BEFORE THE
FEDERAL MARITIME COMMISSION

PETITION OF UNITED PARCEL SERVICE, INC. FOR EXEMPTION PURSUANT TO SECTION 16 OF THE SHIPPING ACT OF 1984 TO PERMIT NEGOTIATION, ENTRY AND PERFORMANCE OF SERVICE CONTRACTS

FMC Petition No. P3-03

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

FMC Petition No. P5-03

PETITION OF OCEAN WORLD LINES, INC. FOR A RULEMAKING TO AMEND AND EXPAND THE DEFINITION AND SCOPE OF "SPECIAL CONTRACTS" TO INCLUDE ALL OCEAN TRANSPORTATION INTERMEDIARIES

FMC Petition No. P7-03

PETITION OF BAX GLOBAL INC. FOR RULEMAKING

FMC Petition No. P8-03

PETITION OF C.H. ROBINSON WORLDWIDE, INC. FOR EXEMPTION PURSUANT TO SECTION 16 OF THE SHIPPING ACT OF 1984 TO PERMIT NEGOTIATION, ENTRY AND PERFORMANCE OF CONFIDENTIAL SERVICE CONTRACTS

FMC Petition No. P9-03

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COMMENTS OF
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The National Industrial Transportation League ("League") submits these Comments in response to petitions filed with the Federal Maritime Commission ("FMC") seeking relief under the *Shipping Act* of 1984, as amended by the *Ocean Shipping Reform Act of 1998* ("OSRA"), to eliminate rate transparency for the services offered by non-vessel-operating common carriers ("NVOCCs").

Each of the petitions presents different approaches for obtaining the requested relief, with varying procedural and substantive proposals. Except for the petition by the National Customs Brokers and Forwarders Association of America ("NCBFAA"), the petitioners are seeking direct authority to enter into confidential contracts with their customers, either individually, on behalf of all NVOCCs, or for those NVOCCs that can meet certain proposed standards. NCBFAA, on the other hand, has requested that all NVOCCs be relieved of the obligation to publish their rates in tariffs or, alternatively, to be able to shield the actual rates charged by NVOCCs by obtaining authority to publish only a range of rates in tariffs that would apply to a given transportation movement.

The League supports the general thrust of the relief requested by each of these petitions, namely, to permit confidential, individually-negotiated arrangements between NVOCCs and their customers. However, the League's comments are not being filed in support of any particular petition. The League does believe that the petitions have raised an issue of industry-wide importance and that the FMC should exercise its exemption authority (under the conditions set forth below) to permit NVOCCs to offer service contracts to their customers. In this filing, the League sets forth its views on the issues at hand, as well as the approach that it believes should be followed to authorize contracting by NVOCCs.

As a general matter, the League strongly supports contracting between NVOCCs and their customers on a broad basis. The League believes that the FMC should exercise its discretionary authority under Section 16 of OSRA and grant a class exemption to allow all NVOCCs to offer service contracts, subject to such NVOCCs meeting standards of financial responsibility bearing some relationship to their contractual committments and adhering to existing requirements for service contracts. Liberalization of the exemption criteria in OSRA, and the substantial market changes that have occurred since OSRA, support the granting of a class exemption. Rather than grant relief on an ad hoc, case-by-case basis to individual NVOCCs, the League believes that the FMC should initiate a rulemaking to establish financial standards of qualification for a class exemption.

I. IDENTITY AND INTEREST OF THE LEAGUE

Founded in 1907, the League is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. For many years, League membership was open only to shippers and receivers of goods. However, last year, the League broadened its membership to permit carriers and all other persons engaged and interested in the transportation of goods to become members. Thus, the League's membership now includes not only "classic" shippers and receivers of goods, but also includes carriers, third party intermediaries, logistics companies, and similar entities. League members are substantial users of NVOCCs and a number of members themselves are NVOCCs.

Since its founding, the League has sought a competitive, efficient, and safe transportation system. Toward that end, the League has participated actively in federal regulatory proceedings and legislative matters dealing with national and international transportation. This has included

taking an active role in passage of OSRA, which has had a significant impact upon League members.

