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MemorandumOFFICE OF THE SECRETARY
FEDERAL MARITIME COMM**TO :** Bryant L. VanBrakle, Secretary**DATE:** January 23, 2004**FROM :** Harold J. Creel, Jr., Commissioner**SUBJECT:** Petition No. P9-03, 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

On January 13, 2004, I met with representatives of C.H. Robinson Worldwide, Inc. ("Robinson") to discuss their above-referenced petition for relief currently pending before the Commission. Representing Robinson were: Jeffrey Scovill, Director - International Development, Joseph J. Mulvehill, Vice President International, and Carlos Rodriguez, Esq., Legal Counsel. Also present was my counsel, David R. Miles.

At the beginning of the meeting, Mr. Rodriguez presented me with the attached document entitled "Oral Presentation of C.H. Robinson, Inc. Before the Federal Maritime Commission." Using this document as a guide, the presenters made the following points:

Robinson discussed the general changes to the ocean transportation industry since the passage of the Ocean Shipping Reform Act of 1998 ("OSRA"). It contends that its request for authority to offer service contracts to its shipper customers is driven by shipper demand. Shippers are allegedly seeking to outsource their ocean transportation.

Robinson's ocean transportation contracts are tailored for their customers. Robinson offers 15-20 various transportation-related services and its contracts are generally quite extensive. In addition, confidentiality of freight rates is also increasingly important to shippers today.

With respect to the argument that service contracting authority is not a "requirement of the Act" for purposes of a section 16 exemption, Robinson points out that it is seeking an exemption from the tariff publication requirement of the Act, with some conditions. Robinson also contends that there is no requirement that it show harm in order to obtain an exemption.

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In response to a question by Commissioner Creel, Robinson did not believe that there was any serious opposition to its petition by organized labor, especially the ILA.

Robinson claims to spend \$30-\$40 million a year on information technology.


Harold J. Creel, Jr.

Attachment

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January 13, 2004

**ORAL COMMENTS OF:
C.H. ROBINSON, INC.
FEDERAL MARITIME COMMISSION
FMC PETITION NO. PY-03
TUESDAY, JANUARY 13, 2004
10:00 AM - 4:00 PM**

CARLOS RODRIGUEZ, ESQ.
Legal Counsel, C. H. Robinson, Inc.
RODRIGUEZ O'DONNELL ROSS
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January 13, 2004

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5. 4:00PM - HAROLD J. CREEL, JR., COMMISSIONER
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NOTES

**NOTES: ORAL PRESENTATION OF
C.H. ROBINSON, INC.
BEFORE THE FEDERAL MARITIME COMMISSION**

JANUARY 13, 2004

OVERVIEW OF CHRW'S PETITION

INTRODUCTION. (CARLOS RODRIGUEZ, ESQ.)

**THE COMMERCIAL ENVIRONMENT
THE LEGAL ENVIRONMENT
RESPONSE TO WORLD SHIPPING COUNCIL COMMENTS**

**THE COMMERCIAL ENVIRONMENT OF THE PETITION FOR EXEMPTION
(BY MR. MULVEHILL; MR. JEFF SCOVILL)**

- **PRIMARY IMPETUS FOR PETITIONS: FREEDOM TO CONTRACT WITH SHIPPERS; DEMANDED BY SHIPPERS**
- **COMMERCIAL COMPETITIVE BENEFIT OF CONFIDENTIAL SERVICE CONTRACTING IS CLEAR**
- **COMMERCIAL CHANGES IN THE OTI COMMUNITY, SINCE OSRA ARE RELEVANT IN TERMS OF TOTAL LOGISTICS PACKAGES, INCLUDING OCEAN TRANSPORTATION (TOWIT: THE OVERWHELMING CONGRESSIONAL RESPONSE ON POINT)**
 - 1. LOGISTICS DEVELOPMENT: MANY INTEGRATED SERVICES**
 - 2. CONSOLIDATION: LARGE COMPANIES ARE COMPETING IN THE OCEAN ARENA SUCH AS FEDEX, UPS, ETC.**
 - 3. OCEAN CARRIERS HAVE FORMED LOGISTICS ARMS**

THE EXEMPTION SHOULD BE GRANTED TO FINANCIALLY RESPONSIBLE NVOs LIKE C.H.ROBINSON

SUMMARY OF C.H. ROBINSON, INC. OPERATIONS AND FINANCIAL STATUS

1. THE OPERATIONS OF CHR

2. CHR'S FINANCIAL STATUS

- . GROSS REVENUES
- DEBT PICTURE
- IT FOCUSED

CONCLUSION.

