

**BEFORE THE
FEDERAL MARITIME COMMISSION**

Non-Vessel-Operating Common)
Carrier Service Arrangements:)
Notice of Inquiry)

Docket No. 05-06

**COMMENTS OF THE UNITED STATES
DEPARTMENT OF TRANSPORTATION**

JEFFREY N. SHANE
Under Secretary of Transportation
for Policy

JEFFREY A. ROSEN
General Counsel

ROSALIND A. KNAPP
Deputy General Counsel

DALE C. ANDREWS
Deputy Assistant General Counsel
for Litigation

PAUL SAMUEL SMITH
Senior Trial Attorney

U.S. Department of Transportation
400 Seventh Street, S.W.
Washington, D.C. 20590
(202) 366-9280

Dated: October 20, 2005

grounds for the Commission to expand its present exemption in the manner contemplated by the Notice of Inquiry, and the Department urges the Commission to do so expeditiously.

Over the years DOT has strongly advocated the deregulation of NVOCC services. See Comments of the United States Department of Transportation, dated January 21, 1992 (“1992 Comments”) in FMC Docket No. P5-91; Comments of the United States Department of Transportation, dated January 16, 2004 and Supplemental Comments of the United States Department of Transportation dated September 30, 2004 in response to FMC Petition Nos. P3-03, P5-03, P7-03, P8-03 and P9-03; Comments of the United States Department of Transportation, dated August 23, 2005 in response to the Commission’s Notice of Proposed Rulemaking in FMC Docket No. 05-05.

Our most recent comments, in Docket No. 05-05, noted that “[a]llowing NVOCCs, in their role as shippers, to collectively seek transportation services will predictably enhance competition without detriment to commerce and will further level the playing field by eliminating a prohibition that is not imposed on shippers that are beneficial owners of cargo.” August 23, 2005 Comments at 3. The Commission has agreed with that conclusion in its Final Rule expanding the current exemption. Non-Vessel-Operating Common Carrier Service Arrangements, 70 Fed. Reg. 56577 (September 28, 2005) (“September 28, 2005 Decision”). The same rationale supports extending the ability of NVOCCs, in their role as carriers, to jointly offer NSAs to shippers.

In DOT’s 1992 Comments we argued that an exemption from tariff publication and adherence requirements for NVOCCs was not only warranted, but would bring those

carriers into parity with the regulatory treatment already accorded their counterparts (middlemen non-operating entities) in other transportation sectors. The attachment to our 1992 Comments explained in text and accompanying graphs that the concept of non-operating carriers is common throughout the transportation industry, but that the extent of economic regulatory oversight was much greater for NVOCCs than for any similar intermediary. That remains the case today.¹

Now that NVOCCs also are free to enter into individual contracts under the Commission's 2004 exemption, it is again informative for the Commission to examine the regulatory approaches historically applied to other non-conveyance operating carriers in determining whether the NVOCC exemption should be expanded to allow concerted carrier activities. DOT regulations similar to the Commission's rules in Part 515 of Title 46 protect shippers in their dealings with non-conveyance operating carriers, usually by ensuring the financial responsibility and legal accessibility of such entities. See, e.g., 14 C.F.R. Parts 296 and 297 (for indirect air carriers) and 49 C.F.R. Parts 366 and 387 (for motor carrier freight forwarders). But DOT rules do not in any manner restrict cargo transportation middlemen from collectively offering transportation services to the shipping public. As a result, all freight transportation intermediaries with the exception of NVOCCs have long been free to enter into such arrangements.

Indeed, the absence of regulatory constraints on concerted activity is consistent with the approach followed in other sectors of the economy. As a general matter horizontal cooperation between and among competitors providing goods or services is

¹ / A copy of the 1992 attachment is included with this submission. The only noteworthy changes that have occurred since then are the transfer of rules regarding the motor carrier industry from the Interstate Commerce Commission to DOT and the recent FMC exemption allowing NVOCCs to enter into NSAs.

not prohibited, and joint ventures as well as other cooperative arrangements are freely pursued in other economic sectors. The check on anticompetitive concerted activity in those industries is the threat of exposure under the antitrust laws. General antitrust constraints should be all that is necessary here as well.