II. THE FMC HAS BROAD AUTHORITY TO GRANT A CLASS EXEMPTION TO PERMIT NVOCCs TO ENTER INTO SERVICE CONTRACTS WITH SHIPPERS.

The FMC has the authority to grant an exemption to permit NVOCCs to enter into service contracts with shippers. Pursuant to Section 16 of OSRA (46 U.S.C.App. § 1715), the FMC:

> may by order or rule exempt for the future any *class of agreements* betweenpersons *subject to this chapter* [46 U.S.C. App. Ch. 36] or any *specified activity of those persons* from any requirement of this chapter *if* it finds that [1] the exemption will not result in substantial reduction in competition or [2] be detrimental to commerce. The Commission may attach conditions to any exemption and may, by order, revoke any exemption.

This exemption authority is broader than the Commission possessed pre-OSRA. The Congress deliberately revised the exemption authority to remove two additional factors that, prior to OSRA, also required the Commission to determine that the exemption would not substantially impair effective regulation and would not be unjustly discriminatory. In eliminating these two tests, Congress determined 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."[1] It is significant that the factors that Congress removed were "regulatory" considerations, whereas the remaining factors to be applied to current requests for exemption emphasize commercial and competitive considerations. Thus, Congress clearly intended to liberalize the Commission's authority to grant exemptions by encouraging the Commission to exercise its experienced

[1] S. Rep No 105-61 at 30.

judgment, consistent with evolving practices and the more pro-competitive and deregulatory policies underlying OSRA.

An exemption to permit NVOCCs to enter into service contracts with shippers clearly is within the scope of authority provided to the FMC under Section 1715. NVOCCs are "persons subject to this chapter [36]." They are defined within 46 U.S.C. App. § 1702(17) and must be licensed by the Commission pursuant to 46 U.S.C. App. § 1718. Similarly, shippers also are "persons subject to this chapter [36]" and are defined at 46 U.S.C. App. § 1702(21). In addition, service contracting is an "activity" that is specified in Chapter 36, at 46 U.S.C. App. § 1707(c). A service contract is a "class of agreements" subject to the Act.

Neither the statute nor legislative history expressly prohibits the FMC from applying the exemption authority to allow NVOCCs to offer service contracts. Furthermore, an exemption to permit NVOCCs to enter mto service contracts with shippers does not contravene Congressional policy. Congress did not statutorily declare that NVOCCs should be prohibited from entering into service contracts, since no specific prohibition or limitations on the FMC's exemption authority related to NVOCC contracting is set forth anywhere in the Shipping Act.[2] Rather, Congress made an affirmative determination that ocean common carriers should be permitted to enter into confidential service contracts, as an alternative to public tariffs, at the time it enacted OSRA. Congress left to the FMC's discretion to determine, through the exemption process, whether to expand service contracting to NVOCCs at a later date, by exempting them from the

[2] When Congress has intended to place a matter beyond an agency's exemptton authority, it has done so explicitly For example, Congress gave the Surface Transportation Board broad exemptton authority in 49 U.S.C. § 10502 that is comparable to the exemption authority that it has given to the FMC. But, in Sections 10502(e) and (g), Congress expressly prohibited the Board from exercising its exemptton authority with respect to specific rail carrier obligations.

requirement that such contracts be only between ocean common carriers and shippers. The FMC may grant this exemption if it concludes that such action satisfies the relaxed exemption criteria.[3]

III. THE FMC SHOULD EXERCISE ITS AUTHORITY TO GRANT A CLASS EXEMPTION TO PERMIT NVOCCs TO ENTER INTO SERVICE CONTRACTS WITH SHIPPERS.

The League agrees with the petitioners that the business environment for ocean transportation has changed significantly in the five years since the passage of OSRA. The FMC must evaluate whether to grant an exemption in view of these changes.

