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January 12, 2005

Hand Delivered

Bryant L. VanBrakle
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W., Room 1046
Washington, D.C. 20573-0001

Re: Docket No. 04-12; Non-Vessel Operating
Common Carrier Service Arrangements

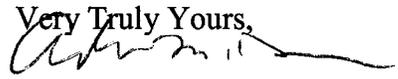
Dear Secretary VanBrakle:

This law firm represents the American Institute for Shippers' Associations, Inc. ("AISA"). Please find enclosed for filing one original and fifteen copies of AISA's Certificate of Service for its Petition for Reconsideration and Request for Stay in the above-referenced proceeding.

Also enclosed is an additional copy of AISA's Certificate, which we request that you stamp for our files and return to us for our files

By separate e-mail this date we are forwarding to you an electronic version of AISA's Certificate of Service in Word format.

Please contact the undersigned should you have any questions regarding the enclosed comments.

Very Truly Yours,

Andrew M. Danas

Enclosures

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U.S. SECRETARY
FEDERAL MARITIME COMM

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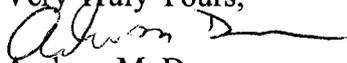
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Enclosures

CC: OS/OGC
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 Chair
 Com

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 FEDERAL MARITIME COMM.

**BEFORE THE
 FEDERAL MARITIME COMMISSION
 WASHINGTON, D.C.**

_____)
 _____)
Non-Vessel-Operating Common Carrier) **Docket No. 04-12**
Service Arrangements)
 _____)
 _____)

**PETITION OF THE
 AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC.
 FOR RECONSIDERATION AND STAY**

COMES NOW AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC., ("AISA"), by and through its undersigned counsel, and pursuant to Rule 261 of the Commission's Rules of Practice and Procedure herein Petitions the Commission for Reconsideration of the final rule issued in this proceeding. AISA further petitions the Commission for a stay of the rule issued in this proceeding until a final decision is rendered on its petition by the Commission.¹

GROUND FOR RECONSIDERATION

AISA is petitioning the Commission to review and reconsider the provisions of its final rule authorizing non-vessel-operating common carriers (NVOCCs) to enter into Nvocc Service Arrangements (NSAs), in particular, those provisions of the final rule set forth in 46 C.F.R. §531.3(o) which exclude from the definition of "NSA Shipper" shippers' associations whose membership include nvoccs. In adopting a final rule including this prohibition, the Commission has totally ignored and failed to address the comments AISA filed in this proceeding stating that the prohibition is unlawful because the Commission lacks the statutory authority to regulate the membership of shippers' associations. Nowhere in the Commission's decision is there any explanation as to how it has the authority to adopt a definition of "shipper" contrary to the definition

¹ To the Extent that the Commission believes that this petition should not be accepted under Rule 261 of its Rules of Practice and Procedure, we ask that a waiver be issued under Rule 10 in order to prevent "undue hardship [and] manifest injustice," as well as hopefully to obtain administrative relief, thereby precluding the need for judicial review.

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PETITION OF AMERICAN INSTITUTE
FOR SHIPPERS' ASSOCIATIONS, INC.
FOR RECONSIDERATION AND STAY
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of "shipper" that Congress itself enacted at 46 U.S.C. App. §1702(22). Similarly, the Commission's decision also fails to address twenty years of Commission precedent cited by AISA holding that it lacks the statutory authority to adopt such restrictions with respect to shippers' associations. *See, e.g., Status of Shippers' Associations Under the Shipping Act of 1984*, 49 F.R. 21799 (May 23, 1984); FMC, *Petition For An Amended Statement of Policy Regarding the Status of Shippers' Associations; Order Denying Petition*, 50 Fed. Reg. 7225 (Feb. 21, 1985).

Since the Commission has failed to address any of these issues in its final decision, AISA will not reiterate them here but will instead incorporate by reference the comments that it has already filed in this proceeding. AISA requests that the Commission actually consider and address them. To the extent that they address matters pertinent to shippers' associations, AISA also endorses and incorporates by reference the arguments made by the International Shippers Association in its Petition for Reconsideration and Stay.

Nowhere in the Commission's decision is there any rational explanation of where it derives authority to grant a new form of contract right while at the same time restricting the types of entities who will be able to enjoy those contract rights. The Commission has the responsibility to apply the Shipping Act on the basis of what Congress has written, not what Congress might have written. *Cf., United States v. Great Northern Ry.*, 343 U.S. 562 (1952). The statutory language of the Shipping Act explicitly defines a "shipper" as including both a "shippers' association" and "nvocc." *46 U.S.C. App. §1702(22)(D) and (E)*. In adopting a different definition for purposes of NSAs, the Commission's final decision in this proceeding represents nothing more than an unlawful attempt to rewrite the Shipping Act and to give effect to the Commission's ideas of policy. *Cf., Busse v. Commissioner*, 479 F.2d 1147 (7th Cir. 1973).

