BEFORE THE
FEDERAL MARITIME COMMISSION

Petition of United Parcel Service, Inc.
Petition No. P3-03

Petition of National Customs Brokers and Forwarders Association of America, Inc.
Petition No. P5-03

Petition of Ocean World Lines, Inc.
Petition No. P7-03

Petition of Bax Global Inc. for Rulemaking
Petition No. P8-03

Petition of C.H. Robinson Worldwide, Inc.
Petition No. P9-03

COMMENTS OF
FEDEX TRADE NETWORKS

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January 16, 2004

2245389 v. 2

BEFORE THE
FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.

COMMENTS OF FEDEX TRADE NETWORKS

Introduction

FedEx Trade Networks Transport & Brokerage Inc. ("FedEx Trade Networks")[1] tiles these comments in reply to the World Shipping Council and to others that have argued that this Commission lacks authority to eliminate outdated regulatory requirements that prevent non-vessel-operating ocean common carriers (NVOCCs) from competing effectively with vessel-operating ocean common carriers. The Commission can and should act by rule to remove these requirements, subject to the condition that the shipper and carrier enter into a contract, file it with the Commission, and publish its essential terms as appropriate In its mlemaking, the Commission should strive to create the flexibility necessary for carriers — whether vessel-operating or not — to meet the needs of the rapidly evolving marketplace.

This change will facilitate international ocean commerce, and harmonize the rules for that commerce with the rules governing the domestic ocean trades. It will eliminate the anomaly whereby only one of the two transportation-equipment operators participating in an international intermodal movement can enter into contracts for the

[1] FedEx Trade Networks is a wholly owned subsidiary of FedEx Corporation, and is one of six operating companies that comprise the FedEx group of companies. It is a licensed Ocean Transportation Intermediary (FMC OTI License No. 0738N/F; Org. No. 018021). As required by the Shipping Act of 1984, we publish an electronic tariff that may be viewed at www.plustariff.com, and we maintain the required FMC financial responsibility amounts.

entire movement. Finally, it will modernize the operation of the Shipping Act without requiring Congress to reconsider the statutory framework for regulating international ocean shipping services.

Background

FedEx Trade Networks is an integral part of FedEx Corporation, a leading global provider of worldwide intermodal cargo transportation, e-commerce, and supply chain management services. In providing these services, the group largely uses its own employees, aircraft, vehicles, and loading and unloading equipment. Besides FedEx Trade Networks, other operating companies provide air and surface carriage. FedEx Corporation has more than 210,000 employees, the world's largest fleet of cargo aircraft (643 total), and nearly 65,000 vehicles.

FedEx Trade Networks provides both ocean freight forwarding and NVOCC services in the U.S. foreign commerce. We also provide full-service customs brokerage, trade advisory, information technology, e-clearance, and air and ocean freight forwarding services.

1. OSRA's Amendments To The Shipping Act Of 1984 Have Altered The Ocean Liner Industry Dramatically.

The regulatory changes made by OSRA[2] were designed to encourage the liner shipping industry to become more responsive to market forces and to become more efficient. A key change was to allow vessel-operating common carriers to depart from their published tariffs by entering into "service contracts" — confidential contracts between such carriers and their shipper-customers that establish the terms and conditions

[2] Ocean Shipping Reform Act of 1998, Pub. L. No. 105.258 (1998) ("OSRA").

of carriage.[3] In response to the broad OSRA changes, the liner industry has shifted toward contract carriage, as the Commission found in its 2001 study:

> The ability to deal with individual carriers, the elimination of the "me-too" requirement for similarly situated shippers, and the confidentiality of certain commercially sensitive service contract terms have fostered a shift to contract carriage -- carriers generally report that 80 percent or more of their liner cargo currently moves under service contracts.[4]

Contracting flexibility, a departure from outmoded tariff publication and enforcement rules, has successfully increased competition in international and domestic oceanborne trades as well as in other transportation modes, such as trucking and air transportation. Indeed, over the past 20 years, the flexibility to negotiate private terms is available to carriers — direct or indirect — in all transportation modes except international ocean shipping.[5]

In light of these changes, retention of this competitive disparity functions, only to increase the costs of ocean shipping, to the detriment of U.S. manufacturers, exporters and shippers alike. Currently, petitions are pending before this Commission in five separate dockets seeking relief from the anomalous situation that has evolved since OSRA was adopted.

