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BEFORE THE
FEDERAL MARITIME COMMISSION

COMMENTS OF THE UNITED STATES DEPARTMENT OF JUSTICE ON PETITION OF UNITED PARCEL SERVICE FOR AN EXEMPTION PURSUANT TO SECTION 16 OF THE SHIPPING ACT OF 1984 TO PERMIT NEGOTIATION, ENTRY AND PERFORMANCE OF SERVICE CONTRACTS	Petition No. P3-03 P5-03 P7-03 P8-03 P9-03

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I. Introduction

The U.S. Department of Justice (the "Department") files these comments in support of the petitions of non-vessel-operating common carriers ("NVOCC") requesting an exemption from tariff filing requirements.

A. The NVOCC Petitions

On July 25, 2003, UPS, an NVOCC, filed a petition with the Federal Maritime Commission (the "Commission") seeking an exemption that would permit UPS to enter into confidential service contracts with shipper customers in the same manner as vessel-operating common carriers ("VOCCs"). Other NVOCC petitions followed. For example, on August 8, 2003, the National Customs Brokers and Forwarders Association of America filed a separate petition requesting a broader exemption from all tariff filing requirements on behalf of all NVOCCs. Such an exemption would eliminate an administrative burden and free NVOCCs to sign confidential service contracts. On September 4, 2003, Ocean World Line requested a rulemaking for an alternative remedy, in the event the Commission determines it lacks authority to allow NVOCC service contracts, expanding the "special contracts" authority (currently used only by freight forwarders) to include NVOCCs. On September 11, 2003, BAX Global Inc. sought a rulemaking that would permit all intermediaries that meet various criteria, including a substantial U.S. presence with over $100 million in annual transportation gross revenue, to enter into confidential service contracts just as VOCCs do.

The Department supports the common intent of these petitions, which is to permit more entities to compete with the VOCCs on an equal footing. When regulatory barriers that confront one class of actual or potential rivals are removed, competition is enhanced. The Department believes that exempting all NVOCCs from all tariff-publication requirements would produce the

greatest competitive benefits. Even the more limited approach of exempting NVOCCs from the current tariff-publication requirements, to allow them to enter into confidential service contracts, would create important benefits for NVOCCs, their customers, and ultimately American consumers, by fostering competition, lowering costs, and improving service in U.S. liner trades.

B. Background on NVOCCs

NVOCCs provide a variety of services for their customers, the "underlying shippers." By negotiating service contracts with VOCCs for the aggregated volume of their underlying shippers' cargoes, NVOCCs can reduce smaller shippers' ocean transportation costs and compete to lower VOCC prices. In addition, many NVOCCs provide intermodal combinations of ocean and inland transportation services. Some add still other services to their transportation packages, such as packing, loading, labeling, warehousing, customs clearance, and other logistical services.

Many shippers, particularly smaller shippers, appear to value NVOCC services, as evidenced by the fact that many choose to book shipments through NVOCCs instead of directly with VOCCs. Shippers generally can obtain from NVOCCs lower prices than VOCCs charge for small shipments (the "full retail" price published in the VOCCs' tariffs). And it often is more efficient and less expensive for shippers to rely on NVOCCs for additional services than to make arrangements on their own. NVOCCs can help shippers reduce their costs and become more efficient when they provide competitive alternatives to booking their shipments with VOCCs.

II. Analysis

A. By Authorizing Confidential Service Contracts, OSRA Has Increased Competition and Improved Commercial Conditions in U.S. Liner Trades

When it adopted OSRA in 1998, Congress recognized that regulations requiring public posting of contract terms would limit – and possibly defeat – the Act's procompetitive reforms.

Congress therefore eliminated previous regulatory provisions of the Shipping Act that had (a) required the publication of the "essential terms" of service contracts (including price, minimum volume, and other commercially-sensitive terms and conditions) and (b) afforded "me too" opportunities for "similarly situated" shippers. Former 46 App. U.S.C. §§ 1707(c) (2) and (3) (1984). In short, OSRA gave VOCCs and their shippers an opportunity to substitute confidential service contracts for published contract prices, terms, and conditions.

Already today, more than 80% of all liner cargo moves under service contracts, and many VOCCs have expanded the logistical services they offer to customers.'

B. OSRA Gave the Commission Broad Authority to Grant Exemptions that Promote Competition

Before OSRA, Congress authorized the Commission to grant Shipping Act exemptions only if they would not "substantially impair effective regulation by the Commission, be unjustly discriminatory, result in a substantial reduction in competition, or be detrimental to commerce." Former 46 App. U.S.C. § 1715 (1984). With OSRA, Congress broadened the exemption power by eliminating the first two criteria, authorizing the Commission to grant any exemption that "will not result in substantial reduction in competition or be detrimental to commerce." 46 App. U.S.C. § 1715 (1998).

