

FEDERAL MARITIME COMMISSION

PETITION NO. P6-89

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE
UNITED STATES, INC. - APPLICATION FOR EXEMPTION OF
VEHICLE SHIPMENTS FROM PORTIONS OF THE
SHIPPING ACT OF 1984

ORDER DENYING PETITION

The Motor Vehicle Manufacturers Association of the United States, Inc. ("**Petitioner**")¹ has filed a request for exemption ("**Petition**") pursuant to section 16 of the Shipping Act of 1984 ("**1984 Act**"), 46 U.S.C. app. § 1715. Petitioner seeks an order from the Federal Maritime Commission ("**Commission**") exempting from sections 8 and 10(b)(1)-(4), (6), and (10)-(12) of the 1984 Act, 46 U.S.C. app. § 1707 and 1709(b)(1)-(4), (6), and (10)-(12),² the

¹ Petitioner is "a not-for-profit trade association whose members are **major** manufacturers of automobiles and trucks, including: Chrysler Corporation, Ford Motor Company, General Motors Corporation, Honda of America Mfg. Inc., Navistar International Transportation Corp., PACCAR, Inc., and Volvo North America Corporation." Petition at 1.

² Section 8 of the Shipping Act of 1984 states in pertinent part:

Sec. 8. TARIFFS.

(a) In General.--

(1) Except with regard to bulk cargo, forest products, recycled metal scrap, waste **paper**, and paper waste, each common carrier and conference shall file with the Commission, and keep open to public inspection, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on

(continued...)

²(...continued)

any through transportation route that has been established. . . .

* * *

(c) Service Contracts. --An ocean common carrier or conference may enter into a service contract with a shipper or shippers' association subject to the requirements of this Act. Except for service contracts dealing with bulk cargo, forest products, recycled metal scrap, waste paper, or paper waste, each contract entered into under this subsection shall be filed confidentially with the Commission, and at the same time, a concise statement of its essential terms shall be filed with the Commission and made available to the general public in tariff format, and those essential terms shall be available to all shippers similarly situated. The essential terms shall include--

- (1) the origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements;
- (2) the commodity or commodities involved;
- (3) the minimum volume;
- (4) the line-haul rate;
- (5) the duration;
- (6) service commitments; and
- (7) the liquidated damages for nonperformance, if any.

The exclusive remedy for a breach of a contract entered into under this subsection shall be an action in an appropriate court, unless the parties otherwise agree.

The prohibitions contained in sections **10(b)(1)-(4)**, (6) and **(10)-(12)** of the Shipping Act of 1984 read as follows:

(b) COMMON CARRIERS. -- No common carrier, either alone or in conjunction with any other person, directly or indirectly, may --

- (1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs or service contracts;

(continued...)

". . . carriage of motorized vehicles, including automobiles, trucks, buses, military vehicles, and agricultural tractors moving in lots of more than 50 vehicles per sailing or moving under contracts for the carriage of more than 300 vehicles in a three month period." Petition at 2.

Petitioner states that the purpose of the proposed exemption is to provide shippers moving vehicles in large lots the freedom

²(...continued)

(2) rebate, refund, or remit in any manner, or by any device, any portion of its rates except in accordance with its tariffs or service contracts:

(3) extend **or** deny to any person any privilege, concession, equipment, or facility except in accordance with its tariffs or service contracts;

(4) allow any person to obtain transportation for property at less than the rates or charges established by the carrier in its tariff or service contract by means of false billing, false classification, false weighing, false measurement, or by any other unjust or unfair device or means:

* * *

(6) except for service contracts, engage in any unfair or unjustly discriminatory practice in the matter of --

(A) rates;

(B) cargo classifications:

(C) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage;

(D) the loading and landing of freight; or

(E) the adjustment and settlement of claims:

* * *

(10) demand, charge, or collect any rate or charge that is unjustly discriminatory between shippers or ports;

(11) except for service contracts, make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever;