Shipping Act § 8(c), as amended by OSRA.

[4] THE IMPACT OF THE OCEAN SHIPPING REFORM ACT OF 1998 at 2 (Federal Maritime Commission 2001).

A few exceptions exist, generally where consumers are involved, such as in the transportation of household goods and the indirect air transportation of passengers.

2. The Commission Has Full Authority to Eliminate the Only Legal Obstacle to Direct OTI-Shipper Contracts: The Requirement to Publish and Adhere to Tariffs.

Carrier organizations like the World Shipping Council (WSC) and the American Maritime Congress suggest that NVOCCs like FedEx Trade Networks who wish to offer integrated freight services to their customers should buy or charter a vessel in order to qualify to offer service contracts, as defined in section 3(19) of the Shipping Act.[6] This is not an appropriate suggestion.

FedEx Trade Networks has requested this contracting flexibility to assist its customers in choosing the most efficient combination of international cargo services from the available options, whether the cargo is to move by land, sea, or air. Without this flexibility, U.S. shippers and exporters suffer from a lack of seamless transportation options and increased transportation costs. Rather, the role of a major integrated carrier like FedEx Trade Networks with respect to oceanbome freight is to make it possible for its customers to take full advantage of the transportation facilities provided by ocean liners like the WSC's members.

WSC next contends that the Commission has no authority to eliminate the obstacle that allows vessel operators to have private arrangements with shippers but forces NVOCCs like FedEx Trade Networks to charge only tariff rates. This is legally incorrect.

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[6] Letter dated Oct. 9, 2003 from G. Tosi, President, American Maritime Congress to B. VanBrakle, FMC at 1; Comments of the World Shipping Council at 5, Oct. 10, 2003 (on file in, *inter alia*, Docket P8-03).

The Shipping Act of 1984 requires NVOCCs, like vessel operators, to publish tariffs that govern their rates.[7] Under the law, the tariff creates a constructive legal relationship between shipper and carrier, binding both regardless of whether the tariff terms meet the shipper's rules or whether the shipper is aware of them.[8] In addition, section 10(b)(l) of that Act requires a common carrier, whether or not it operates vessels, to adhere to its published tariffs.

In essence, Bax Global Inc. and other petitioners ask this Commission to adopt a rule exempting them from the requirement of section 10(b)(l) to adhere to their tariffs, to the extent they have entered into a contract with a shipper for their services. Thus, petitioners seek to *replace* the constructive legal relationship created between shipper and carrier by a tariff with a legally binding contract individually tailored to meet the needs of each shipper.

Although some petitioners have referred to this contractual legal arrangement as a "service contract," they are using this term as a shorthand way of referring to a contract individually negotiated to meet shipper needs. A service contract, as WSC points out, is statutorily defined and, by its terms, is available only to vessel operators. Rather, the contract of an integrated carrier like FedEx Trade Networks would govern the whole of a seamless movement from ultimate origin to ultimate destination. It would permit FedEx Trade Networks to provide direct services where it has its own equipment or to contract for cargo space as appropriate. In addition, in such a contract, FedEx Trade Networks

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7 Shipping Act §8(a)(I).

8 *See, Keogh v. Chicago & Northwestern R. Co., 260 U.S.* 156, 163 (1922).

could also agree to provide customs brokerage, trade advisory, information technology, and e-clearance services, depending on customer needs.

Unable to forecast the precise effect a shift to contract carriage would have in international ocean shipping, Congress opted to give the Commission the flexibility to adapt Shipping Act requirements to market changes, so long as proposed changes would promote the purposes of the Shipping Act while not reducing competition substantially or being otherwise detrimental to commerce. Indeed, Congress contemplated that the need of the Commission to make adjustments such as these would be even greater, and broadened the Commission's flexibility under section 16. Thus, OSRA removed the requirements that any exemption not "substantially impair effective regulation" or be "unjustly discriminatory." As a result, the Commission has the power under section 16 to make the kinds of fine-tuning adjustments required to protect and advance competition in the wake of the changes brought about by OSRA.