A. Since OSRA, there have been substantial changes in the industry that must be taken into consideration by the FMC

The shipping business under OSRA has changed radically. Probably the most dramatic change has been the shift from common carriage to contract carriage based on the proliferation of confidential contracting between shippers and VOCCs. When given the choice, shippers overwhelmingly choose to contract with their carrier partner as opposed to shipping under public tariff rates. The growth in the use of service contracts unleashed by OSRA surprised even the Commission. *The Impact of the Ocean Shipping Reform Act* of 1998, September 2001, at 44 (hereafter "FMC OSRA Report"). As of 200 1, the Commission observed a 200% increase in the number of service contracts filed with it since May 1999 and an increase in the volume of cargo transported under service contracts. *Id.* at 17, 18, 20. Both shippers and carriers have cited the main advantage of service contracts as "the ability to engage in one-on-one negotiations with greater flexibility to structure contracts as needed." *Id.* at 18. Another key advantage cited by both shippers and carriers is the ability to "discuss and address commercially sensitive issues

[3] If the FMC fails to exercise its exemption authority here, the petitioners and other parties will have no alternattve but to seek legislative recourse by reopening the *Shipping Act of* 1984 and the *Ocean Shipping Reform Act of 1998* The League believes that the FMC's exercise of its exemption authority in this case would enable the statute to continue to perform as Congress intended, to meet the changing needs of the ocean liner industry.

more freely, and privately structure their contracts accordingly." *Id.* at 22. These factors led the Commission to conclude that

> Overall, . . . confidentiality under OSRA has provided shippers and carriers with the privacy they deem necessary to freely transact business. With the ability to shield such information, the contracting process is not constrained by the previous standards of meeting benchmarks and matching terms identically. Commercially sensitive issues and business requirements can be discussed more freely and accommodated more easily with specific contract terms. Carriers and shippers are more focused on achieving their individual rate and business objectives through contract negotiations.

Id. at 23. Shippers and VOCCs have overwhelmingly determined that their commercial requirements are better suited to a contracting process that allows for confidential arrangements.

Another change that is having a profound effect upon the industry is the influx of very large, sophisticated, and profitable logistics companies that offer NVOCC services to their customers. Large companies, as well as small and medium-sized entities in the transportation industry, now provide NVOCC services. These companies, many of which hold themselves out as third-party logistics providers, are serving an increasingly important role for shippers, as more companies seek assistance in cutting transportation costs and managing their supply-chain.

These 3PL/NVOCC companies tend to offer a myriad of logistics services, including ocean transportation. Many shippers would like to have a single contract with such entities covering the broad scope of their supply chain. However, due to the inability of NVOCCs to contract with their customers, efficiencies are lost or diminished because the 3PL must address the ocean transportation component separately and/or, at a minimum, the pricing for the ocean piece must be made known and available to the public. Granting an exemption that would allow for comprehensive logistics services to be bundled in a single contract would increase efficiencies and facilitate commerce. The current trend of transportation and logistics

outsourcing to large and experienced service providers lends further support for the Commission to grant an exemption.

The benefits shippers and VOCCS derive from contracting-more flexible and customized arrangements that are better suited to their business objectives-could also be accomplished in contracts between shippers and NVOCCs, if the FMC grants an exemption. From the perspective of shippers, commerce is facilitated due to the contracting process itself, and not because the party with whom they can contract owns a vessel. Moreover, because NVOCCs are unable to offer the same flexibility and customized services on a confidential basis that shippers clearly desire, they must compete with VOCCs on an unlevel playing field. This competitive disadvantage would be eliminated if the FMC grants an exemption.

Furthermore, the vertical integration of VOCCs, which increasingly are expanding to perform NVOCC activities, represents another change since OSRA. FMC OSRA Report at 3 1. This change appears to have been fostered in part by confidential service contracts and is symptomatic of the growing trend towards integrated logistics services mentioned above. *Id.* As a consequence, affiliates of ocean common carriers are now competing directly with NVOCCs/3PLs to provide services, such as warehousing, customs brokerage, and ocean shipping, but all in a single bundled confidential package, which NVOCCs are unable to offer. *Id.* at 3 l-32. As the Commission has observed, NVOCCs have a "need to offer more service to customers in an effort to strengthen competitive position under what is seen as a more difficult operating environment under OSRA." *Id* at 33. In order to respond effectively to this new competitive threat from VOCCs, NVOCCs need to meet VOCC confidential service packages with confidential service packages of their own.

