

BEFORE THE
FEDERAL MARITIME COMMISSION

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PETITION OF NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION
OF AMERICA, INC. FOR A LIMITED EXEMPTION FROM CERTAIN TARIFF
REQUIREMENTS OF THE SHIPPING ACT OF 1984

PETITION NO. P 5-03

COMMENTS OF THE NEW YORK/NEW JERSEY FOREIGN FREIGHT
FORWARDERS AND BROKERS ASSOCIATION

Submitted by:

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Dated: October 10, 2003

BEFORE THE
FEDERAL MARITIME COMMISSION

PETITION OF NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION
OF AMERICA, INC. ("NCBFAA") FOR A LIMITED EXEMPTION FROM CERTAIN
TARIFF REQUIREMENTS OF THE SHIPPING ACT OF 1984

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**COMMENTS OF THE NEW YORK/NEW JERSEY FOREIGN FREIGHT FORWARDERS AND
BROKERS ASSOCIATION**

The New York/New Jersey Foreign Freight Forwarders and Brokers Association ("the Association") submits the following comments to the Exemption Petition submitted by the NCBFAA in Petition No. P5-03 and respectfully requests that the Commission take note that the Association is in agreement with the Petition.

I. INTRODUCTION AND SUMMARY

The New York/New Jersey Foreign Freight Forwarders and Brokers Association is an association of approximately one hundred sixty (160) ocean freight forwarders and customhouse brokers, serving the New York-New Jersey port area for the last eighty years. Many of its members are also non-vessel operating common carriers ("NVOCCs") as that term is defined in the Shipping Act of 1984. The Association requests that the Commission take into consideration the Association's written comments in considering the NCBFAA's Petition.

II. Comments

The Association fully endorses the NCBFAA's Petition. The Association herein will review the basis for its full support of the NCBFAA Petition. The Association believes that its proposed changes result in regulations and policies that better reflect the significant changes which have occurred in the NVO/Logistics industry since Congress' review during the Ocean Shipping Reform Act of 1998 ("OSRA") which justify the changes to the Shipping Act of 1984, as amended ("the Act") through the Exemption process contained in the Act.

To a large degree, the NCBFAA Petition is based on industry changes since OSRA. In that regard, it is noteworthy that former Chairman of the House Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation, Congressman Wayne Gilchrist, concludes in a supporting letter to Petition P3-03 (UPS) to the Federal Maritime Commission, dated September 15, 2003, that "[n]ow five years after enactment of OSRA, it is clear the US ocean shipping industry has changed dramatically." He further concludes, "[t]he current regulatory scheme, however, puts NVOCCs at a distinct disadvantage and should be revised." The Association agrees with that assessment of the changes in the industry and that the Commission should exercise its exemption authority as provided in OSRA.

The Commission's exemption authority allows it to:

exempt for the future. . .any specified activity of those persons (subject to this chapter) from any requirement of this chapter if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce. The Commission may attach conditions to any exemption and may, by order, revoke any exemption. No order or rule of exemption or revocation of exemption may be issued unless opportunity for hearing has been afforded interested persons and

departments and agencies of the United States . . .

46 U.S.C. app. §1715.

Two things demonstrate that in 1998, Congress' understood that if conditions changed after OSRA was enacted, it might become appropriate to allow OTIs to offer service contracts to their customers, and, if so, that Congress intended the FMC to use its exemption authority to bring this about. First, when Congress amended Section 10 of the Shipping Act of 1984, 46 U.S.C. app. §1709, it chose not to include a specific prohibition against service contracts between OTIs and their customers. Second, the legislative history of the OSRA amendment to the Commission's exemption authority under Section 16 of the Shipping Act of 1984, 46 U.S.C. app §1 715, states that its underlying policy is that ". . .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." S. Rep. No. 105-61 at 30 (1997). These conclusions are further confirmed by Congressman Gilchrist in the aforementioned letter wherein he states,

“[u]nder OSRA Congress granted FMC broad exemption authority to deal with anticipated changes in the shipping industry. The UPS petition presents FMC the opportunity to acknowledge these changes and promote fair competition that will ultimately benefit the industry and shipping consumers worldwide.”

It is clear that the Commission has the statutory authority to exercise this discretionary authority that will benefit all responsible segments of the ocean shipping industry.

The NCBFAA Petition in basic terms is requesting the following:

1. An exemption for all NVOCCs opting to be exempt from the tariff filing requirements pursuant to Sections 8(a), (b), (d) and (e), and Sections 10 (b)(I), (2) (4).

(7), (8) of the Act, or in the alternative;

2. If the Commission believes it does not have authority to provide the exemption noted in (1) above, that the Commission initiate a rulemaking procedure that would permit NVOCCs to establish and maintain "range rates"---i.e. rates one of which would be a maximum and the other rate to be a minimum rate for particular services.

The Association concurs with the NCBFAA that since OSRA there has been a fundamental change towards a market-based regulatory model, which emphasizes competition, efficiency and reliance on the marketplace. The NCBFAA has carefully documented through its members that VOCCs have largely moved away from tariffs and conduct business primarily through service contracts. Rates are negotiated on a case-by-case basis with shippers. That is true for NVOCCs as well as for VOCCs. However, the VOCCs have generally opted out of the tariff system, but the NVOCC remains shackled to the tariff, with all its concomitant inefficiencies and expense burden.

While on a theoretical basis, tariffs are intended to prevent discrimination among shippers, the truth is that shippers do not consult tariffs. Shippers and NVOCCs negotiate transportation terms on a case-by-case basis. The use of tariffs by shippers is a myth whose time has come. The NCBFAA has taken numerous polls of its members and has concluded without doubt that no one consults tariffs. Another salient reason for the abolishing of tariffs is the cost associated with establishing and maintaining tariffs. This is a cost without any corresponding commercial benefit. It is bureaucracy at its worst. The NCBFAA has learned from membership surveys, and the Association can confirm, that tariff-publishing costs comprise approximately between 3% and 5% of total

administrative resources for NVOCC. Obviously, since 100% of all NVOCC transactions must be accomplished via tariffs, there is a serious corresponding regulatory risk, which has been demonstrated by penalties assessed by the Commission. It has been the experience of the Association, that it doesn't matter how well intentioned an NVUCC might be, or **how** many resources are directed at this process, there is still enormous exposure to penalties since it is almost impossible to achieve 100% technical compliance. This is especially true for those NVOCCs who handle hundreds of transactions a day to and from all parts of the globe.

III. Conclusion

For all of the foregoing reasons, the Association joins in support of the NCBFAA's Petition to eliminate tariff-publishing obligations altogether, or in the alternative, to provide NVOCCs the ability to publish minimum/maximum rates. Either of these alternatives would bring the regulatory infrastructure closer to the realities of the shipping industry.



Respectfully Submitted,
Louis Policastro Jr., Vice President Export
New York/New Jersey Foreign Freight Forwarders
and Brokers Association

DATE: OCTOBER 10, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of October, 2003, served a copy of foregoing Comments by The New York/New Jersey Foreign Freight Forwarders and Brokers Association upon the parties, named herein, by causing an original and **fifteen** copies thereof to be hand delivered to the following:

Mr. Bryant L. VanBrakle
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Federal Maritime Commission
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