Such a change is not only lawful, but will address an anomaly under which confidential contracting is permitted in domestic oceanbome trades but not in international oceanbome trades. Freight forwarders' in the noncontiguous domestic trade" have been exempt from tariff filing and rate-reasonableness requirements since 1997, when the Surface Transportation Board (STB) decided to exempt them by rule.

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[9] According to STB, "a freight forwarder, as that term is used [by STB] is equivalent to an NVOCC under FMC regulations." Appendix A at 2, Surface Transportation Board, Exemption of Freight Forwarders in the Noncontiguous Domestic Trade from Rate Reasonableness and Tariff Filing Requirements (1997) ("STB decision").

[10] Generally, noncontiguous trade is trade between the continental United States and Alaska, Hawaii, or a U.S. territory or possession. *See*, 49 U.S.C. § 13102.

Because of the STB's action, non-vessel operators are free to contract directly with shippers in domestic offshore maritime trades. Although vessel operators argued there that tariff-filing exemptions would upset the competitive balance to the detriment of the public, STB found no evidence in that record to support that finding. Similarly, the record adduced in these petition dockets shows no such evidence.

STB's action provides a precedent for FMC action. STB tariff-filing requirements are very similar to those in the Shipping Act." Although STB's exemption authority is different from the Commission's exemption authority, both require the agency to consider the effect of granting an exemption on commerce" and on competition.[13]

The Department of Transportation (DOT) itself has also used exemption authority to excuse both direct and indirect cargo and passenger carriers from tariff filing and enforcement requirements. 49 U.S.C. section 41504 requires air carriers, whether direct or indirect, to publish and adhere to tariffs for their international air services. DOT has exempted them from these requirements by rule.[14] DOT's exemption authority in this

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11 Compare49 U.S.C. § 13702 with Shipping Act § 8(a)(1).

12 *Compare* Shipping Act § 16 (Commission must find that the exemption will not be detrimental to commerce) *with* 49 U.S.C. § 13541 (practice being exempted is not needed to protect shippers from abuse or to encourage the establishment and maintenance of reasonable, nondiscriminatory transportation rates).

13 Compare Shipping Act § 16 (Commission must find that the exemption will not result in substantial reduction in competition) *with* 49 U.S.C. § 13541(a)(1) (practice being exempted is not needed to encourage sound economic conditions, including among carriers).

14 *See* 14 C.F.R. § 292.10 (exempting direct air carriers from the requirement to file cargo tariffs; 14 C.F.R. § 293.10(a) (exempting air carriers from the duty to file passenger tariffs); 14 C.F.R. §§ 292.20 and 293.20 (holding that a carrier exempt from the duty to file tariffs is also not subject to the posting, notification or subscription requirements of 49 U.S.C. § 41504).

regard is broader, since it may exempt a class of carriers from certain requirements if the exemption is "consistent with the public interest." That authority is not unlimited because the Act specifies the factors that DOT must consider as being in the public interest, which include the availability of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices, preventing unfair, predatory or anticompetitive practices.[15] These policy factors evince a congressional concern with protecting commerce and avoiding reductions in competition, just as in Shipping Act section 16.

American President Lines, Ltd. (APL) contends that the Commission is not free to consider an exemption because Congress considered and rejected an amendment during the adoption of OSRA that would have extended service contract authority to NVOCCs.[16] Congress' failure to adopt an amendment does not resolve any potential questions over the proper meaning of Shipping Act section 16. First, it would be proper to resort to legislative history only if there was ambiguity in the statute. But section 16 is not ambiguous: the Commission can exempt carriers from "any requirement" of the Shipping Act so long as "it will not result in substantial reduction in competition or be detrimental to commerce." Far from circumscribing requirements from which carriers can be relieved, the section allows the Commission to exempt carriers from "any

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[15] 49 U.S.C. § 40101(a). Of course, DOT must consider a broad range of 16 factors, of which these are just two, and must strike a balance in considering every exemption. Nonetheless, not all factors will be relevant to every exemption. For example, the decision to terminate tariff filing for cargo carriers in international markets did not implicate factor 1 (safety is the highest priority), or 8 (maintaining service to small communities.

