *See* Pets. Nos. P3-99, P4-03 and P6-03. Most interestingly, since the Joint Supplemental Comments were filed, American President Lines, Ltd., and APL Co. Pte. Ltd. ("APL") submitted a Section 16 petition asking that the FMC grant the companies a full exemption from the first sentence of Section 9(c) of the Shipping Act, as amended, which applies to (foreign state) controlled ocean carriers. *See* Pet. No. P5-04. According to the petition, due to recent (and anticipated future) ownership changes in the corporate structure of its parent company, Neptune Orient Lines, the Shipping Act's "controlled carrier" restrictions may become applicable to APL. Thus, APL now seeks an exemption from the FMC to permit its ocean liner operations to reduce tariff rates, charges, classifications, rules, or regulations, effective upon publication. APL raises substantially similar arguments in support of its exemption request that are also found in the NVOCC petitions and the Joint Supplemental Comments.

There is no need for further procedural maneuvering by the FMC. The ocean shipping industry and public have finally come to terms with what should be done regarding the issue of NVOCC service contract authority—and that is found in the Joint Supplemental Comments. Topocean agrees with the Joint Supplemental Commenters that the FMC has "a complete record justifying a grant of the conditional tariff exemption, and the proceedings have afforded ample time to analyze that record thoroughly . . . [t]he time has come for the Commission to act."[8]

Topocean looks forward to the FMC's favorable and timely adoption and implementation of the "conditional exemption" proposal as presented in the Joint Supplemental Comments.

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[8] *See* Joint Supplemental Comments (Aug. 2, 2004) at 4.

Respectfully submitted,

Robert Wang, President

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Dated: October 4, 2004