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**BEFORE THE FEDERAL MARITIME COMMISSION**

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**COMMENTS OF FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC.  
IN OPPOSITION TO FMC PETITION NO. P 3-03, PETITION OF UNITED PARCEL  
SERVICE, INC. DATED JULY 25, 2003**

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**INTRODUCTION**

These comments are submitted to the Federal Maritime Commission (“FMC”) on behalf of the Fashion Accessories Shippers Association, Inc. (“FASA”) in opposition to the Petition of United Parcel Services, Inc. (“UPS” or “Petitioner”) FMC Petition No. P. 3-03 dated July 25, 2003.

FASA is a shippers association as defined in Section 3(24) of the Shipping Act of 1984 as amended by the Ocean Shipping Reform Act of 1998, 46 App. U.S.C. §1701 (“Act”). FASA was incorporated in 1986 as a shippers association designed to service the needs, and represent the interests of, small and medium size shippers in the fashion accessories industry and other related industries with common interests. FASA was among the first shippers associations to receive a favorable business review letter from the U.S. Department of Justice, following enactment of the Shipping Act of 1984. Currently, FASA negotiates service contracts with most of the ocean common carriers in the eastbound Pacific trades and through such service contracts represents virtually every notable importer of fashion accessories and related department store merchandise throughout the country. FASA has been active since its inception in all import and regulatory matters before Congress and the FMC. During congressional deliberations leading to the enactment of the Ocean Shipping Reform Act of 1998 (“OSRA”), FASA championed the interests of small and medium size shippers to preserve their right to negotiate service contracts

through shippers associations and in a statutory framework that afforded meaningful protection to shippers and shipper associations. FASA views the instant UPS Petition as an attempt by the largest domestic shipper of parcels and one of the largest shippers in the world to dominate a large segment of the ocean cargo transportation industry. If granted, the exemption sought by UPS would enable it to extract from ocean carriers confidential service contracts containing discriminatory and unfair ocean cargo rates which would be available to shippers only as a tie in with UPS cargo movement and/or logistic services. FASA believes that this is the “real world” impact of the relief requested.

On statutory grounds, FASA opposes the UPS petition for the following reasons:

- 1) Sections 3 (19) and 8 (c) of the Act authorize service contracts only between shippers and ocean common carriers.
- 2) The Federal Maritime Commission lacks the authority to amend the Act to expand the scope of service contracting in Sections 3( 19) and 8 (c) to include a Non-Vessel Operating Common Carrier (“NVOCC”) such as UPS.
- 3) Section 16 of the Act does not empower the FMC to amend the Act and is inapplicable to the relief requested by the Petitioner.
- 4) Even if Section 16 applied to the type relief sought by the Petitioner, the Petitioner has not met its burden of demonstrating that the requested activity would not result in a substantial reduction in competition nor be detrimental to commerce.

I. UPS Is Barred By Sections 3(19) and 8 (c) From Entering Into Service Contracts With Shippers

Section 8(c) authorizes service contracts between shippers and ocean common carriers, individually or ocean common carriers operating through an agreement specified in Section 4.

The definition of “service contract” contained in Section 3( 19) compliments Section 8(c). It could not be clearer. An “ocean common carrier” is a “vessel operating common carrier” (Section 3 (16)). Accordingly, there is absolutely no statutory authority to carry on the activity requested in the Petition.

The statutory bar to the relief sought in the Petition is supported by the legislative history of OSRA. Sections 3 (19) and 8 (c) of the penultimate version of Senate Bill 414 as reported by the Senate Committee on Commerce, Science and Transportation Senate Report 105-6 1 (“Committee Report”) contained the term “common carrier” without the modifier “ocean”. The Committee Report (page 23) was explicit in what the proposed changes to Sections 3(19) and 8 (c) were intended to achieve:

“Consistent with the bill’s amendment to the definition of “service contract,” section 8(c)( 1) would be amended to allow all common carriers, as defined by the 1984 Act, **including** NVOCCs, and ocean common carriers operating under all types of agreements, not only conference agreements, to enter into service contracts as common carriers with one or more shippers, including a shippers’ association.” (emphasis added)

However, S. 414 was amended on the floor of the Senate to, among other things, reinsert the term “ocean” in Sections 3( 19) and 8 (c) of S. 4 14, thus restoring the statutory bar that had existed since 1984. There can be no clearer indication of Congress’ intent to bar NVOCCs from entering into confidential service contracts with shippers.