[16] Comments of American President Lines, Ltd. and APL Co. PTE., Ltd. at 15-26, Petition Nos. P3-03, P5-03, P7-03-P9-03 (Oct. 10, 2003).

statements of congressional intent to which APL refers are floor statements by individual members, and provide weak authority for determining congressional intent. Statements from individual members, even those as influential as Senator Breaux and Representative Oberstar,[17] do not represent the will of the entire body. The only conclusion to be drawn from the selective statements APL includes is that there was no consensus on the amendment. Individual members may have had many reasons for not supporting the amendment that do not bear at all on its merits, such as its timing, or the amendment's effect on the future of the legislation. Some members no doubt considered that, by broadening the Commission's exemption authority, they could leave the decision in the Commission's trusted hands. The changes in the industry that resulted from OSRA's adoption have vindicated that judgment.

3. The Commission May Impose on Any Exemption Such Conditions as it Believes are Necessary to Achieve the Purposes of the Act.

FedEx Trade Networks advocates a complete exemption from the tariff publication and adherence requirements of Shipping Act sections S(a) and 10(b)(l), subject to the condition that the carrier and shipper enter into a private contract for services, which must be filed confidentially with the FMC. In addition, FedEx Trade Networks would consider it reasonable (but not necessary) to require publication of certain terms to place NVOCCs on the same footing with their vessel operating counterparts. As the Department of Justice argued here,[18] and the Department of

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17 *Id.* at 16-17.

18 Comments of the United States Department of Justice at 4-5 (Oct. 10, 2003)

Transportation argued before the STB in 1997,[19] tariff-publication requirements for transportation intermediaries decrease competition and are unnecessary to protect the public.

Nonetheless, as suggested by some commenters, the FMC may wish to impose conditions on an exemption to address specific, objectively determined problems. The Shipping Act already subjects ocean transportation intermediaries to financial responsibility requirements. The Commission may wish to consider conditions that limit the exemption to NVOCCs that themselves are carriers in a different mode; NVOCCs that engage in intermodal services using their own ground equipment or NVOCCs having assets or revenues over a certain level."

4. The Commission Should Act To Give Carriers The Flexibility They Need to Respond to Market Demand.

Inherent in a competitive environment is the flexibility to meet market demand creatively and efficiently. FedEx Corporation is a group of companies known the world over for their highly reliable, creative, and cost-effective services. FedEx Corporation actively promotes U.S. exporters and manufacturers abroad and its unique brand of services have helped those companies cut costs by enabling them to rely on just-in-time delivery services. We speak to customers with one voice, and provide them with seamless access to our services, while allowing the operating companies to deliver their

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19 STB decision at 3.

20 For example, in the air transportation context, the tariff-tiling exemption does not apply to services to countries with whom the United States has a restrictive pricing regime. U.S. international *responsibilities require DOT to oversee and review carrier filings in markets subject to such a regime, so* carriers in those trades must still file tariffs. 14 C.F.R. § 293.10(a). In addition, air carriers must file rules tariffs regarding the terms of their liability to passengers. 14 C.F.R. § 293.10(e).

services at the lowest cost with the highest level of service. We listen carefully to our customers' needs and design a bundle of services to meet those needs.

In some circumstances, such as with a small domestic manufacturer of hand-crafted goods, the customer needs help delivering the goods from its shop to the ultimate market. In that case, FedEx Trade Networks will issue a bill of lading governing the entire journey. The customer is less interested in the means of delivery than with the time, safety, and reliability of the service. Such a shipper cannot participate in the global marketplace without an NVOCC.

In other circumstances, particularly in the case of sophisticated large-scale manufacturers, FedEx Trade Networks and its affiliates provide a full range of logistics services, providing warehouse space, tilling customer orders, and arranging for delivery. Such a customer may or may not have the resources to develop full NVOCC services, but it usually chooses to allow us to provide them because of our efficiency and expertise.

FedEx Trade Networks offers a full range of intermodal services. in many cases, FedEx itself is the direct carrier for a portion of the movement. There is no regulatory justification whatsoever for a result where only one of the participants in intermodal carriage has the authority to enter into service contracts for the entire movement.