Although not mentioned in the NOI, DOT notes the Commission has previously expressed concern about the decision of the United States Court of Appeals for the Ninth Circuit in United States v. Tucor, 189 F.3d 834 (9th Cir. 1999). Notice of Proposed Rulemaking, Docket 05-05. In Tucor the court held that concerted activities among NVOCCs related to the foreign inland provision of services are exempt from antitrust exposure under section 7(a)(4) of the Shipping Act of 1984, 46 U.S.C. § 1706(a)(4) (“1984 Act”). But as DOT explained in its comments in Docket 05-05, Tucor is likely incorrectly decided, and in any event should provide no support for a claim that concerted activities by NVOCCs are somehow immunized from antitrust exposure pursuant to Section 7(a)(2) of the 1984 Act, 46 U.S.C. § 1706(a)(2). See August 23, 2005 DOT Comments in Docket 05-05 at 3; see also December 3, 2004 Supplemental Comments of the Department of Justice in response to Petition Nos. P3-03, P5-03, P7-03, P8-03 and P9-03 at 3. See also September 28, 2005 Decision, 70 Fed. Reg. at 56579 (recognizing that Federal courts likely would not find concerted activities of NVOCCs to be immunized from antitrust exposure).

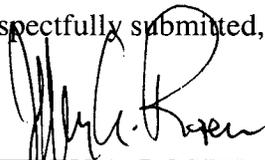
Any lingering fear on the part of the Commission that antitrust immunity might arguably attach to anticompetitive cooperative arrangements among NVOCCs can be further minimized if the Commission simply states in any order expanding the NSA exemption that the expansion provides no such immunity. See section 7(a)(3) of the

1984 Act, 46 U.S.C. § 1706(a)(3), which states that the Act provides immunity for an activity only where there is “a reasonable basis to conclude that . . . [the activity] is exempt under Section 16 [46 U.S.C. § 1715].”

Finally, it should be noted that concerted activities of NVOCCs, which are “common carriers” for purposes of the 1984 Act, are also within the purview of the prohibited acts provisions of section 10(c) of the 1984 Act, 46 U.S.C. § 1709(c). Thus, concerted activities of NVOCCs would also remain subject to Commission jurisdiction in circumstances where those activities violate section 10. This is yet another existing check against anticompetitive concerted activities, as recognized by the Commission in its September 28, 2005 Decision, 70 Fed. Reg. at 56579.

As noted at the outset of these comments, DOT believes that the private sector is best positioned to comment on the specific operational and administrative questions raised by the Commission’s Notice of Inquiry, and it is also for the private sector to ultimately decide whether, as a practical matter, cooperation among NVOCCs as carriers offering NSAs makes commercial sense. But DOT strongly believes that there is no reason in law or policy to withhold that authority. Accordingly, we encourage the Commission to expand its exemption in the manner contemplated by the Notice of Inquiry.

Respectfully submitted,



JEFFREY A. ROSEN
General Counsel

October 6, 2005

ATTACHMENT

The Regulation and Functioning of Transportation Intermediaries

A Functional Comparison

The Commission has recently emphasized that "an intermediary's conduct, and not what it labels itself, will be determinative of its [legal] status [and duties]." Bonding of Non-Vessel-Operating Common Carriers, Dkt. No. 91-1, Order served October 8, 1991, at 17-18. As a general rule, the "conduct" or functions of carriers and intermediaries, regardless of name, are the same in every mode of transportation. Table 1 hereto displays the functional similarity of providers and arrangers of transportation by mode. It shows that each entity in the ocean trade has its functional counterpart in each of the other modes. That is, an NVOCC is functionally comparable to an air freight forwarder in the field of air transportation, and to a surface freight forwarder in the motor carrier and railroad industries. Similarly, an ocean freight forwarder is functionally comparable to a broker of air and motor carriage, and to a railroad shipper agent. Finally, shipper associations are the same in every mode.