These changes are not limited to large shippers, which otherwise might still contract directly with VOCCs. Small and mid-size shippers also are coming under increased pressure to develop better supply chain management. The integrated services that VOCCs initially rolled out for their larger customers now are being extended to smaller volume shippers. This invasion by VOCCs of the traditional core NVOCC customer base has placed pressure on NVOCCs to respond with consolidated service offerings of their own. But, NVOCCs are severely handicapped because they cannot enter into service contracts that offer the confidentiality and flexibility that more and more shippers demand.

Finally, the consolidation of VOCCs since OSRA also has also modified the competitive landscape. NVOCCs are another source of competition, but not for the growing number of shippers who prefer the flexibility and confidentiality of service contracts. NVOCCs enhance competition in an environment in which there have been a number of VOCC mergers, and NVOCCs could better contribute to a healthy and competitive ocean shipping landscape if they are allowed to offer service contracts to shippers. By authorizing NVOCCs to contract with their customers, the Commission would allow NVOCCs to match, and even improve upon, VOCC service offerings, thus providing even more competitive options to the shipping public.

Accordingly, the FMC must evaluate its exemption authority with an eye toward the substantial industry changes that have occurred since OSRA. These changes support the granting of a class exemption, subject to the condition that NVOCCs desiring to contract provide evidence of financial responsibility and comply with existing service contract requirements.

B. An exemption authorizing NVOCCs to enter into service contracts would not reduce competition or be detrimental to commerce

The FMC's authority to grant an exemption is discretionary when it finds that granting the exemption will not substantially reduce competition or be detrimental to commerce, 46

U.S.C. App. 17 15. Enabling NVOCCs to contract confidentially with their customers would do neither, rather it would significantly enhance both.

As shown above, contracting between NVOCCs and shippers would be pro-competitive, because it would allow NVOCCs to better compete with VOCCs who today are the only carriers that can meet the high shipper demand for confidential contracts. While VOCCs and NVOCCs clearly are competitors for shipper's cargo under the current regime, notwithstanding the disadvantage to NVOCCs, leveling the playing field can only lead to greater and more vigorous competition between the two. Furthermore, competition between NVOCCs would likewise increase. The growing number of large, well-capitalized NVOCCs in the 3PL market are essentially offering the same comprehensive logistic service offerings of VOCC-owned logistics companies. All of these companies should be able to compete head-to-head for shipper's cargo based on confidential pricing and service proposals and, undoubtedly, would compete fiercely, if provided with the authority to engage in service contracts.

Granting an appropriately-crafted exemption to financially sound NVOCCs would also facilitate commerce by increasing the benefits derived from the contracting process. As the Commission itself has recognized, confidential contracts can lead to more flexible pricing and service offerings, greater efficiencies, and more customized business practices. Enabling NVOCCs to contract would only expand the opportunities for those benefits to be achieved on a wider scale. NVOCCs today simply do not have sufficient flexibility to craft comprehensive, individualized business partnerships with their customers using only tariffs. Many shippers recognize that NVOCCs increasingly have much to offer through competitive pricing and bundled services. However, without the protection of confidentiality to protect commercially sensitive information or innovative ideas, they are constrained in their negotiations. By

removing the contracting restriction for NVOCCs that can demonstrate financial stability, the FMC would be furthering commerce.

IV. THE FMC SHOULD INITIATE A RULEMAKING TO DEVELOP STANDARDS TO APPLY TO THE CLASS EXEMPTION

Having established that the FMC has the authority to exempt NVOCCs from the service contracting limitations in OSRA, the League believes that it should exercise that authority by initiating a rulemaking to determine the proper contours of a class exemption. Because the issue of contracting by NVOCCs is one of major significance with potential impacts on the industry as a whole, the Commission should not address the matter on an ad hoc, case-by-case basis. Rather, it would be more beneficial for the FMC to examine this issue on a broad level through a rulemaking proceeding. This approach has the benefit of consolidating the issues raised by the various petitioners and allowing the FMC to collect feedback from all interested parties in a single, more manageable docket. Given the number and variety of NVOCC petitions already filed with the agency, this approach would avoid, or at least discourage, petitions by countless other NVOCCs, and repeated comment filings by interested parties. Thus, a rulemaking offers the most workable approach for a thorough vetting of the issue at hand and would assist the FMC in the management of its own resources.

