**U.S. Department of Transportation**
Office of the Secretary of Transportation

**GENERAL COUNSEL**

400 Seventh St., S.W.
Washington, D.C. 20590

September 30, 2004

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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

Bryant L. VanBrakle,
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Washington, D.C. 20573-0001

Re: FMC Petition Nos. P3-03, P5-03, P7-03, P8-03 and P9-03

Dear Secretary VanBrakle:

Enclosed please find an original and fifteen copies of the "Comments of the United States Department of Transportation in Response to Joint Supplemental Comments Requesting Expedited Adoption of a Conditional Exemption from Tariff Publication," which are being filed in the above referenced proceedings. Also enclosed is an additional copy of our comments. We would appreciate it if you would hand stamp the additional copy and return it to our messenger.

We are providing an electronic version of our filing by email addressed to Secretary@FMC.gov.

Sincerely,

Dale C. Andrews
Deputy Assistant General Counsel
for Litigation

Enclosures

CC: OS/OGC
public

ORIGINAL

Chairman
Commissioners (4)
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OA

BEFORE THE
FEDERAL MARITIME COMMISSION

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| Petitions of United Parcel Service, Inc., National Customs Brokers and Forwarders Association of America, Inc., Ocean World Lines, Inc., BAX Global, Inc., and C.H. Robinson Worldwide, Inc. for Exemptions Pursuant to Section 16 of the Shipping Act of 1984 | FMC Petition Nos. P3-03, P5-03, P7-03, P8-03, P9-03, P1-04, P2-04 and P4-04 |

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# COMMENTS OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION IN RESPONSE TO JOINT SUPPLEMENTAL COMMENTS REQUESTING EXPEDITED ADOPTION OF A CONDITIONAL EXEMPTION FROM TARIFF PUBLICATION

JEFFREY A. ROSEN
General Counsel

JEFFREY N. SHANE
Under Secretary of Transportation
for Policy

ROSALIND A. KNAPP
Deputy General Counsel

DALE C. ANDREWS
Deputy Assistant General Counsel
for Litigation

PAUL SAMUEL SMITH
Senior Trial Attorney

U.S. Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590

Dated: September 30, 2004

BEFORE THE
FEDERAL MARITIME COMMISSION

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COMMENTS OF THE UNITED STATES DEPARTMENT OF TRANSPORTATION IN RESPONSE TO JOINT SUPPLEMENTAL COMMENTS REQUESTING EXPEDITED ADOPTION OF A CONDITIONAL EXEMPTION FROM TARIFF PUBLICATION

On August 2, 2004 some, but not all, of the parties in the above-referenced proceedings filed supplemental joint comments ("Joint Comments") requesting the Federal Maritime Commission ("FMC" or "Commission") to exercise its exemption authority under section 16 of the Shipping Act of 1984, 46 U.S.C. § 1715, and exempt non-vessel-operating common carriers ("NVOCC"s) from the requirements of section 8 of the Act, 46 U.S.C. § 1707, pursuant to the terms of an agreed draft exemption attached to the Joint Comments.[1]

On August 17, the World Shipping Council ("WSC") filed a reply to the Joint Comments, suggesting that the FMC allow an additional opportunity for interested parties

[1]/ The Joint Comments were filed on behalf of the National Industrial Transportation League, United Parcel Service, Inc., BAX Global, Inc., FedEx Trade Networks Transport & Brokerage, Inc., the Transportation Intermediaries Association, C.H. Robinson Worldwide, Inc., and BDP International, Inc.

to address the proposal set forth in the Joint Comments. In a reply filed on August 26, the United States Department of Transportation ("DOT" or "Department") supported the request for an additional round of comments. The WSC request was then granted by the Commission, which provided the opportunity for interested parties to file additional comments on or before September 30, 2004.

In the comments originally filed by the Department in each of these proceedings we urged the Commission to exercise its exemption authority to remove presently-applicable tariff publication and adherence requirements in a manner that would allow NVOCCs to enter into private and confidential contracts with their shippers, the same sorts of contracts that vessel operators are specifically allowed to utilize under Section 8(c) of the 1984 Act, 46 U.S.C. § 1707(c). We continue to believe that the record before the Commission clearly establishes the basis and need for the requested relief. We also continue to believe (as discussed at length in the Department's previous filing, pp. 10-14) that the Commission's statutory exemption authority provides ample legal grounds for the Commission to remedy the matters addressed in the pending petitions.

The proposal appended to the Joint Comments would, in the words of the commenters, "place NVOCCs and vessel operating carriers on equal footing vis-à-vis their shipper customers" by allowing NVOCCs to enter into confidential contracts with their customers, but then subjecting those contracts to the confidential filing and publication requirements imposed on vessel operating carriers and conferences of such carriers under section 8(c)(2) and (3) of the 1984 Act, 46 U.S.C. § 1707(c)(2), (3). See Joint Comments at 2. As such, the proposal contemplates a "level playing field" approach, in which the same obligations currently imposed on vessel operators when they

enter into service contracts would be imposed on NVOCCs under an exemption allowing them to enter into confidential shipping arrangements.