As the marketplace becomes more global and more competitive, U.S. companies must be given the regulatory freedom they need to respond to market demand. Artificial regulatory restraints must be examined in light of rapidly changing global trade circumstances to ensure that shipper needs are being met and that U.S. companies are able to compete effectively and innovatively in global trade. FedEx Trade Networks

urges the Commission to consider the needs of U.S. manufacturers, exporters and transportation companies for regulatory flexibility

Conclusion

This Commission has more than sufficient authority to exempt NVOCCs from regulatory requirements that have become unresponsive to shipper needs and operate only to prevent vessel-operating ocean common carriers from competing effectively with NVOCCs. The Commission should act to remove these requirements, subject to the condition that the shipper and carrier enter into a contract, which is filed with the Commission and published as appropriate. Finally, the Commission should strive to give NVOCCs the flexibility to meet the needs of U.S. manufacturers and exporters.

Respectfully submitted,

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APPENDIX A TO COMMENTS
OF FEDEX TRADE NETWORKS
STB Ex Parte No. 598

21543 SERVICE DATE - LATE RELEASE FEBRUARY 21, 1997
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This decision will be included in the bound volumes of printed reports at a later date.

SURFACE TRANSPORTATION BOARD

DECISION

49 CFR Part 1319

STB Ex Parte No. 598

EXEMPTION OF FREIGHT FORWARDERS IN THE NONCONTIGUOUS DOMESTIC TRADE FROM RATE REASONABLENESS AND TARIFF FILING REQUIREMENTS

AGENCY: Surface Transportation Board.

ACTION: Final Rules.

SUMMARY: The Board exempts freight forwarders in the noncontiguous domestic trade from tariff tiling requirements. This action eliminates an unnecessary regulatory burden and should provide freight forwarders with additional flexibility to meet the needs of their customers.

EFFECTIVE DATE: These rules are effective March 30, 1997.

FOR FURTHER INFORMATION CONTACT: James W. Greene, (202) 927-5612. [TDD for the hearing impaired: (202) 927-572 1.]

SUPPLEMENTARY INFORMATION: In a notice ofproposed rulemaking (Notice) served November 20, 1996 (61 FR 59075), the Board requested comments on whether to exempt freight forwarders from rate reasonableness and tariff tiling requirements in the noncontiguous domestic trade, pursuant to 49 U.S.C. 13541. Under section 13541--enacted by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA)--the Board is directed to exempt a person or class ofpersons from an otherwise applicable statutory provision when it finds: (1) that the application of that provision is not necessary to carry out the transportation policy of 49 U.S.C. 13 101; (2) either that the application of that provision is not needed to protect shippers from the abuse of market

power or that the transportation or service is of limited scope; and (3) that it is in the public interest to exempt.

We received comments in response to the Notice from the Caribbean Shippers Association, Inc. (CSA), Crowley American Transport, Inc. (Crowley), Export Transports, Inc. (Export), the Government of Guam (GovGuam), NPR, Inc. d/b/a Navieras (NPR), Samuel Shapiro & Company, Inc. (Shapiro), Sea-Land Service, Inc. (Sea-Land), and the United States Department of Transportation (DOT).' Two of the commenters (Export and Shapiro) are freight forwarders, one (CSA) is a shipper, three (Crowley, NPR and Sea-Land) are water carriers, and two (DOT.and GovGuam) are government entities. CSA, DOT, Export and Shapiro favor the proposed exemption, and Sea-Land does not object to it. Crowley, NPR and GovGuam oppose the exemption.

Coverage of the Exemption

Several of the comments reflect some uncertainty or misperception as to the nature and scope of the proposed exemption. Prior to the ICCTA, regulatory authority over the noncontiguous domestic trade[2] was shared by the Federal Maritime Commission (FMC) and the Board's predecessor, the Interstate Commerce Commission (ICC). The FMC had authority over "port-to-port" (all-water) movements, while the ICC had exclusive jurisdiction over "intermodal" (land-water) movements provided under joint rates. The ICCTA transferred responsibility for both types of transportation to the Board.

The FMC and ICC used differing terminology to refer to an entity that, acting as a carrier, consolidates shipments for further movement, and that then uses an underlying carrier for line-haul transportation. The ICC, the ICCTA, and the Notice in this proceeding used the term "freight forwarder" to refer to this type of carrier [49 U.S.C. 13102(3), (8)], while the FMC referred to this type of entity as a "non vessel operating common carrier" (NVOCC). By contrast, what the FMC characterized as a freight forwarder is an entity that can provide services involving transportation by a water carrier[3] similar to those provided by a "broker" involving transportation by a motor

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1 Crowley requested that the time for filing comments be extended. An extension until January 21, 1997, was granted in a decision served January 3, 1997.