(12) subject any particular person, locality, or description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

to make flexible and adjustable arrangements without the constraints of the Commission's regulations governing filed service contracts or tariffs. Neither conventional tariffs nor service contracts allegedly meet the needs of shippers and carriers moving large lots of vehicles. Petitioner also argues that considerable coordination and long-term planning are required between shipper and carrier to assure that vessel space is available when and where needed, and that expensive, specialized roll-on, roll-off ships and Pure Car and Truck Carriers are not under-utilized. Petitioner maintains that because production schedules have to match sales, which in turn depend on general economic conditions and on public acceptance of particular models, carriers must be able to meet the changing requirements of their shippers.

Notice of the Petition was published in the Federal Register (54 Fed. Reg. 41161) and seven comments were received in response to the Notice. The Petition was supported by: (1) **NOSAC**; (2) Porsche Cars North America, Inc. ("**Porsche**"); and (3) Wallenius. Comments in opposition to the Petition were filed by: (1) Crowley Maritime Corporation ("**Crowley**"); (2) the South **Europe/U.S.A.** Freight Conference, the "**8900**" Lines, the Mediterranean/North Pacific Coast Freight Conference, the Mediterranean/Puerto Rican Conference, the U.S. Atlantic & Gulf/Australia-New Zealand Conference, and the United States Atlantic and Gulf Ports/Eastern Mediterranean and North African Freight Conference, jointly (collectively referred to as "**MedConferences et al.**"); (3) the Transpacific Westbound Rate Agreement ("**TWRA**") and (4) the **U.S.A.-**

North Europe Rate Agreement and the North Europe-U.S.A. Rate Agreement, jointly (collectively referred to as the "**North Europe Conferences**" or "**NEC**").

DISCUSSION

Section 16 of the 1984 Act grants the Commission discretion to exempt any activity of persons subject to the Act from any requirement of the Act provided that the Commission finds that the exemption will not: (1) substantially impair effective regulation by the Commission; (2) be unjustly discriminatory; (3) result in a substantial reduction in competition; or (4) be detrimental to **commerce**.³ The burden is on anyone seeking an exemption to show that such exemption will not have any of these effects. Each criteria of section 16 is addressed seriatim below.

A. Substantial impairment of effective regulation.

1. Positions of the parties.

³ Section 16 of the 1984 Act states:

The Commission, upon application or on its own motion, may by order or rule exempt for the future . . . any specified activity of those persons from any requirements of this Act if it finds that the exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, result in a substantial reduction in competition, or be detrimental to commerce. The Commission may attach conditions to any exemption and **may, by** order, revoke **any** exemption. No order or rule of exemption or revocation of exemption may be issued unless opportunity for hearing has been afforded interested persons and departments and agencies of the United States.

a. Petitioner.

Petitioner argues that its proposed exemption would have no effect on shippers of single or small lots of vehicles inasmuch as all existing regulatory requirements applicable to such shippers would remain unchanged. It states that "[s]ince there are no barriers to entry in shipping, the fear of 'discrimination' against such larger shippers is purely illusory, as the 1984 Act itself recognizes." Petition at 5-6.

According to Petitioner, if it were exempted from section 8 tariff-filing and service contract rules, the statutory strictures as to tariff observance (i.e., certain specific prohibitions) would be unnecessary. Petitioner emphasizes that it seeks no exemption from the other subsections of section 10.

Petitioner submits that "**the** exemption would not impair any effective aspect of regulation. . . ." (Emphasis supplied.) Rather, it allegedly would only remove the ". . . ineffective aspect of regulation that prevents flexible, tailored and responsive carriage of vehicles in large **lots**." Petition at 6. It is Petitioner's opinion that by creating a distinction between shipments covered by publication provisions as opposed to those which are not, an atmosphere of greater regulatory certainty would emerge regarding what is, and is not, contract carriage.

b. Proponents.

NOSAC, Porsche and Wallenius do not address this standard.

c. Opponents.