Table 1 therefore graphically shows that there are common carriers by air, rail, motor, and water that own and operate the actual means of conveyance in their respective modes. Carriage by air, land, and sea also encompasses entities that are common carriers at law yet do not themselves operate the means of conveyance: so-called indirect air carriers (tour operators for

passengers and air freight forwarders for cargo), 1/ surface freight forwarders, and NVOCCs, respectively. These entities are deemed carriers by the law because they hold themselves out as such to the public and are therefore ultimately responsible for the transportation offered and purchased.

Because they do not (as intermediaries) themselves operate aircraft, long haul trucks, rail equipment, or ocean vessels, functionally these parties can only arrange transportation for shippers on the conveyances of others. 2/ In this functional aspect, air freight forwarders and NVOCCs are the same as freight forwarders and other intermediaries in the motor, rail, and ocean

1/ Air cargo transportation is technically more complicated, because since deregulation of that field (1977) it has become commonplace for firms to hold joint authority as forwarders and as direct air carriers (e.g., Airborne Express, United Parcel Service, Consolidated Freightways/Emery, etc.). Such entities, like motor common carriers and contract carriers under common control, file tariffs in some instances (i.e., when acting as air carriers in some international markets) and not in others (i.e., when acting as a forwarder in either the domestic or international market).

2/ Indeed, even air freight firms that operate their own aircraft as common carriers may and do act as forwarders when they use the aircraft of others.

modes. See Table 1. 3/ Neither motor and rail forwarders nor other surface intermediaries file tariffs covering their activities. Air and surface freight forwarders, despite their common carrier status, no longer file tariffs for either domestic or international shipments. Of all transportation intermediaries, only NVOCCs continue to do so. As discussed in DOT's comments, there is no need to continue to impose this duty; all purposes that tariffs purport to serve will be met without them.

A Regulatory Comparison

Table 2 hereto relates the regulatory oversight applicable to the aforementioned transportation intermediaries. By and large, that regulation is minimal. Surface (motor and rail) freight forwarders and brokers must post bonds or other evidence of financial responsibility with the ICC (49 U.S.C. § 10927, 49 C.F.R. Parts 1043 and 1084), as must ocean freight forwarders (46 U.S.C. App. § 1718, 46 C.F.R. Part 510) and NVOCCs (46 U.S.C. App. § 1721, 46 C.F.R. Part 583 (1991)) with the FMC. Brokers must

3/ Within each mode, the intermediaries perform virtually identical services. For example, in the surface transportation modes a freight forwarder buys truck or rail capacity from a carrier and sells it to various shippers. A shipper association does exactly the same thing; its shipper customers are simply a group of shippers who have formed a voluntary association in order to save transportation costs by pooling traffic. Brokers are not legally "carriers" and they may or may not assume liability for loss or damage; they tend to specialize in larger volumes (complete aircraft, truckloads, etc.), but in all other respects they are the same. Shipper agents perform the same services, but tend to concentrate on brokering containerized freight (Trailer-On-Flatcar and Container-On-Flatcar) in the rail industry. Importantly, intermediaries may often serve in many capacities in the arrangement of transportation, in order to appeal to a broad range of customers -- as brokers, forwarders, and shipper agents.

obtain a license from the ICC (49 U.S.C. § 10924, 49 C.F.R. Part 1160), as must ocean freight forwarders from the FMC (46 U.S.C. App. § 1718; 46 C.F.R. Part 510), and foreign (but not U.S.) air freight forwarders must register with DOT. 14 C.F.R. Parts 296 and 297. The sole economic regulation significantly burdening the daily operations of any of these entities is the FMC requirement that NVOCCs file tariffs. 4/