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As the Commission knows, during the debates that led to enactment of the Ocean Shipping Reform Act of 1998 Congress specifically debated an amendment which would have granted nvoccs the right to enter into service contracts. Congress rejected that amendment. *144 Cong. Record S.3311* (April 21, 1998). Even assuming that the Commission has any authority under its exemption powers to now grant a contractual right that is contrary to what Congress legislatively denied in enacting the underlying statute, that authority clearly does not extend to arbitrarily rewriting the language of the statute to grant such rights only to select groups of shippers, while at the same time, taking away statutory rights from other groups of shippers.

As adopted, the new rule is thus clearly unlawful and clearly contrary to the will of Congress in enacting the Ocean Shipping Reform Act of 1998. Left unchanged, the courts are likely to find the entire exemption authorizing the use of NSAs unlawful, not just the prohibition on NSAs with shippers' associations having nvoccc members.

The only explanation that the Commission has given for adopting Section 531.3(o) is the possibility that Section 7(a) will grant an exemption from the antitrust laws in the event that two nvoccs enter into an NSA, one as a shipper and the other as the carrier. The Commission cites one court decision, which it claims is wrongly decided, for this possibility. Yet, the Commission's decision totally ignores AISA's arguments that since the Commission is creating a new filing requirement for NSAs the exemptions in Section 7(a)(2) on their face can never come into effect for NSAs. See, AISA Comments at 13-15.

The Commission's decision also fails to consider or adopt a less restrictive solution to its perceived antitrust problem. Rather than re-write the definition of "shipper", one possible solution would be to allow shippers' associations with nvoccc members to enter into NSAs with nvoccs but

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prohibit access to such NSAs by the association's nvoccc members as part of a broader ban on nvoccc-nvoccc NSAs. While the legality of such a prohibition *vis a vis* nvocccs is still questionable, it at least addresses the actual legal concerns raised by the Commission about two nvocccs entering into NSAs while avoiding an unlawful rewriting of the statutory definition of shipper adopted by Congress. This approach would also allow the non-nvoccc members of shippers' associations to have access to NSAs, while avoiding relegating such members and shippers' associations as a whole to a second class status.

Indeed, while focusing on hypothetical situations that might arise as the result of a court decision that it believes is incorrectly decided, the Commission totally fails to address the fact that its final decision adopts a regulation that effectively reduces, if not eliminates, the right of many shippers' associations to enter into and use NSAs. The net result is that the final rule will substantially reduce competition in ocean shipping. There is no discussion or analysis of how the final rule will work to the detriment of the thousands of small to medium-sized shippers who rely upon shippers' associations to obtain competitive ocean transportation rates, but will be unable to obtain access to NSAs because their associations also have nvoccc members.

By law, the Commission must consider the competitive ramifications of its actions and their impact on small businesses. It has not done so. In particular, in finding that "the Final Rule will not have a significant impact on a substantial number of small entities" and that it "will have no significant economic impact on a substantial number of small entities," the Commission has not complied with the requirements of the Regulatory Flexibility Act, 5 U.S.C. § 605. As argued by AISA in its comments, but totally ignored by the Commission in its final decision, imposing restrictions on the right of shippers' associations with nvoccc members to enter into and use NSAs

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will substantially harm and otherwise impede the ability of small to medium sized shippers to use shippers' associations as a means to obtain access to competitive ocean transportation services, including those that may be offered by NSAs.

Both the Commission and Congress have clearly stated that in authorizing shippers' association operations in the international trades Congress was recognizing that small to medium sized shippers must turn to nonprofit shippers' associations in order to take advantage of competitive volume rates. The greatest impact of the Commission's decision in restricting the right of shippers' associations with nvoc members to use NSAs will be on these smallest shippers. It is not an exaggeration to state that the inability of shippers' associations to access NSAs if they have nvoccs in their membership may place the smaller industries and companies in this country at an economic disadvantage with their larger competitors who can ship their products at volume rates.

The economic and policy rationale for shippers' associations has always been that transportation providers will usually favor and offer economic discounts to larger accounts. This is simply a function of supply and demand. At the same time, however, experience has demonstrated that transportation providers will frequently seek to impede the development of shippers' associations as a means for smaller shippers to obtain similar competitive transportation rates for the very simple reason that in doing so they can obtain higher rates from the smaller shippers.