MedConferences et al. argue that Congress, in drafting the 1984 Act, ". . . recognized that requiring the filing of tariffs and service contracts is critical to preventing unfair discrimination in the ocean transportation of cargoes. . . ." MedConferences et al. at 5. (Emphasis added.)

TWRA maintains that when Congress determined which commodities would be excepted, that decision also constituted a determination that other commodities were not to be excepted from section 8. Thus, according to TWRA, the Petition not only challenges the basic premise on which the 1984 Act regulation rests, but also seeks to change the law in an area in which Congress legislated with great specificity. "Exemption powers are not entrusted to agencies on the assumption that the agency will simply set aside core provisions of a statute." TWRA at 6.

TWRA questions how the Petition can be found not to impair effective regulation, inasmuch as the requested relief would exempt large volume motor vehicle shipments from all relevant regulatory provisions and all meaningful Commission powers to regulate. "The Petition does not just 'impair' effective regulation: it terminates all effective regulation." TWRA at 4.

The North Europe Conferences contend that the exemption from section 8 would place the Petitioner beyond the reach of regulatory oversight and the exemption from parts of section 10 would completely insulate its members from the reach of the Commission's enforcement procedures. They point out that, heretofore, only Congress alone has seen fit to except specific commodities from

section 8 requirements, and that neither Congress nor the Commission has excepted any traffic from the prohibited acts provisions of section 10. NEC maintain that under a section 8 exemption, all rates, terms and conditions applicable to the relevant motor vehicle traffic would be "secret, unknown and unknowable" to the Commission and to the public. NEC at 9. They attack Petitioner's 50/300 vehicle lot criteria of the **volume-**based exemption, disputing Petitioner's claim that these criteria offer regulatory certainty as to what is and what is not contract carriage. The 50/300 volume plan is said to be "imprecise, ambiguous and uncertain." NEC at 24. Its implementation would allegedly only serve to eliminate any meaningful distinction between contract and common carriage of this traffic by effectively abolishing Commission regulation.

Crowley takes the position that the exemption of motorized vehicles moving in large quantities from filing both tariffs and service contracts, would encourage rebates, discrimination and preference and would substantially impair effective regulation by the Commission.

2. Discussion.

The 1984 Act prescribes a specific statutory scheme which the Commission has been charged with **enforcing**.⁴ Section 16 of that Act

⁴ Prior to the 1984 Act, only bulk cargo and softwood were statutorily excepted from tariff filing requirements (section 18(b)(1) of the Shipping Act, 1916, 46 U.S.C. § 817(b)(1)). The Commission granted exemptions under the Shipping Act, 1916 (at that time contained in 46 C.F.R. § 536.1, and presently contained in 46 C.F.R. § 580.1) reflecting two specific commodities. In exempting
(continued...)

does not provide authority to repeal or substantially amend that regulatory scheme. The legislative history of the 1984 Act leaves no doubt that Congress intended to limit the scope of section 16:

Commission authority under this section is limited--it must act within the parameters of the regulatory scheme approved by Congress (the Commission must find, *inter alia*, "that the exemption will not substantially impair effective regulation by the Commission.")

129 Cong. Rec. H8125 (daily ed. Oct. 6, 1983).

Although Petitioner labels the request for exemption as "partial," it is in fact very broad in scope. The requested section 8 exemption, if granted, would free Petitioner, and others taking advantage of the exemption, from regulatory surveillance, while the section 10 exemption would protect them from enforcement procedures and third party claims.⁴ Granting the exemption would not simply impair effective regulation, it would eliminate

⁴(. . .continued)

mail between the U.S. and foreign countries from tariff filing requirements, the Commission noted that such mail rates ". . . are generally determined by sovereign governments which do not compete with one another for the transportation of **mail**." (Docket No. 75-41, Order served June 22, 1976). In exempting used military household goods and personal effects (exemption restricted to **non-vessel operating common carriers** only) the Commission similarly observed that the Department of Defense's Military Traffic Management Command was the sole shipper utilizing its own bidding regulations (Docket No. 80-37, Order served June 30, 1981).