The Department agrees with the view expressed in the Joint Comments that "the Commission should act as expeditiously as possible"[2] to resolve the underlying issues in the pending petitions. The Department believes that the Commission, at the very least, should adopt the proposed exemption appended to the Joint Comments without further proceedings. As the Department pointed out in our earlier comments, there is ample basis in the record before the Commission to exempt NVOCCs from the otherwise applicable tariff requirements of the 1984 Act. The record already clearly demonstrates that continuing to require NVOCCs to carry cargo only pursuant to disclosed rates set forth in published tariffs serves no regulatory purpose and reduces competition. The exercise of the Commission's exemption authority under section 16 of the 1984 Act in these circumstances remains completely warranted.

Thus far no interested party has opposed the proposal set forth in the Joint Comments. However, the National Customs Brokers and Forwarders Association ("NCBFAA") has urged in recently-filed comments that the Joint Comments proposal does not go far enough.[3] NCBFAA argues that whatever regulatory purposes may be served by requiring vessel operating carriers to continue to file service contracts confidentially, and to publish certain essential terms of such contracts, no such purpose

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[2]/ Joint Comments at 3.

[3]/ See Reply of the National Customs Brokers and Forwarders Association of America, Inc. to Joint Supplemental Comments Requesting Expedited Adoption of a Conditional Exemption from Tariff Publication ("NCBFAA Reply Comments") at 3-4.

would be served by imposing similar requirements on NVOCCs. NCBFAA Reply Comments at 3.

While no further proceedings are required in order for the Commission to exercise its exemption authority in the manner set forth in the Joint Comments' proposed exemption, the Commission should consider the points raised in NCBFAA's reply comments – specifically, whether the burden associated with requiring confidential filing of individual NVOCC contracts, and the publication of the essential terms of such contracts, serves a legitimate regulatory need. It is true that the Act requires vessel operators and conferences of vessel operators to file service contracts confidentially with the Commission and then to publish specified essential terms of such contracts. [4] But to the extent these statutory requirements were enacted by Congress as tools for the Commission to oversee conference service contract practices, including the requirement of section 5(c) of the Act, 46 U.S.C. § 1704(c), which ensures the ability of individual conference lines to enter into independent service contracts free from unreasonable conference restrictions, those purposes would be inapplicable to NVOCC confidential contracts. NVOCCs could not, in any event, concertedly offer confidential contracts under the 1984 Act even if they were exempted from the tariff filing and adherence requirements of section 8 since they would still be precluded from entering into concerted pricing agreements under the terms of sections 4 and 5 of the Act, 46 U.S.C. §§ 1703,

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[4]/ Section 8(c)(2) of the 1984 Act requires that, with certain exceptions, service contracts entered into by vessel operating carriers or by conferences of such carriers "shall be filed confidentially with the Commission." Section 8(c)(3) of the Act requires that for each such confidential contract the origin and destination port ranges, the commodity or commodities involved, the minimum volume required, and the duration of the contract "shall be published and made available to the public in tariff format."

1704. Therefore, if conference oversight is the only regulatory purpose currently served by the confidential filing and essential terms publication requirements of the Act, the Commission should consider whether there is a legitimate basis to impose a filing and publication requirement on NVOCC confidential contracts. If no regulatory purpose would be served by imposing confidential filing and essential terms publication requirements on NVOCCs, then the Commission should not impose such requirements.

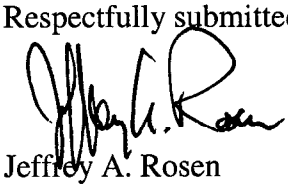
Indeed, if the oversight of conference service contract practices is the sole regulatory basis for confidential filing and essential term publication requirements, there may even be a basis in a subsequent proceeding for the Commission to exercise its exemption authority to remove filing and publication requirements that currently are imposed on vessel operating carriers as well. The Commission's 2001 report to Congress noted that as of 2001 "carriers generally report that 80 percent or more of their liner cargo . . . move[d] under service contracts" and that these movements are generally "achieved through individual contracts" because both carriers and shippers prefer "to engage in one-on-one negotiations [which provide] greater flexibility to structure contracts as needed." The Impact of the Ocean Shipping Reform Act of 1998 at 2, 18. Anecdotal information suggests that in the intervening four years that trend has clearly continued and increased.

Since individual service contracts therefore have apparently largely supplanted conference service contracts that previously were concertedly set, there may now be little or no need for the Commission to continue to police conference service contract practices at all. If this is, in fact, the case, the Commission should, in a future proceeding, consider either the advisability of exempting all service contracts from the confidential filing and essential term publication requirements of the Act, or, alternatively, the advisability of

only continuing to impose those requirements for service contracts that are offered concertedly by more than one vessel operator.

While the Department offers these observations for the Commission's consideration, we emphasize that consideration of broader issues should not deter or delay the Commission from acting expeditiously on the pending NVOCC petitions. As stated in our January 16 comments, we believe that the record is adequate and the time is ripe for the Commission to promulgate an exemption that frees NVOCCs of section 8 constraints so that they can enter into the type of confidential contracts that the shipping public desires.

Respectfully submitted,



Jeffrey A. Rosen
General Counsel

September 30, 2004