2 The term "noncontiguous domestic trade" means transportation now subject to jurisdiction under 49 U.S.C. Chapter 135 that involves traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States. 49 U.S.C. 13102(15).

3 A "water carrier" under the ICCTA is known as a "vessel operating common carrier" (VOCC) in FMC parlance.

carrier. See 49 U.S.C. 13102(2). A freight forwarder, as that term is used here, is equivalent to an NVOCC under FMC regulations. Thus, what the FMC referred to as "freight forwarders" would not be covered by the proposed exemption. Accordingly, CSA's concern that our proposal here is overly broad is misplaced.

NPR suggests that NVOCCs do not function in respect to water transportation as freight forwarders function in respect to land transportation, and as a result, that deregulation of freight forwarders in the motor carrier industry cannot serve as a guide to the deregulation of NVOCCs in the ocean carrier industry. We disagree. Although the term "freight forwarder," as used by the FMC, may refer to a non-carrier, NVOCCs formerly regulated by the FMC do function in the same way as freight forwarders function with respect to land transportation. In each case, the forwarder holds out service as a common carrier; performs consolidation and break-bulk; uses an underlying carrier to perform line-haul transportation; and maintains the dual status of both carrier (vis a vis its shippers) and shipper (vis a vis the underlying carrier that it uses). Moreover, the ICCTA does not establish different requirements for freight forwarders in the noncontiguous domestic trade depending upon whether they utilize an underlying motor and/or water carrier to provide the transportation that they purchase. Thus, we conclude that there is no functional difference between the two.

Basis for the Exemption

DOT views as an anachronism the provision of the ICCTA that imposes tariff filing requirements on forwarders in the noncontiguous domestic trade. As DOT notes, because of the shared regulatory authority over common carriers in the noncontiguous domestic trade prior to the ICCTA, carriers could to a large degree choose the regulatory regime that would apply to their activities simply by choosing to structure their services as either port-to-port or intermodal transportation. The freight forwarders in the noncontiguous domestic trade that were subject to the ICC's jurisdiction have provided transportation since 1986 without being subject to tariff filing requirements.

In addition, DOT points out that all other types of transportation intermediaries are already exempt from tariff tiling and rate reasonableness regulation. DOT argues that forwarding services are highly competitive, that the market is easily entered, that the public interest has been well served during the last 10 years by an approach that did not require any tariff tiling by ICC-regulated freight forwarders, and that removal of the tariff filing requirement for noncontiguous domestic trade shipments would enhance competition and transportation efficiency.

Export and CSA also support an exemption. Export views tariff filing for freight forwarders in the noncontiguous domestic trade as outdated and unnecessary. CSA

agrees that the freight forwarder industry is highly competitive, and argues that the exemption will increase that competitiveness and remove a burdensome administrative cost.

NPR and Crowley express concern that exempting freight forwarders would create an uneven playing field between freight forwarders and water carriers, because freight forwarders would have full knowledge of water carriers' rates in light of the tariff filing requirement, but water carriers would not have similar knowledge of freight forwarders' rates, However, as Crowley acknowledges, both freight forwarders and water carriers may now enter into contracts under 49 U.S.C. 14101 for transportation to which tariff requirements do not apply. Thus, water carriers in many cases may not know freight forwarders' rates now. Moreover, as Sea-Land observes, because water carriers have the same ability to contract, an exemption does not put them into an unfair competitive position.