⁵ As Senator Slade Gorton stated in the deliberations leading to passage of the 1984 Act:

It is the basis of the principle that ocean cargo carriers are common carriers. As such, they are prohibited from unjustly discriminating against other carriers, ports, or shippers. Without tariffs, these prohibitions are largely unenforceable, since secrecy will be encouraged. 129 Cong. Rec. **S1788-89** (daily ed. Feb. 28, 1983).

regulation of the relevant motor vehicle traffic, replacing fundamental common carrier obligations with unregulated contract carriage. This we believe is contrary to the regulatory scheme established by Congress.

B. Potential for Unjust Discrimination.

1. Positions of the parties.

a. Petitioner.

Petitioner argues that because all regulatory requirements would remain in place for small shippers, such shippers would not be affected by the requested exemption. Further, it claims that barriers to entry do not exist in shipping and, therefore, discrimination against large-volume vehicle shippers is not at issue.

b. Proponents.

Wallenius claims that the exemption would meet the needs of major shippers while at the same time would preserve the tariff system for shippers of individual vehicles or small lots.

c. Opponents.

MedConferences et al. argue that section 8 relief would produce discriminatory treatment that is in favor of large shippers vis-a-vis small shippers, citing Congressional concerns regarding discrimination during the drafting of the 1984 Act. 129 Cong. Rec. S1682 (daily ed. Feb. 24, 1983). It would therefore allegedly be contrary to section 16 of the 1984 Act for the Commission to grant an exemption that results in discrimination in favor of large shippers. Furthermore, MedConferences et al., citing Tariff

Publication of Free Time & Detention Charges, 24 S.R.R. 346, 383 (1987), maintain that the relief sought by the Petitioner requires Congressional action and that the Commission is not the appropriate body to consider the exemption.

TWRA points out that a primary reason for tariff filing is to make public the rates that all common carriers are charging all shippers, so that a given shipper ". . . can make informed choices, can press carriers for treatment similar to that given other shippers by that or other common carriers, and to know when the shipper has a reasonable basis, at least prima facie, to complain of discrimination." TWRA at 16. The proposed exemption, TWRA maintains, would facilitate the use of secret prices and preferences. Such secret rates would allegedly disadvantage both those shippers that do not have knowledge of the preferences given to other shippers and carriers that are uninformed as to the prices charged by competitors.

TWRA argues that the Petition is actually an admission by Petitioner that the requested section 8 exemption will in fact produce discrimination by common carriers as between shippers. Otherwise, TWRA reasons, there would be no reason to make the additional request for relief from the section 10 anti-discrimination prohibitions.

TWRA insists that the proposed exemption ". . . is so loosely drafted that shipments of any size could be exempted at the election of the carrier, in order to favor a particular shipper with secret **rates**." TWRA at 9. TWRA contends that because section

8 would not apply under the proposed exemption, a contract having no actual requirement for carriage could be entered into in writing or orally, before or after shipment, covering worldwide shipment of at least 300 vehicles. It is argued that under this arrangement as few as six vehicles, for example, could be moved on a single vessel within the three-month period in a U.S. trade for a preferred shipper on a secret, wholly deregulated basis.

TWRA submits that even if volume of shipment did constitute a 1984 Act criterion for exemption, the exemption's **50/300** vehicle unit distinction can not be justified. It argues that there are numerous other commodities that are shipped by common carriers in quantities at least as large as the **50/300** threshold used by Petitioner. **"These** cargoes are able to move without apparent difficulty in volatile, changing markets under tariffs and regulated service **contracts."** TWRA at 8.

The North Europe Conferences also maintain that the request for relief from section 10 provisions is tantamount to an admission of intent to engage in unjust discrimination. Those provisions of section 10 which Petitioner would leave in place are allegedly ones which are irrelevant for its purposes of creating **"secret** bi-lateral shipper/carrier transportation dealings. . . ." NEC at 14.