The courts have thus consistently struck down industry and agency rules arbitrarily restricting shippers' associations membership and contract rights such as the one adopted by the Commission in this proceeding. For example, *Pacific Coast Wholesalers' Association v. United States*, 81 F.Supp. 991 (S.D.Calif. 1949), *aff'd* 338 U.S. 689 (1950) struck down an Interstate Commerce Commission decision that would have limited the operations of shippers' associations to

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those instances where the member is the actual shipper of the freight, thus barring a shippers' association from handling any freight where the member is the receiver of the freight.

Similarly, in *Interstate Commerce Commission v. Delaware, Lackawanna, and Western Railroad Co.*, 220 U.S. 235 (1911), the Supreme Court was faced with a railroad tariff provision which would have precluded shippers' associations from taking advantage of volume carload rates. In striking down the provision, the Court favorably cited the following language from an earlier ICC decision in *California Commercial Association v. Wells Fargo & Co.*, 14 I.C.C. 422 (1908), which struck down a similar tariff provision:

It is not an exaggeration to say that the enforcement of such a rule by the carriers of the United States would bring disaster upon thousands of smaller industries, and more surely establish the dominance of the greater industrial and commercial institutions. (14 I.C.C. 434, cited at 220 U.S. 244).

The Commission's own rule will have an impact identical to that of the tariff provision held unlawful by the Supreme Court in the *Delaware, Lackawanna* decision. At a minimum, the Commission is required to conduct an analysis of the competitive impact of the regulation and provide a legal justification for the restrictions it is adopting. Such an analysis will demonstrate that the rule, as adopted, is not justified.

CONCLUSION

Wherefore, American Institute for Shippers' Associations, Inc., respectfully requests that the Commission reconsider its decision in this proceeding and amend its Section 531.3(o) of its final rule to read as follows:

531.3(o) - Amend the definition of "NSA Shipper" by deleting the stricken sentence:

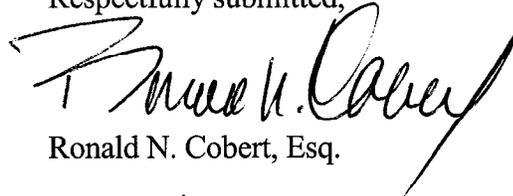
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NSA shipper means a cargo owner, the person for whose account the ocean transportation is provided, the person to whom delivery is to be made, or a shippers' association. ~~The term does not include NVOCCs or shippers' association whose membership includes NVOCCs.~~

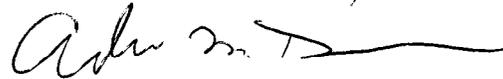
Should the Commission determine not to grant the relief requested, AISA asks the Commission rescind the final rule and terminate this proceeding for the reason that they clearly contravene the provisions of the Shipping Act.

AISA also respectfully requests that the Commission issue a stay of the effective date of the regulations pending resolution of its petition.

Respectfully submitted,



Ronald N. Cobert, Esq.



Andrew M. Danas, Esq.
Grove, Jaskiewicz and Cobert
1730 M Street, N.W. Suite 400
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(202) 296-2900

COUNSEL FOR THE AMERICAN INSTITUTE
FOR SHIPPERS' ASSOCIATIONS, INC.

Dated: January 11, 2005

CERTIFICATE OF SERVICE

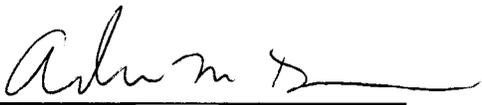
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U.S. DISTRICT COURT
THE DISTRICT OF COLUMBIA

I hereby certify that I have this day I have served the attached Petition for Reconsideration and Stay of the American Institute for Shippers' Associations, Inc., (AISA) in FMC Docket No. 04-12, *Non-Vessel Operating Common Carrier Service Arrangements*, upon all parties of record, by e-mail, acknowledgement of receipt requested, except for the following persons served by first-class mail, postage prepaid:

Therese G. Groff, Esq.
Vice President, General Counsel & Secretary
BAX Global, Inc.
440 Exchange Drive
Irvine, CA 92602

Penelope W. Register, Esq.
Senior Vice President and General Counsel
FedEx Trade networks Transport & Brokerage, Inc.
6075 Poplar Avenue, Suite 422
Memphis, TN 38119

Dated at Washington, D.C., this 12th day of January, 2005.



Andrew M. Danas