In examining this argument regarding the eventuality of an uneven playing field, it is important to note that freight forwarders, while performing as carriers vis-a-vis their shippers, must utilize the services of a water carrier, such as Crowley or NPR, to transport the cargo (except for service between Alaska and the lower 48 States, for which a freight forwarder could choose to use the overland services of a motor carrier)." Thus, freight forwarders must also be customers of the water carriers. Freight forwarders typically consolidate shipments, and they may, therefore, qualify for lower unit rates because of the greater volume. Nevertheless, the transportation rates paid by freight forwarders are those established by the water carriers; presumably, any lower unit rates paid for the larger shipments received from freight forwarders reflect the lower unit costs or other advantages to the water carriers associated with such larger shipments. We do not believe that an exemption will, in and of itself, divert traffic from existing water carriers as a result of the uneven playing field that NPR and Crowley claim will result from an exemption. See Cent. & Southern Motor Freight Tariff Ass'n v. United States, 757 F.2d 301, 323-24 (D.C. Cir. 1985), cert. denied, 474 U.S. 1019 (1985) (Cent. &Southern) ("the shipper has an incentive to disclose ['secret rates'] to start a bidding war between carriers interested in his business"). But in any event, while there may be some small shipment traffic handled by freight forwarders that would otherwise be handled by NPR and Crowley in small lots, the forwarders themselves will consolidate these small shipments into larger shipments that NPR and Crowley can handle.

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4 we have not received any comments directed specifically to the trade between Alaska and the lower 48 states.

Crowley suggests that our proposal to exempt freight forwarders from the tariff filing requirement is based on an unfounded assumption that tariff filing in the noncontiguous domestic trade is likely to end eventually for water carriers also. We make no such assumption. Rather, we note that in the past surface freight forwarders and air freight forwarders were exempted from tariff tiling requirements while the underlying motor and air carriers were still required to file tariffs. A differing tariff filing status for freight forwarders and water carriers in the noncontiguous domestic trade is no less appropriate than was a different tariff tiling status for surface freight forwarders and motor carriers, or air freight forwarders and air carriers.

Finally, we note that the argument that tariff filing exemptions will upset the existing competitive balance have been raised, and rejected, many times before. See Improvement of TOFC/COFC Regulation, 46 Fed. Reg. 14348, 14349 (Feb. 27, 1981), aff'd, American Trucking Associations v. ICC, 656 F.2d 1115 (5th Cir. 1981); Improvement of TOFC/COFC Regulations, 3 I.C.C.2d 869,879 (1987); Exemption of Motor Contract Carriers from Tariff Filing Requirements, 133 M.C.C. 150 (1983), aff'd, Cent. & Southern. Nothing on this record suggests that we should take a different approach here.

Breadth of the Exemption

GovGuam does not oppose relieving segments of the domestic offshore freight forwarder industry from tariff tiling and rate reasonableness standards, where appropriate; however, it states that such action must be tailored to operative trade conditions. GovGuam indicates that, while there are some large volume domestic offshore trades where many freight forwarders vigorously compete for business, other trades with less cargo volumes may have significantly fewer competitors, to the point where market power in the freight forwarding segment can be attained and abused. GovGuam contends that Guam is such a non-competitive trade.

GovGuam suggests that we undertake an origin/destination-oriented investigation in which freight forwarder tariffs might be required from/to certain origins/destinations in the noncontiguous domestic trade but not others. According to GovGuam, individual domestic offshore trade exemptions "should only be granted in those trades that: (1) evidence a significant number of directly competing freight forwarders; (2) have a historical record of a low incidence of rate malpractices; (3) include only a de minimis amount of cargo not suitable for direct tendering to underlying ocean water carriers; and (4) have in place an adequate [Board] program for the regulation of rate levels of underlying ocean water carriers."

With regard to this argument, we have consulted informally with FMC staff members regarding noncontiguous domestic trade tariffs, and they advise us that they are not aware of any protests or suspension requests relating to freight forwarder (NVOCC) tariffs in that trade. Thus, it would appear that any such proceedings, at least in recent years, have been limited to water carrier (VOCC) tariffs, which will not be affected by the exemption. Similarly, while GovGuam asserts that NVOCC/freight forwarder "malpractices"[5] in the foreign trades can be documented, there is no indication from FMC staff that such practices involve any Guam tariffs that would be affected by the exemption.

In any event, upon further examination, we conclude that, while the tariff filing requirement for the noncontiguous domestic trade would apply to freight forwarders absent this exemption,[6] the rate reasonableness requirement for water transportation does not apply to freight forwarders. Under 49 U.S.C. 13701(a)(l)(B), a rate for a movement ***by or with a water carrier*** in noncontiguous domestic trade must be reasonable. We interpret this language as embracing only local rates of a water carrier and joint rates in which a water carrier is a participant. Because freight forwarder rates are not subject to the rate reasonableness requirements of 13701, we would have little regulatory oversight over those rates, even if tariff tiling continued to be required.

