

FEDERAL MARITIME COMMISSION

PETITION OF UNITED PARCEL
SERVICE, INC. FOR EXEMPTION;

PETITION OF THE NATIONAL CUSTOMS
BROKERS AND FORWARDERS
ASSOCIATION OF AMERICA, INC. FOR
LIMITED EXEMPTION;

PETITION OF OCEAN WORLD LINES,
INC., FOR RULEMAKING;

PETITION OF BAX GLOBAL, INC. FOR
RULEMAKING;

PETITION OF C.H. ROBINSON
WORLDWIDE, INC. FOR EXEMPTION;

PETITION OF DANZAS CORPORATION
D/B/A DANMAR LINES LTD., DANZAS
AEI OCEAN SERVICES, AND DHL
DANZAS AIR AND OCEAN FOR
EXEMPTION;

PETITION OF BDP INTERNATIONAL,
INC. FOR EXEMPTION;

PETITION OF FEDEX TRADE
NETWORKS TRANSPORT &
BROKERAGE, INC. FOR EXEMPTION.

Petition Nos. P3-03,
P5-03, P7-03, P8-03,
P9-03, P1-04, P2-04,
P4-04

Served: September 2, 2004

ORDER**I. INTRODUCTION**

On August 2, 2004, the National Industrial Transportation League (“NITL”), United Parcel Service, Inc. (“UPS”), BAX Global Inc. (“BAX”), FEDEX Trade Networks Transport & Brokerage, Inc. (“FEDEX”), Transportation Intermediaries Association (“TIA”), C.H. Robinson Worldwide, Inc. (“CHRW”), and BDP International, Inc. (collectively, “Movants”) filed a Motion for Leave (“Motion”) pursuant to Rule 73, 46 CFR § 502.73, in the proceedings referenced above to file Joint Supplemental Comments Requesting Expedited Adoption of a Conditional Exemption from Tariff Publication (“Supplemental Comments”). Conceding that the comment period for these proceedings is closed, Movants nonetheless seek acceptance of the Supplemental Comments into the record, claiming that the comments reflect an updated, unified version of the various forms of relief requested in the original individual petitions.

Interested persons were given until August 20, 2004, to file replies on the Motion, and five were received. The World Shipping Council (“WSC”), American President Lines, Ltd. (“APL”), the U.S. Department of Transportation (“DOT”) and Danzas Corporation d/b/a Danmar Lines Ltd., Danzas AEI Ocean Serves, and DHL Danzas Air and Ocean (“Danzas”) filed replies in support of the Motion. Ocean World Lines (“OWL”) filed a reply in opposition.

The Commission hereby grants the Motion, accepts the Supplemental Comments, and invites interested persons to respond to the Supplemental Comments by September 30, 2004.

II. MOTION AND SUPPLEMENTAL COMMENTS

Movants submit that they have engaged in “substantial discussions” over the past several months that have resulted in a unified approach to the pending NVOCC tariff publication exemption proceedings. They believe that the Commission should be informed of this approach, as it is intended to give “clear direction” to the Commission in its deliberations on the petitions. Supplemental Comments at 2-3.

Movants note that the motion and corresponding comments do not constitute a withdrawal of the existing petitions. Supplemental Comments at 2 n.2. Movants submit that any Commission action on the proposed conditional tariff exemption should not supercede consideration of petitioners’ requested relief from the tariff publication requirements. Id.

Reiterating their concerns submitted in the pending petitions and comments that the current regulatory scheme undermines competitiveness in the shipping industry, Movants request that the Commission use its authority under section 16 of the Shipping Act to exempt certain NVOCC agreements with shippers from the tariff publication requirements in sections 8(a), (b), (d) and (e) of the Shipping Act and 46 CFR Part 520 of the Commission’s Rules and Regulations, as well as the tariff-related prohibited acts found in sections 10(b)(1), (2), (4) and (8) of the Shipping Act. Supplemental Comments at 3, Appendix 1. The proposed exemption would apply to any written agreements between an NVOCC and shipper (excluding bills of lading, receipts or other transport documents), where the shipper pledges to provide a specific volume/portion of cargo over a fixed time period while the NVOCC commits to a defined rate and service level. Id. According to Movants, the proposed exemption would be subject to the following conditions: 1) the

agreements and their essential terms must be filed confidentially with the Commission;¹ 2) the NVOCC must publish, in tariff format, the origin and destination port ranges, commodity involved, minimum volume/portion, and duration of the agreement; and 3) the Commission would retain jurisdiction to the same extent as it does over service contracts under the Shipping Act. Id.

