

August 23, 2005

Via E-Mail

Mr. Bryant L. VanBrakle
Secretary
Federal Maritime Commission
800 No. Capitol Street, N.W.
Room 1046
Washington, D.C. 20036

Re: **FMC Docket No. 05-05; Non-Vessel-Operating Common Carrier Service Arrangements**

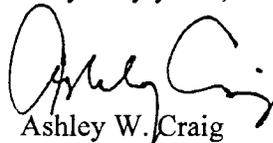
Dear Mr. VanBrakle:

We enclose the following Joint Comments in response to the Commission's Notice of Proposed Rulemaking that would revise the exemption for non-vessel-operating common carriers from the tariff publication requirements of the Shipping Act of 1984, as amended. The Joint Comments are filed on behalf of the following:

Agriculture Ocean Transportation Coalition;
BAX Global Inc.;
FedEx Trade Networks Transport & Brokerage, Inc.;
The National Industrial Transportation League;
North Atlantic Alliance Association, Inc.;
Transportation Intermediaries Association; and
United Parcel Service, Inc.

We ask that the Joint Comments be filed in the above-cited proceeding and that you acknowledge receipt by return e-mail. Please do not hesitate to contact the undersigned with any questions.

Very truly yours,



Ashley W. Craig
Counsel for BAX Global Inc.

Enclosures

CC: DS/OGC
ORIGINAL

Pub
Via email
Chair
Comm (4)
BCC
BoE
BTA
OA
OFS

BEFORE THE
FEDERAL MARITIME COMMISSION
Washington, D.C.

Docket No. 05-05

JOINT COMMENTS IN RESPONSE TO PROPOSED NON-VESSEL-
OPERATING COMMON CARRIER SERVICE ARRANGEMENTS RULE

Submitted By

THE NATIONAL INDUSTRIAL
TRANSPORTATION LEAGUE
UNITED PARCEL SERVICE, INC.
BAX GLOBAL INC.
FEDEX TRADE NETWORKS TRANSPORT
& BROKERAGE, INC.

TRANSPORTATION
INTERMEDIARIES ASSOCIATION
NORTH ATLANTIC ALLIANCE
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Dated: August 23, 2005

**JOINT COMMENTS IN RESPONSE TO PROPOSED
NON-VESSEL-OPERATING COMMON CARRIER SERVICE
ARRANGEMENTS RULE**

The foregoing petitioners in Petitions Nos. P3-03, P5-03, P8-03, P9-03, P1-04, P2-04 and P4-04 and national trade associations representing non-vessel-operating common carriers ("NVOCCs") and their shipper-customers ("Joint Commenters"), hereby submit the following Joint Comments in response to the Federal Maritime Commission's ("Commission" or the "agency") publication of a proposed rule in Docket No. 05-05 ("Proposed Rule" or "NPRM").¹ The Proposed Rule would amend the Commission's Final Rule of December 20, 2004,² that authorized NVOCCs to offer and enter into non-tariff-based confidential ocean transportation agreements (*i.e.*, NVOCC Service Arrangements or "NSAs") with shippers by permitting NVOCCs (when acting as shippers) to also enter into NSAs with other NVOCCs (as carriers). The Proposed Rule would also permit shippers' associations that include NVOCCs as members to enter into NSAs with other NVOCCs acting as carriers.

The Joint Commenters support the Proposed Rule and thank the Commission for its expeditious handling of this matter. As the Commission is aware, the Joint Commenters have supported the freedom to contract concept behind NSAs since the first petition was filed on the issue in July 2003. Further, the Joint Commenters appreciate the Commission's cooperation with the trade in devising the original NSA Rule and the Proposed Rule now under consideration. This public-private sector cooperation has resulted in prompt action by the Commission in response to changes in the ocean shipping marketplace and a recent decision issued by the Fourth Circuit Court of Appeals

¹ See 70 FED. REG. 45,626 (Aug. 8, 2005).

² See FMC Docket No. 04-12, 69 FED. REG. 75,850 (Dec. 20, 2004).

in United States of America v. The Pasha Group and Gosselin World Wide Moving, N.V., ___ F.3d. ___, 2005 WL 1389531, Slip Op. No. 04-4877 (4th Cir. June 14, 2005), *reh'g denied*, July 12, 2005 ("Gosselin"). The Gosselin decision clarified in the context of that case that NVOCCs are not covered by the antitrust exemption provided under the Shipping Act of 1984, (as amended the "Shipping Act"), and thus, as discussed below, addresses the Commission's anticompetitive concerns which led to adoption of the restrictions at issue in this proceeding.