THE BEST AND MOST EFFICIENT WAY TO CONDUCTING
TRANSPORTATION SERVICE IS BY CONFIDENTIAL CONTRACTING
WITH CUSTOMERS.

TARIFF SYSTEM IS ARCHAIC, EXPENSIVE, AND HAS NO
COMMERCIAL BENEFIT TO ANY SEGMENT OF THE INDUSTRY,
EXCEPT FOR SURCHARGES BY CARRIERS.

GUIDELINES FOR EXEMPTIONS: IN RESPONSE TO WORLD
SHIPPING COUNCIL

LEGAL CONTEXT

**THE LEGAL CONTEXT OF THE PETITION
(BY CARLOS RODRIGUEZ, ESQ.).**

- FMC HAS CLEAR AUTHORITY TO ISSUE EXEMPTIONS PURSUANT TO SECTION 16.
- EXEMPTION AUTHORITY DOES NOT REQUIRE PARTICULAR OBJECTIVE. (WSC "NO HARM" ARGUMENT).
- A REASONABLE OBJECTIVE OF EXEMPTION WOULD BE TO ENHANCE COMPETITION; AND TO CREATE EFFICIENCIES TO SHIPPING PUBLIC (EX. "ONE STOP SHOPPING")
- SECTION 16 EXEMPTION IS RELEVANT. PETITIONS ARE IN EFFECT REQUESTING **EXEMPTIONS FROM TARIFF PUBLISHING REQUIREMENTS**, WITH REASONABLE CONDITIONS WHICH THE FMC MAY IMPOSE ON THE CONFIDENTIAL CONTRACTING BETWEEN CHR AND ITS CUSTOMERS.
- TWO LEGAL PREREQUISITES ARE MET: A) COMPETITION IS ENHANCED; AND B) THERE IS A POSITIVE EFFECT ON COMMERCE
- RULEMAKING V. EXEMPTION.
- WORLD SHIPPING COUNCIL COMMENTS ARE NOT PERTINENT

**RESPONSE TO:
WORLD SHIPPING COUNCIL COMMENTS**

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**FEDERAL MARITIME COMMISSION
C.H. ROBINSON, INC.
JANUARY 13, 2004**

RESPONSE TO WORLD SHIPPING COUNCIL COMMENTS

1. “Enterprises acting as NVOCCs must publish tariffs because NVOCCs want to be considered and want to present themselves to the marketplace as “carriers,” notwithstanding the fact that they do not own or operate any ships that physically transport or carry cargo. In order to be accorded common carrier status, one must comply with the Shipping Act’s common carrier obligations.”

RESPONSE:

- a. There is no requirement in the Act that “common carriers” own or operate any vessels.
- b. The “asset” issue for carriers comes from Senator Breaux’s comments in the legislative history of the Slate-Gorton amendment where he pointed out that it is not right to allow NVOs to enter service contracts as carriers because: i) NVOs do not have the expenses; ii) do not have liability; and iii) do not have responsibility as carriers.

IN FACT PETITIONS/COMMENTS SHOW:.

- NVOs either have substantial assets, and corresponding expenses (See Petitions);
- NVOs like CHR have tremendous investment in IT solutions; and
- Liability and responsibility as carriers as can be readily seen in the legal systems with regard to cargo loss and damage claims;

- With **NVO** bonds, there is sometimes greater recourse by shippers against an NVO, than say a vessel operator going bankrupt as did Cho Yang.

2. The Council notes as a general observation that there is no evidence of **harm** under the current regulatory structure. NVOCC market growth **has** been substantial, and there is no data offered by the Petitioners showing that the regulatory structure embodied in the Shipping Act has impeded this growth.