Crowley asserts that a consequence of the proposed exemption would be unjust discrimination between Petitioner's members, on the one hand, and smaller shippers on the other hand, resulting in unreasonable preference to large shippers of motor vehicles. It believes that large shippers of motor vehicles would receive rate

reductions from common carriers, in return for their patronage, at the expense of other small shippers. Crowley argues that the motor vehicle shippers would be subsidized by other shippers as common carriers are forced to recoup the revenues lost due to the rate reductions granted to the motor vehicle shippers.

2. Discussion.

The Commission is unpersuaded by Petitioner's claim that the exemption would not lead to unjust discrimination. While maintaining that the requested exemption would not result in such discrimination, Petitioner also seeks an exemption from the **anti-discrimination** provisions of section 10. If no discrimination would result from an exemption from section 8, there would be no need for relief from the anti-discrimination provisions of section 10. Thus, as noted by some opponents, the request for section 10 exemption strongly suggests that the activities contemplated by Petitioner might result in unjust discrimination.

We believe that Petitioner has failed to meet its burden of proof to show that the requested exemption will not result in unjust discrimination. To grant an exemption from those prohibitions contained in section 10 which are intended to curb economic discrimination would be to act outside of the parameters established by Congress. The prevention of economic discrimination is at the heart of the regulatory scheme established by Congress in the 1984 Act. Only Congress can change that regulatory scheme.

c. Potential for Substantial Reduction in Competition.

1. Positions of the parties.

a. Petitioner.

According to Petitioner, the exemption would enhance, not reduce, competition. It maintains that the alleged rigidity of the service contract system hinders competition when it prevents suppliers and buyers from rapidly altering their arrangements to meet changing needs. Petitioner observes that "permitting sellers to **meet** buyers' needs not only aids competition, it **is** competition." Petition at 7. (Emphasis added.)

b. Proponents.

NOSAC contends that the exemption would not have a "significant effect" on the carriage of general cargo by common carriers that do not utilize specialized vehicle carrying vessels.

Wallenius maintains that "**big lots**" of vehicles do not move on liners under conference jurisdiction. Thus, it foresees ". . . no harm to liner conferences or the conference system." Wallenius at 1.

c. Opponents.

TWRA argues that the 1984 Act specifies that common carriers engage in competition based on public rates available to all persons similarly situated. It contends that this standard is destroyed by the proposed exemption. The only type of competition that is said to be served by the proposed exemption is that characterized by secret rates and preferred treatment for selected shippers by keeping other shippers and carriers in ignorance of the rates charged.

The North Europe Conferences allege that the underlying purpose of the requested exemption is to enable specialized ocean carriers of certain motor vehicle traffic moving in large lots and shipped by Petitioner's members under both common and contract carriage to gain unjust competitive advantage over other carriers which lift smaller lots of such traffic, and quite possibly to "foreclose competition by such other carriers **at will. . .**" NEC at 18. NEC further charge that -- under the exemption -- these specialized carriers could gain a "virtual **monopoly**" in the vehicle transport market. NEC at 19.

Crowley believes that the majority of Petitioner's members could receive the exemption for shipping in excess of 300 vehicles over a three-month period and, therefore, almost all vehicle shipments would be exempt. Consequently, due to the large size of such shipments, it argues, "**destructive** bidding would occur among U.S. and foreign-flag carriers for the business." Crowley at 2. Crowley also notes that the exemption might apply to shipments of U.S. military vehicles, "further impacting U.S. **carriers.**" Crowley at 2.

2. Discussion.

Those shippers who would conceivably qualify for the exemption can be divided into two groups. The first group would be the large shippers of thousands of motor vehicles who typically would also be involved in contract movements on specialized auto-carriers. The second group would be the small-to-medium size motor vehicle shippers who from time-to-time would be able to qualify for the

exemption, but are not so large as to enter into large contract movements on specialized auto carriers. The members of the first **group** -- by virtue of their size -- enjoy a competitive advantage over the second group in dealing with carriers.