In the next to last page of its Petition UPS finally concedes that “. . .Congress did not extend service contract authority to OTI’s [Ocean Transportation Intermediaries] through OSRA”. . . but suggests that Congress also “broadened the ability of the FMC under Section 16 of the Shipping Act to grant exemptions to statutory or regulatory provisions to meet changing circumstances.” (Petition page 23 citing Committee Report, page 30). FASA disagrees.

II. Section 16 of the Act Does Authorize the FMC To Grant Relief Sought In the Petition

In explaining the amended Section 16 contained in S. 414 Section 16 of the 1984 Act, the Committee Report explained:

“The policy underlying this change is that while Congress has been able to identify broad areas of ocean shipping commerce for which reduced regulation is clearly warranted, the FMC is more capable of examining through the administrative process specific regulatory provisions and practices **not yet addressed by Congress** to determine where they can be deregulated consistent with the policies of Congress.” (emphasis added)

As explained in the preceding section of these Comments, conferment on NVOCC’s of the authority to enter into service contracts was “addressed by Congress” and rejected. It is inexplicable how UPS can read the authority conferred on the FMC to grant exemptions under Section 16 as co-extensive with the power to literally amend the law. UPS is not seeking exemption from the regulatory requirements of the Act, but rather is seeking the ability to sign service contracts which Congress specifically withheld after debate and deliberation.

Even if Section 16 of the Act applied to the relief sought in the Petition, it is incomprehensible how UPS can argue that an exemption (or more accurately, grant of authority not permitted by the Act) would not result in substantial reduction in competition nor be detrimental to commerce.

The Petition readily admits UPS’ dominant market power: “UPS is the world’s largest package transportation and delivery service, delivering 3.4 billion packages and documents annually, utilizing its fleet of 88,000 vehicles and over 500 aircraft.” (Petition page 14). “UPS, with 2002 corporate revenues of \$3 1.3 billion dollars, has 360,000 employees.” (Petition page 3). “UPS moves approximately 300,000 TEUs of ocean freight annually.. . “UPS serves a number of larger ocean freight shippers moving up to 4,000 TEUs each year.” (Petition page 5).

Yet, despite its enormous assets and buying power, UPS complains of being at a competitive disadvantage in relation to ocean common carriers that also control ocean transportation intermediaries because “[t]hese carriers may quote specialized combinations of rates and service features, offering flexibility with respect to the ocean freight portions of their services that UPS as an OTI cannot match.” (Petition page 12). This statement is at the heart of UPS’ grievance. In its view, it is competitively disadvantaged in relation to its ocean carrier suppliers simply because it cannot resell such suppliers’ transportation space on the same confidential basis that the supplier sold it to UPS. Thus, if permitted, UPS would be able to (1) purchase ocean cargo transportation space on a confidential basis as a shipper; (2) then compete with its own suppliers and resell that space at retail, also on a confidential/volume commitment basis as if it was a ocean carrier.

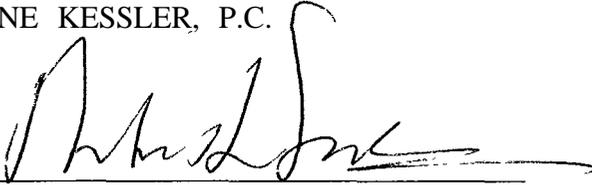
UPS does not attempt to conceal its ability based on volume to extract more favorable rates and terms with ocean carriers but, urges this would be beneficial to the shipping public because “[t]hese factors would enable UPS to offer more competitive pricing and more advantageous service packages for shippers of all sizes throughout its system.” (Petition page 17). It is realistic to assume that these favorable rates would be tied to utilization of the UPS domestic cargo system. At the end of the day, having locked up a substantial cargo volume through service contract commitments to itself, UPS would be poised to act (1) as one of the world’s largest shippers in relation to ocean carriers (2) as one of the world’s largest carriers in relation to small and medium sized shippers and (3) as one of the largest inland domestic carriers in relation to both. In reality, the relief requested is not just from the prohibitions of the Act, but also from the anti-monopsony restrictions of Section 2 of the Sherman Act.

This part of FASA's comments is not intended as a detailed economic rebuttal of the arguments raised in the Petition which, in any event, belong in the legislative arena. However, FASA believes that the plan articulated in the Petition, if implemented, would be highly detrimental to commerce and competition. Therefore, FASA considers it prudent and in the interests of its members and the shipping public to submit copies of these Comments together with the Petition to the Anti-Trust Division of the U.S. Department of Justice for its review and in order to alert it to the relief sought by UPS in these proceedings.

Dated: August 19, 2003

Respectfully submitted,

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