Using the rulemaking process, the League believes that the FMC should endeavor to create standards of financial responsibility bearing some relationship to the contractual commitments to be undertaken by NVOCCs in their contracts with shippers as part of the class exemption. The basis for this approach is to address the apparent concern of the Congress at the time OSRA was enacted that NVOCCs do not invest in the assets needed to actually perform the transportation service and, thus, may have difficulty standing behind their contractual commitments. See 144 Cong. Rec. S3192, S3200 (daily ed. April 3, 1998) (statement by Sen.

Breaux), 144 Cong. Rec. S3305, S3307 (daily ed. April 21, 1998) (statement by Sen. Breaux). The League strongly believes that individual shippers are fully capable of performing due diligence to determine whether a company they intend to do business with is reputable and financially sound. However, because of OSRA's legislative history, creating standards of financial responsibility to enable contracting by NVOCCs would be an appropriate agency response to Congressional concerns expressed when the statute was enacted.

Although the League does not propose in this filing the specific kinds or levels of financial responsibility that would be acceptable, since development of such standards would be determined via the rulemaking, it does suggest that the minimum standards of financial responsibility could be demonstrated in several ways. UPS suggested in its petition that the Commission should adopt an asset-based standard. However, there are other ways to measure financial responsibility and the League opposes a strictly asset-based standard because it arbitrarily would exclude many financially responsible NVOCCs from the exemption. There are many other NVOCCs who are financially secure and have substantial expertise in ocean transportation, yet they do not own or operate transportation assets. The League does not believe that those NVOCCs should be excluded from the exemption. Therefore, the League advocates the development of standards that would allow NVOCCs to demonstrate financial responsibility through a variety of means, such as assets, earnings or net income, a surety bond, or marine insurance.

The minimum threshold of NVOCC financial responsibility could be tied to the value of cargo volumes to be moved by service contract. For example, an NVOCC could post a blanket bond or purchase a blanket insurance policy to cover cargo handled by contract up to a specified maximum value. If the NVOCC had the opportunity and desire to handle a greater value of

cargo by contract, it could supplement the bond or purchase an insurance rider to increase the threshold. Evidence of the financial responsibility could be made available to or filed with the agency, as is already done as part of the OTI licensing requirements. Any bond, surety or insurance that may be posted would serve as security for the contractual commitments undertaken by the NVOCC.

In addition, there are likely to be some NVOCCs that are so large, highly capitalized, and financially strong, that they would automatically qualify for the exemption based on their annual earnings or net income. However, the League is not advocating specific threshold amounts at this time that should be adopted.

Following this approach, the League believes that the primary Congressional concern at the time of OSRA that initially prevented NVOCCs from entering into service contracts with shippers would be addressed. In addition, those concerns should be re-evaluated based on the considerable changes to the ocean transportation business environment and the NVOCC industry itself discussed above.

Finally, the League believes that a condition for granting the class exemption should be that service contracts between NVOCCs and shippers must be subject to all existing rules and requirements applicable to service contracts between VOCCs and shippers.

V. CONCLUSION

For the foregoing reasons, the League requests the FMC to: (1) exercise its authority to exempt NVOCCs from the service contracting limitations in OSRA; and, (2) defer action on the individual petitions and consolidate them with a rulemaking for the purpose of developing standards of qualification for a class exemption, including subjecting NVOCCs to financial

responsibility requirements for service contracts and to existing rules and requirements for service contracts between VOCCs and shippers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing COMMENTS OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE was servedvia first-class U.S.mailonthe 10th day of October, 2003, upon the following:

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