Beginning in 1977, federal regulatory reform, administrative and legislative, has eliminated tariff filing requirements for most carriers and transportation intermediaries to which they have historically applied. This includes U.S. (direct) common carriers by air in domestic markets, 5/ U.S. and foreign air freight forwarders (indirect air carriers) in domestic and international markets, 6/ motor contract carriers, 7/ and surface freight

4/ As noted in DOT's comments in FMC Dkt. No. 91-1, tariff requirements are qualitatively different from bonding and other financial responsibility measures because the former "are very costly to set up and maintain" on the frequent basis necessary in a competitive environment, while the latter "ordinarily might continue indefinitely with little or no additional expense once they are put in place." DOT Comments at 11. As discussed previously in this document, tariffs also have an adverse impact on price competition and innovation.

5/ Regulation ER-1080, 43 Fed. Reg. 53628 (November 16, 1978). Foreign direct air carriers cannot transport freight wholly within the U.S., but foreign air freight forwarders can serve U.S. domestic markets on a reciprocal basis (in other words, if U.S. carriers can serve the home country markets of these forwarders).

6/ Regulation ER-1094, 44 Fed. Reg. 6634 (January 31, 1979); CAB Order 79-3-51 (March 8, 1979).

7/ Exemption of Motor Contract Carriers from Tariff Filing Requirements, 133 M.C.C. 150 (1983).

forwarders. ^{8/} Other entities arranging transportation for shippers, such as brokers, shipper agents, ocean freight forwarders, and shipper associations, have never had to file tariffs.

Motor carriers

Motor common carriers obtain operating authority from the ICC and file tariffs. By contrast, motor contract carriers also receive operating authority from that agency, but do not file either tariffs or copies of their contracts with shippers. Id.; 49 C.F.R. Part 1030. Indeed, the ICC recently proposed to eliminate its rules governing contract carriage altogether. Contracts for Transportation of Property, Ex Parte No. MC-198, served September 11, 1991, 56 Fed. Reg. 46397 (September 12, 1991). Most important for present purposes is that these apparent differences in treatment are relatively insignificant, because trucking firms may (and commonly do) hold both contract and common carrier authority. American Trucking Associations v. United States, 602 F.2d 444, 449-52 (D.C. Cir.) cert. denied, 444 U.S. 991, 100 S.Ct. 522, 62 L.Ed.2d 420 (1979). This situation, in which a single firm often operates pursuant to tariffs -- or not -- as circumstances dictate, has resulted in no significant difficulties for the industry or its shippers.

^{8/} Surface Freight Forwarder Act of 1986, §§ 6(c), 7(k), P.L. No. 99-521, 100 Stat. 2995 (1986).

A motor carrier broker is licensed by the ICC, but files no tariffs. Shipper associations are exempted from ICC tariff filing and most other economic regulation. 49 U.S.C. §§ 10526(a)(5), 10529. Shipper agents are not subject to ICC jurisdiction. A surface freight forwarder is a common carrier, but files no tariffs. Surface Freight Forwarder Act, supra; see 49 U.S.C. §§ 10561, 10762(a)(2). ^{9/} Finally, motor carrier transportation of various types of freight, such as agricultural commodities, is exempt from tariff and other regulatory requirements. 49 U.S.C. § 10526(a)(6). Consequently, motor common carriers that specialize in these commodities are exempt from tariff requirements as well.

Rail carriers

The railroad industry is served by the same types of transportation intermediaries as the motor carrier industry, and these intermediaries are subject to the same levels of economic regulation. Here, too, the ICC has exempted from tariffs and other requirements an increasing number of commodities, such as perishables, as well as traffic moving in particular types of equipment, such as boxcars and containerized freight on flatcars, because effective competition did away with the need for government oversight. See, 49 C.F.R. Part 1039; Rail General

^{9/} The legislative history of this statute includes an overview of transportation intermediaries in various transportation modes, and the reasons, similar to those here, supporting elimination of tariffs for surface freight forwarders. See 1986 U.S. Code Cong. & Ad. News at 5028 et seq.