The Joint Commenters believe that adoption of the proposed rule would expand further the commercial flexibility provided by the initial tariff publication exemption granted by the agency in December 2004. As with the original NSA rulemaking, the Joint Commenters believe the Commission has the necessary statutory authority to amend the conditional tariff publication exemption as proposed in the NPRM, and that the exemption requirements of Section 16 of the Shipping Act have been satisfied.

In particular, Section 16 requires the FMC to find that the proposed rule will not result in a substantial reduction in competition or be detrimental to commerce.³ Removal of the restrictions as proposed by the agency will foster greater competition in the industry by permitting NVOCCs to compete against vessel-operating common carriers ("VOCCs") in securing the business of both individual NVOCCs (acting as shippers) and shippers' associations with NVOCC members. It is widely recognized that confidential service contracts are the preferred means for conducting ocean transportation arrangements in the liner trades but currently only VOCCs may offer confidential contract rates to all classes of shippers (*e.g.*, beneficial cargo owners, shippers' associations, and NVOCCs). Thus, unless the Proposed Rule is adopted, VOCCs will

³ 46 U.S.C. App. § 1715.

continue to enjoy a distinct commercial advantage in attracting the business of shippers' associations with NVOCC members and other NVOCC-shippers who prefer to tender cargo under confidential arrangements. Adoption of the Proposed Rule would enhance further competition among all carriers (*i.e.*, VOCCs, NVOCCs) and provide additional commercial options for NVOCCs (as shippers) and shippers' associations with NVOCC members.

The removal of the restrictions on NVOCCs acting as a shipper party in NSAs would also promote commerce by expanding the opportunity for customized ocean transportation services for NVOCCs (as shippers). In response to evolving shipper demands and the changing marketplace, the number of NVOCCs (and Third Party Logistics Providers offering NVOCC services) has increased in recent years. The Joint Commenters believe that permitting increased contracting options on a confidential basis will ultimately lead to greater efficiencies and other important commercial benefits for the ocean shipping industry and the public.

The Commission imposed the restrictions on the shipper parties to NSAs⁴ and others applicable restrictions to the carrier party⁵ when adopting the NSA Rule due to concerns arising from United States v. Tucor, 189 F.3d 834 (9th Cir. 1999) and the lower court in Gosselin (United States of America v. Gosselin World Wide Moving N.V. and The Pasha Group, 333 F.Supp. 2nd 497 (E.D. Va. 2004)). These decisions created a possibility that multiple NVOCCs participating in NSAs could assert claims of antitrust immunity for their joint activities, which were neither granted nor implied in the Shipping

⁴ See 46 C.F.R. § 531.3(o).

⁵ See 46 C.F.R. § 531.3(p) (definition of NSA precludes multiple, unaffiliated NVOCCs from acting as the carrier party or parties).

Act or the Commission's regulations. Due to the more recent decision of the 4th Circuit Court of Appeals in Gosselin, this concern has been substantially alleviated. Based on the Gosselin ruling, the Joint Commenters believe that the concern that NSAs between NVOCCs (as shipper and carrier) present the opportunity for collusion by such parties are adequately addressed by application of the antitrust laws to such NSA activities.

Accordingly, the basis now exists for a revision of the NSA Final Rule allowing for full participation by NVOCCs and shippers' associations with NVOCC members as the shipper party to NSAs.⁶ The record previously developed in the original petition dockets and Docket No. 04-12 adequately supports the Proposed Rule within the context of Section 16 of the Shipping Act.

In conclusion, the Joint Commenters urge the Commission to move swiftly toward final implementation of the Proposed Rule. Timely adoption of the Proposed Rule will benefit the ocean shipping industry, the public, and the Commission by finally resolving the NSA shipper issue.

⁶ As the Joint Commenters noted in their comments filed in Docket No. 04-12 on November 19, 2004, the restriction in the NSA Rule against multiple NVOCC carrier parties could be addressed by less restrictive means than the current absolute prohibition against this practice currently in the NSA Rule. The Commission is addressing this issue separately pursuant to a Notice of Inquiry. We appreciate and support the Commission's continued interest in this issue.

Respectfully submitted,

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