BEFORE THE
FEDERAL MARITIME COMMISSION

PETITION OF UNITED PARCEL SERVICE, INC.
FMC Petition No. P3-03

PETITION OF NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION OF AMERICA, INC.
FMC Petition No. P5-03

PETITION OF OCEAN WORLD LINES, INC.
FMC Petition No. P7-03

PETITION OF BAX GLOBAL INC.
FMC Petition No. P8-03

PETITION OF C.H. ROBINSON WORLDWIDE, INC.
FMC Petition No. P9-03

PETITION OF DANZAS CORPORATION D/B/A/ DANMAR LINES LTD., DANZAS AEI OCEAN SERVICES, AND DHL DANZAS AIR AND OCEAN
FMC Petition No. P1-04

PETITION OF BDP INTERNATIONAL, INC.
FMC Petition No. P2-04

PETITION OF FEDEX TRADE NETWORKS TRANSPORT & BROKERAGE, INC.
FMC Petition No. P4-04

RESPONSE OF YELLOW ROADWAY CORPORATION TO JOINT SUPPLEMENTAL COMMENTS REQUESTING EXPEDITED ADOPTION OF A CONDITIONAL EXEMPTION FROM TARIFF PUBLICATION

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On August 2, 2004 the National Industrial Transportation League, United Parcel Service, Inc., BAX Global, Inc., FedEx Trade Networks Transport & Brokerage, Inc., Transportation Intermediaries Association, C.H. Robinson Worldwide, Inc., and BDP International, Inc. (hereinafter jointly referred to as the "Joint Commenters") filed a document with the Federal Maritime Commission ("Commission") in the above-referenced dockets titled "Joint Supplemental Comments Requesting Expedited Adoption of a Conditional Exemption from Tariff Publication" ("Joint Supplemental Comments"). Yellow Roadway Corporation hereby submits its response to the Joint Supplemental Comments in accordance with the Commission's Order served on September 2, 2004 Yellow Roadway has previously filed comments in a number of these proceedings on January 16, 2004.[1]

The Joint Supplemental Comments contain a "Tariff Exemption Proposal" that would establish a new type of shipping contract called an "NVOCC Agreement" and a regulatory structure for these contracts that would be virtually the same as the requirements currently in place for service contracts of vessel operating common carriers ("VOCCs"). The Joint Commenters suggest that "NVOCC Agreements" be defined in language identical to that used for the definition of "service contracts" in the Shipping Act of 1984; 46 App. U.S.C. §1702[19]. NVOCC Agreements would be required to have the same "essential terms" as are required for service contracts in Section 8(c)(2) of the Shipping Act; 46 App. U.S.C. §1707(c)(2)[2]. Moreover, NVOCCs would be required to file the same redacted version of these essential terms in their tariffs as VOCCs are currently required to file in their Essential Terms Publications. *Id*. at §1707(c)(3). Finally, the Tariff Exemption Proposal makes it explicit that the Commission would have the same power over NVOCC Agreements that it currently has

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[1] As noted in its earlier submission, Yellow Roadway currently conducts Ocean Transportation Intermediary ("OTI") services through two subsidiaries; a licensed ocean freight forwarder named Yellow GPS, LLC and a licensed NVOCC named Globe.Com Lines, Inc. As soon as all regulatory approvals are obtained, all OTI operations will be conducted through a single entity named MIQ LLC d/b/a Meridian IQ.

[2] There appears to be a single difference between the essential terms required of a service contract and the essential terms the Joint Commenters would require of an "NVOCC Agreement." That is, NVOCC Agreements would be required to have liquidated damages provisions, whereas such provisions are optional in service contracts.

over service contracts. For the reasons set forth below, Yellow Roadway urges the Commission to reject this proposal.

A. The Proposal Would Place More Regulatory Burdens on NVOCCs

As pointed out in numerous filings with the Commission in these dockets, NVOCCs currently labor under burdensome costs and expenses imposed by the outmoded and meaningless tariff filing requirements of the Shipping Act and Commission's tariff regulations. This burden might be justified if these requirements served any meaningful commercial purpose. In fact, they don't. No shipper uses them to make real world pricing decisions. They also serve no valid regulatory purpose. As Congress explicitly recognized in the Ocean Shipping Act of 1998 ("OSRA"), the concept of common carriage – which is the primary basis for NVOCC tariff requirements -- is no longer of importance in the international ocean shipping industry. Thus, tariffs are vestigial regulatory anachronisms. The costs and expenses of tariff filing, however, are real. NVOCCs spend real money and devote real time and energy every month to file rates nobody looks at.

The Tariff Exemption Proposal in the Joint Supplemental Comments does not alleviate this problem. It would, if adopted, actually impose additional meaningless regulatory burdens on NVOCCs. In the first place, the creation of "NVOCC Agreements" would not eliminate the burden of filing tariff rates unless NVOCCs decided to enter into "NVOCC Agreements" with every one of their customers, which is highly unlikely. Moreover, for each "NVOCC Agreement" there would be two filing requirements. A copy of the agreement would have to be filed directly with the Commission and the redacted essential terms would have to be filed in the NVOCC's tariff.

Clearly, adoption of this proposal would impose greater burdens on NVOCCs with no corresponding benefit to the shipping public. Since it is clear that shippers do not look at NVOCC tariffs to find out what the rates are, why would shippers look at NVOCC

tariffs to see redacted versions of "NVOCC Agreements" that don't contain any rates? It is, in addition, highly doubtful the Commission itself would - - or could - - review the thousands of NVOCC Agreement filings that would result from adoption of this proposal. As more fully discussed below, there is no need for the Commission to review them, or even have them on file. Thus, adoption of the proposal would also impose additional, and unjustifiable, burdens on the Commission.