Movants also assert that the elements of the conditional tariff exemption are based upon the requested relief submitted in the original petitions and are therefore not novel. Supplemental Comments at 3. As such, they aver that the Commission need not seek any further inquiry on the matter and should find the exemption to be “justified” based upon the “substantial evidence” already developed in the record. Movants urge the Commission to take immediate action to adopt the exemption. Id. at 3-4.

III. REPLIES

WSC submitted a reply to the Commission on August 17, 2004. Because the Supplemental Comments appear to address WSC’s concern that the original petitions were vague and inconsistent, WSC claims that it does not oppose the Motion as long as interested persons are provided a reasonable amount of time to comment on Movants’ proposed tariff exemption. According to WSC, its Board of Directors and general

¹The essential terms would include: 1) origin and destination port ranges; 2) origin and destination geographic areas in the case of through intermodal movements; 3) list of commodities; 4) minimum volume/portion; 5) line-haul rate; 6) duration; 7) service commitments; 8) liquidated damages for non-performance. Id.

membership are scheduled to meet in mid-September. As such, WSC requests that the comment period be set for September 30, 2004, and notes that Movants have authorized WSC counsel to represent that they have no objection to this date. WSC Reply at 2-3. On August 19, 2004, APL submitted a one-line reply expressing its support of WSC's position. APL Reply at 1. DOT also filed a reply indicating its support of WSC's position. DOT Reply at 1-2.

On August 17, 2004, Danzas, petitioner in Petition P1-04, submitted a reply in support of the Motion as it affects its own petition. Danzas asserts that the Motion serves as a "consensus position" to the many diverse requests for relief under consideration by the Commission and could be useful in expediting the deliberation process on the petitions. Danzas Reply at 2. As such, Danzas asserts that the Commission should reopen the comment period under Rule 10 of the Commission's Rules of Practice and Procedure, 46 CFR § 502.10, which allows the Commission to waive rules in particular cases "if expeditious conduct of business so requires," except where such a waiver would be inconsistent with any statute.

OWL, petitioner in Petition P7-03, filed its reply on August 18, 2004. OWL contends that granting the Motion would unnecessarily delay the proceedings not only by reopening the comment period, but also by diverting the Commission's attention and resources from taking final action on the petitions to crafting a response to the instant request. OWL Reply at 2. Because the new, unified proposal differs from the varying relief sought by individual petitioners who are also parties to this Motion, OWL argues that it would be more appropriate for Movants to file a new petition. *Id.* OWL also claims that the Motion provides no compelling reason to reopen the comment period, as the only new fact that will be

contributed to the already voluminous record is “that they have agreed among themselves that they now want the exact same thing.” Id. at 3.

IV. DISCUSSION

While OWL’s concerns of delay are well-taken, the deliberation process requires a full, up-to-date picture of the participants’ positions.² Because the Supplemental Comments provide a unified, tangible proposal to the overarching NVOCC tariff publication exemption matter, the granting of this Motion and the acceptance of the comments into the record may serve to advance an administratively final decision rather than postpone one.

The Commission has determined to grant the Motion, accept the Supplemental Comments into the record, and allow interested persons to respond to the Supplemental Comments by September 30, 2004. Interested persons are requested to submit their views or arguments in reply to the Supplemental Comments no later than September 30, 2004. Comments shall consist of an original and 15 copies, and shall be directed to the Secretary, Federal Maritime Commission, 800 North Capitol Street, NW, Washington, DC 20573-0001. It is also requested that a copy be submitted in electronic form (WordPerfect, Word or ASCII) on diskette, or e-mailed to Secretary@fmc.gov. The Commission has also determined to waive the service requirements found at 46 CFR § 502.114(b). Instead, copies of

²We should note that NITL and TIA did not file petitions before the Commission, but instead have commented on other persons’ petitions.

all filed comments may be viewed on the Commission's web page at <http://www.fmc.gov>.

CONCLUSION

THEREFORE, IT IS ORDERED, That Movants' Motion is granted and the Joint Supplemental Comments are accepted into the record;

IT IS FURTHER ORDERED, That the Commission waives the service requirements found at 46 CFR § 502.114(b) for any responses to the Joint Supplemental Comments. Interested persons may respond to the Joint Supplemental Comments until September 30, 2004.

By the Commission.

Bryant L. VanBrakle
Secretary