Exemption Authority - Lumber or Wood Products, 7 I.C.C.2d 673 (1991); Rail Exemption - Miscellaneous Manufactured Commodities, 6 I.C.C.2d 186 (1989).

Air carriers

U.S. air carriers, cargo or passenger, owning their own aircraft or not, no longer file tariffs in the domestic market. Airline Deregulation Act of 1978, § 40(a), P.L. 95-504, 92 Stat. 1705 (1978); 14 C.F.R. § 221.3(d); ER-1080 and ER-1094, both supra. 10/ Tariffs for U.S. and foreign air freight forwarders (common carriers at law) operating in domestic and international markets have also been eliminated. Regulations ER-1080 and 1094, and CAB Order 79-3-51, all supra. 11/

10/ Charter carriers, cargo and passenger, direct or indirect (i.e., aircraft owning or not), operating in either domestic or international markets need not file tariffs either. CAB ER-1125, May 31, 1979; 14 C.F.R. Part 221.

11/ It is important to note that while direct air carriers (the equivalent of VOCCs) must file tariffs for international transport and air freight forwarders (the counterpart of NVOCCs) need not, the fact that the former can own or be owned by the latter (and therefore arguably avoid conducting their business via tariffs to the extent considered convenient) has had no adverse effect on either segment of the industry or shippers.

TABLE 1
COMMON CARRIERS AND INTERMEDIARIES
FUNCTIONAL COMPARISON OF THE VARIOUS MODES OF TRANSPORTATION

<u>WATER</u>	<u>AIR</u>		<u>MOTOR</u>	<u>SURFACE</u>	
	<u>INTERNATIONAL</u>	<u>DOMESTIC</u>			<u>RAIL</u>
VOCC		DIRECT AIR CARRIER	COMMON CARRIER		RAILROAD
NVOCC		AIR FREIGHT FORWARDER (INDIRECT AIR CARRIER)		FREIGHT FORWARDER	
FREIGHT FORWARDER		BROKER	BROKER		SHIPPER AGENT
SHIPPER ASSN.		SHIPPER ASSN.		SHIPPER ASSN.	

TABLE 2

REGULATORY COMPARISON OF TRANSPORTATION INTERMEDIARIES

ACTIVITIES OR ATTRIBUTES	SURFACE FREIGHT FORWARDER	SHIPPER ASSN.	SHIPPER AGENT	SURFACE PROPERTY BROKER	AIR FREIGHT FORWARDER	NVOCC	OCEAN FREIGHT FORWARDER
ENTRY CONTROL	BOND	NONE	NONE	LICENSE & BOND	REGISTER (FOREIGN ONLY)	BOND	LICENSE & BOND
PRICE/RATE CONTROL	NONE	NONE	NONE	NONE	NONE	LIMITED 1/	LIMITED 1/
TARIFF FILING	NO	NO	NO	NO	NO	YES	NO
INTRA-MODAL OWNERSHIP RESTRICTIONS	NONE	NONE	NONE	NONE	NONE	NONE	NONE
CARGO LIABILITY	YES	CONTRACTUAL	NONE	NONE	YES	YES	NONE
UNDERLYING CARRIER RESTRICTIONS	LIMITED 2/	NONE	NONE	NONE	NONE	NONE	NONE
OPERATING RESTRICTIONS	LIMITED 2/	NONE	NONE	NONE	NONE	NONE	NONE

1/ Prohibited acts listed in section 10 of the Shipping Act of 1984; NVOCCs also subject to 46 C.F.R. Part 553 rate regulation in domestic offshore trades.

2/ The Surface Freight Forwarder Act of 1986 effectively deregulated almost all the commercial activities of surface freight forwarders. The only restriction on these intermediaries is that when arranging transportation by truck for regulated commodities they must use regulated motor carriers (i.e., no independent owner-operators).