Expansion of the Exemption

CSA suggests that we broaden the exemption to "include motor carrier initiated rates in the domestic offshore trades." With regard to motor carrier "initiated" rates, the only motor carrier tariffs required to be filed with the Board are those containing joint rates with water carriers in the noncontiguous domestic trade. We do not read the ICCTA as requiring the tiling of a motor carrier tariff where the entire service is held out by the motor carrier (notwithstanding that some of the service may be performed by a water carrier under substitute service rules established by the motor carrier). As to joint rates with water carriers, however, the tariff filing requirement is not dependent upon who "initiates" the rate.' Under 49 U.S.C. 13541(d), we are precluded from exempting a water carrier from the tariff tiling requirement in the noncontiguous domestic trade, and we read this prohibition to include both the local and joint rates of a water carrier.

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5 GovGuam uses the term malpractices to refer to "overcharges, 'hidden charges,' and 'after the fact' charges."

6 See 49 U.S.C.13702(b)(2)(C) which sets forth specific requirements for freight forwarder tariffs.

7 The term joint rate is defined in 49 CFR 1312.1(b)(8) as a rate that applies over the lines or routes of two or more carriers made by an agreement between the carriers, effected by a concurrence or power of attorney.

Other Concerns

GovGuam also expresses concern about the restrictions of the Jones Act, the lack of Board financial reporting requirements for water carriers,' and certain provisions of the ICCTA that insulate from legal challenge motor and water carrier rate increases of up to 7.5% annually; allow carriers to enter into confidential transportation contracts; exempt certain commodities from tariff filing requirements; and provide no mechanism for the suspension of proposed rate increases. As GovGuam indicates, certain of these issues may be addressed in the noncontiguous domestic trade study mandated by section 407 of the ICCTA, and others can be addressed in other forums; however, we do not believe that these concerns are closely related to whether freight forwarders should be required to file tariffs. Thus, they will not be addressed in this proceeding.

Conclusion

As indicated in the Notice, the noncontiguous domestic trade freight forwarder industry is highly competitive, and any person meeting basic fitness and financial responsibility requirements can become a freight forwarder and provide service to the public. Elimination of the tariff filing requirement will eliminate an unnecessary burden. To the extent that the exemption affects the rates and services offered to the public, we expect that the reduced burden will result in lower rates and additional competition. Additionally, as also noted in the Notice, water carrier services will continue to be available at tariff rates to both forwarder and non-forwarder shippers, and section 13701 of the ICCTA requires that those rates be reasonable.

We conclude that the tariff tiling requirement for freight forwarders in the noncontiguous domestic trade is not necessary to carry out the transportation policy of 49 U.S.C. 13 101 or protect shippers from the abuse of market power, and that the elimination of that requirement would be in the public interest. We will, therefore, grant the exemption and adopt the regulations set forth below.

Small Entities

The Board certifies that this rule will not have a significant economic effect on a substantial number of small entities. The rule removes an unnecessary regulatory burden and, to the extent that it affects small entities, the effect should be favorable.

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[8] We note, in this connection, that the financial reporting requirements imposed by the FMC in the noncontiguous domestic trade were limited to VOCCs; no such requirements were imposed on NVOCCs.

Environment

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects in 49 CFR Part 1319

Exemptions, Freight forwarders, Tariffs.

Decided: February 13, 1997

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

For the reasons set forth in the preamble, the Board adds a new part 13 19 to title 49, chapter X, of the Code of Federal Regulations to read as follows:

PART 1319 - EXEMPTIONS

Sec.

13 19.1 Exemption of freight forwarders in the noncontiguous domestic trade from tariff filing requirements.

Authority: 49 U.S.C. 721(a) and 13541.

§ 1319.1 Exemption of freight forwarders in the noncontiguous domestic trade from tariff filing requirements.

Freight forwarders subject to the Board's jurisdiction under 49 U.S.C. 13531 are exempted from the tariff filing requirements of 49 U.S.C. 13702.