B. There is No Reason the Commission Should Maintain NVOCC Rates in its Files

Even if the Commission, through its exemption authority, were to authorize "NVOCC Agreements," there is no need for the Commission to collect and maintain these agreements. NVOCCs do not have sufficient market power to warrant the use of Commission resources to monitor NVOCC pricing as a way of preventing market distortions. The Commission does not currently use NVOCC tariffs to monitor competitive conditions in the ocean shipping industry or even the NVOCC portion of the industry. Why, then would there be a need to accumulate thousands of "NVOCC Agreements" in the Commission's files?

The filing of service contracts by VOCCs, on the other hand, fills a necessary and important function. VOCCs have been granted antitrust immunity and the Commission has been mandated to prevent VOCCs from misusing their immunity to harm the shipping public. To accomplish this task the Commission must have ongoing access to the best evidence of the VOCCs' market behavior. This is the reason why agreements among VOCCs must be filed with the FMC and why the VOCCs' service contracts must also be filed with the Commission. Through the exercise of their market power, VOCCs can inflict competitive harm in the marketplace. Congress has instructed the Commission to act promptly when necessary to forestall such harm.[3] Having VOCC agreements and service contracts readily and instantly available in its own files gives

[3] *See e.g.,* S. Rep. No. 105-61, 105th Cong., 1st Sess.14 (1997)("The agency must be prepared and able to address and rectify such anti-competitive conditions before they take their toll on importers, exporters and U.S. ocean borne trade.")

the Commission the necessary tools to perform this function. Thus, there is a legitimate regulatory need for the filings of VOCC service contracts with the Commission.

There is, however, no similar regulatory need for filing of NVOCC pricing arrangements. In this regard, the Joint Commenters proposal is based on the illusory premise that NVOCCs and VOCCs require identical regulatory oversight. As Congress recognized, VOCCs are capable of market distorting anti-competitive behavior and need close, ongoing regulatory supervision. NVOCCs do not have market power, do not have antitrust immunity, and do not control the means of transportation. Their pricing arrangements, therefore, do not constitute any potential dangers to the shipping public or U.S. ocean borne commerce. Problems with NVOCCs may be remedied by the Commission by using its powers in individual cases to enforce the prohibitions against unlawful NVOCC activity in Section 10 of the Shipping Act, 46 App. U.S.C. §1709 and under its licensing regulations.

C. The Money and Time Spent on Tariff Filing Could Be Better Spent in Other Areas.

As numerous NVOCC submissions in these proceedings have made clear, there is a real cost to tariff filing, both in terms of monetary expense and the expenditure of management time and effort. There is, therefore, an opportunity cost to NVOCC filing (whether of tariffs or "NVOCC Agreements") that the Commission should recognize in considering the tariff exemption requests. Given the lack of economic or regulatory utility of NVOCC rate or agreement filing, there are clearly more critical and important areas for NVOCCs to employ their money, time and energy. Rather than spending time and money filing "NVOCC Agreements" with the Commission and redacted essential terms in their tariffs, as the Joint Commenters suggest, NVOCCs could be using their time and money to help protect the American public by improving their security.

As the Commission and other government agencies; notably, U.S. Customs and Border Protection ("CBP"), recognize, NVOCCs perform critical functions in the international supply chains in which they participate. Since 9/11, CBP has adopted new

regulations permitting NVOCCs to file their shipment information directly in the Vessel Automated Manifest System ("Vessel AMS") so as to enable them to comply with the 24 Hour Advance Manifesting Rules. A significant number of NVOCCs have opted to do this by filing international carrier bonds with CBP and investing in the technology necessary to electronically file their manifests in Vessel AMS. CBP has made it clear that advance manifest filing is a critical component of its efforts to protect the United States from the introduction of weapons of mass destruction, other terrorist supplies or weapons, or terrorists themselves, into the United States in ocean shipping containers.

CBP has also included NVOCCs as one of the first groups of entities to be eligible to participate in the Customs-Trade Partnership Against Terrorism (C-TPAT). Again, a substantial number of NVOCCs have taken this opportunity to join CBP and other C-TPAT participants in a massive voluntary effort to upgrade security policies and procedures throughout the international supply chains serving the United States. Through their participation in C-TPAT, NVOCCs are being asked to continually upgrade their security arrangements and the security arrangements of their supply chain partners and to develop and adopt best practices in the area of security.

All of these security activities require money, time and management effort and attention. To the extent these factors are engaged in a wholly meaningless and sterile regulatory activity such as tariff (or "NVOCC Agreement") filing, they cannot be devoted to these more pressing and important activities.

D. Summary and Conclusion.

For all of these reasons, Yellow Roadway respectfully submits that the proposal of the Joint Commenters should <u>not</u> be adopted by the Commission. Rather, the Commission should adopt the proposal of the National Customs Brokers and Forwarders Association of America (NCBFAA), which calls for the total elimination of tariff filing. This is the most sensible and efficient way to address the real problems created by the outmoded NVOCC tariff filing requirements. Moreover, Yellow Roadway

urges the Commission to take this step as soon as possible. In this regard, it agrees with the contentions of the Joint Commenters that there is no need to institute any further regulatory proceedings before taking this action. The Commission already has a complete record fully justifying the total elimination of NVOCC tariff filing. This is the course it should take with no further delay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 30th day of September, 2004, served a copy of the foregoing Response Of Yellow Roadway Corporation To Joint Supplemental Comments Requesting Expedited Adoption Of A Conditional Exemption From Tariff Publication, on the following persons listed below via first-class mail, postage pre-paid:

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