When rates and service arrangements are made public and offered to all, the competitive advantage of the strong over the weak is minimized. The smaller shipper is able to negotiate service contracts with liner operators knowing the rates and service commitments that carriers have made with other customers. This information helps the smaller shippers arrive at a more favorable contract. The hand of a negotiator is strengthened with information. Because the exemption would deprive small-to-medium size shippers of valuable negotiating information (that they currently possess), it would consequently reduce the competitive position of these shippers.

The exempt shippers would know the rates and service terms charged non-exempt shippers, but the converse would not be true. The exempt shippers presumably would already have a competitive advantage over the non-exempt shippers by virtue of their size. The exemption then could significantly enhance their competitive advantage over non-exempt shippers by permitting them to enter into secret arrangements with carriers with knowledge of the rates charged non-exempt shippers.

The arguments of the parties in regard to the effect of the exemption on competition are necessarily somewhat speculative because the exemption is not in effect. However, based on the

submissions of the parties, the Commission is unable to find that the exemption would not have adverse impact on competition. Even if we were to conclude otherwise, the exemption could not be granted because of the finding that the exemption would impair effective regulation and would be unjustly discriminatory.

D. Potential for Detriment to Commerce.

1. Positions of the parties.

a. Petitioner.

Petitioner argues that the exemption would benefit commerce and consumers by offering the flexibility in arranging ocean transportation which shippers of large lots of vehicles require. It sees no reason why such shippers should not enjoy the same flexibility in a common carrier environment as in a charter party arrangement. Petitioner states that the exemption would not remove the full tariff and service contract protection for shippers of small lots or individual vehicles. It argues that the exemption is consistent with transportation policies as expressed in the 1984 Act, the Staggers Act, 49 U.S.C. §§ 1010(a), 1505, and the CAB Sunset Act of 1984, 49 U.S.C. app. § 1301, note. These statutes, it maintains, call for contracting to be conducted in a free market economy with a minimum of government regulation.

b. Proponents.

Proponents do not address this standard.

c. Opponents.

TWRA points out that Petitioner's justification in support of the required **"no detriment to commerce"** finding is made by reference to the policies of statutes other than the 1984 Act. It maintains that Congress, in writing the 1984 Act, made a judgement that compliance with section 8 and section 10 enhances commerce moved by common carriers, and that determination constitutes national policy. Reference to the policies of other statutes is allegedly not an appropriate basis to establish a **"no detriment to commerce"** finding under the 1984 Act.

The North Europe Conferences dispute Petitioner's contention that the exemption would benefit commerce, asserting that it actually would be detrimental to commerce. They call attention to the fact that the regulatory policy relating to ocean common carrier service in foreign commerce is expressed in the 1984 Act. Therefore, NEC also dismiss Petitioner's references to, and discussion of, the Staggers Act and the CAB Sunset Act as irrelevant to the issue at hand.

2. Discussion.

Petitioner's references to policies underlying the Staggers Act and CAB deregulation do nothing to establish that the exemption is consistent with the regulatory scheme established by the 1984 Act. In passing the 1984 Act, Congress determined not to follow the path toward deregulation. Regardless of the purported benefits of deregulation to commerce, the Commission cannot dismantle the regulatory scheme established by Congress through the use of its exemption power. Whatever the effect the exemption might have on

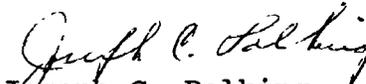
commerce, the exemption cannot be granted because it would substantially impair effective regulation and would result in unjust discrimination.

CONCLUSION

The Commission may only exercise discretion to exempt an agreement or activity from the requirements of the 1984 Act if it finds that the exemption will not have any of the prohibited effects listed in section 16. Here, Petitioner has failed to show and the Commission is unable to conclude that this standard has been met. Under the circumstances, the Commission cannot approve the requested exemption.

THEREFORE, IT IS ORDERED, That the Petition for Exemption filed by the Motor Vehicle Manufacturers Association is denied.

By the Commission.


Joseph C. Polking
Secretary