RESPONSE:

- There is no legal requirement in seeking an Exemption to demonstrate that harm exists.
- The Petitions/Comments are talking about **creating efficiencies**, greater competition. For example: NIT League; Department of Justice. Harm is', not the issue. It is about "**freedom to confidentially contract**"; creating "**efficiencies**"; greater "**competition**" among all players. Section., 16 **poses** no particular objective of an Exemption; it only prohibits that an exemption not decrease competition, or that it results in detriment to commerce.

3. The **WSC** states: 'The UPS petition nowhere states the specific requirement of this Act **from** which it seeks exemption. **In** fact, UPS does not seek to be freed **from** any' requirement of the Act. Instead, it is **asking the Commission to grant it an affirmative privilege** that **is not** otherwise available to **NVOCCs** under the Act, i.e., the **right** 'of vessel operating common **carriers** to satisfy their rate publication/tiling obligations

through the filing of service contracts and the publication of required essential terms, That the petition does not seek an exemption at all is not merely a technical failing.”

RESPONSE:

- **This argument is an argument of semantics.** The Commission can readily understand that the Exemption requests are really seeking **exemption from the tariff filing requirements, in those cases,** where the NVOs opt to do so. And in those cases, the present Petitions have asked the Commission to impose as conditions of granting the Exemption, the confidential **service** contracts regulations that are imposed on the VOCCs. The Commission can obviously impose other conditions, but the main efficiencies which are being sought are by exempting the NVOs from tariff publishing on a selective basis. And then achieving the sought efficiencies **through confidential contracting, whatever they are called or whatever reasonable conditions may be imposed on these.** For example, the Commission might say: “o.k. you are exempt from tariff publication, and when you do this you must keep a copy of the agreement and make it available to the Commission upon request.”

The true exemption is from the tariff publishing. The conditions of the exemption are on how the NVO and its customer contracts.

4. "The CHRW petition correctly points out that NVOCCs that are affiliated with VOCCs are subject to precisely the same regulatory requirements as all other NVOCCs.

"

RESPONSE:

- CHRW believes that one of the developments since OSRA is the proliferation of carrier owned logistics companies (including NVO functions). It is CHRW's contention that these companies are not situated any different than any other NVO/logistics company. An exemption of the type requested would increase competition, even among these carrier owned companies, The paradigm shift involves offering of a laundry list of services that cannot be offered in a vertically integrated group of companies by related companies. Ex.: Maersk Logistics prominently advertises contracts with 19 major ocean carriers. This is part of the new paradigm. **The new efficiencies, even for carrier owned logistics companies, can be achieved through a contract model, not a tariff model.**

5. WSC states: "The Petitions Do Not Provide Any Guiding Principles for the Commission."

RESPONSE:

CHRW HAS PROVIDED FOLLOWING GUIDELINES:

1. The Commission has the authority under Section 16 to **grant** an **exemption to NVOs from tariff publishing requirements**, and to condition **this** exemption on a confidential contract format.
2. **The** exemption, if granted, meets the two requirements of Section 16:
 - a) the exemption **will increase competition** among NVOs, and vessel operators, and logistic companies owned by VOCCs; and
 - b) it will **not be detrimental to commerce**; in fact, it will be salutary to commerce.
3. Review should include whether an NVOCC is **offering** its customers more than just ocean rates and charges; **value-added services** may be provided at various **levels** in a transportation transaction
4. For an NVOCC that will be dealing with its customers on a confidential service contract basis, the review must also demonstrate a **history of financial stability**.
5. **As part of this analysis, in judging the impact of servicing long-term debt**, a company must demonstrate ample resources for that

purpose, so that its operations and **commitments** are not interrupted.

6. Today, the focus has expanded to include **significant investment in the information technology systems**, warehousing, and other service **areas** demanded by shippers. **NVOs** should be seen as investors in technology and other areas that result in **value added** services to customer.
7. Obviously, the Commission should not be rewarding **NVOCCs** who historically have been consistently bad actors in the regulatory process. **NVOs** should have a **history of compliance** With shipping, regulations.

6.