C. Authorizing NVOCC Confidential Service Contracts Will Increase Competition and Promote Commerce in U.S. Liner Trades

1. Confidential service contracts allow carriers to be more efficient and responsive to market conditions

When shippers commit to tender large volumes, carriers may provide discounts in freight

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[1] Federal Maritime Commission, *The Impact of the Ocean Reform Act of 1998* (2001) ("*OSRA Report*") at 2.

rates. To a limited extent, a carrier can offer volume discounts in its tariff by using time-volume tariff rates. But tariffs are not flexible enough to reflect the full range of commercial considerations that carriers and shippers may find to be in their mutual interest, including shippers' agreements to trade cost-saving efficiencies for reductions in ocean freight costs. Some efficiencies can practically be achieved only through the give and take of detailed commercial negotiations between shippers and carriers and making confidential service contracts outside the tariff-publication system.'

Since OSRA was enacted in 1998, shippers have seized the opportunity to negotiate service contracts in which they trade volume commitments and cost-savings efficiencies for lower freight rates from VOCCs. These confidential service contracts can meet the specific commercial needs of carriers and shippers, give carriers greater flexibility in packaging and pricing their services, reflect internal costs factors and individual service requirements, and enhance rate competition. *OSRA Report* at 19-22, 59-60.

2. Prohibiting NVOCCs from entering into confidential service contracts undercuts competitive alternatives for shippers

In contrast to the commercial flexibility available to VOCCs, prohibiting NVOCCs from entering into service contracts denies them comparable competitive opportunities to increase their efficiency by working with shippers to negotiate service contracts that reduce carriers' costs and meet the shippers' specific needs. Reducing the number of service contract competitors may be particularly harmful to smaller shippers, for which NVOCCs may be more efficient providers.

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[2]For example, a VOCC can discount freely to an individual customer for any reason whatsoever, including that customer's commitment to work more closely with the VOCC, without worry that other shippers can demand the same discount under a "me too" provision

The current tariff-publication regulations appear to reduce competition, waste resources, and harm commerce in the U.S. liner trades

3. Requiring NVOCCs to publish tariffs increases their costs without providing any value to customers

As noted in several of the petitions, NVOCCs incur unnecessary expenses in publishing tariffs that few shippers ever read. *An American Shipper* magazine survey of members of the National Customs Brokers and Forwarders Association of America (most of which are NVOCCs) indicates that customers rarely if ever inquire about their tariffs. (Posting of tariffs was "Not At All Useful" to customers. Hits on NVOCC tariff web pages are extremely rare.) But 3-5% or more of their administrative costs were devoted to tariff tiling and other regulatory compliance activities.[3] (Indeed, VOCC employees may be the most avid readers of NVOCC tariffs.) When even the purported beneficiaries of tariff-publication requirements find little value in them, the cost of requiring publication of those tariffs clearly exceeds any competitive or commercial benefits. Moreover, if tariff filings were of value to customers, any carrier would remain free to publish them.

4. Prohibiting NVOCCs from making confidential service contracts may enable VOCCs to undercut competition by NVOCCs

NVOCCs can provide important price competition to VOCCs, which particularly benefits shippers that otherwise must pay the "full retail" price (the rates published in conference tariffs or agreed by discussion agreement members and included in their individual tariffs). It is thus important over the long run to not undercut the ability of NVOCCs to compete against the

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[3] Petition of National Customs Brokers and Forwarders Association of America, Inc. for a Limited Exemption from Certain Tariff Requirements of the Shipping Act of 1984 (Petition No. P5-03) at 9- 11,

VOCCs' collective "retail" pricing structure.

The easier and cheaper it is for conference members or other VOCCs to discipline NVOCCs that engage in aggressive price cutting, the more likely it is that disciplining conduct will occur and in the long run reduce competition and harm shippers. Unfortunately, the current regulations, which give VOCCs access to the competitively sensitive information in the NVOCC's tariffs, make it easier and cheaper for VOCCs to discipline NVOCCs that compete.

The current tariff-publication requirements lower the costs of disciplining NVOCCs in two ways. First, from the tariffs a VOCC may be able to identify specific NVOCC customers, enabling the VOCC to target lower contract rates only to those shippers that might switch from the NVOCC to that VOCC (and not, for example, to shippers that use other conference members). Second, because the tariff discloses the NVOCC customer's current rate, the VOCC can make the minimum counter bid necessary to win the business. The disciplining effect of this selective conduct will have an even greater impact if picking off the NVOCC's largest shippers causes it to fall short of the minimum quantity commitments in its service contract with a VOCC, resulting in the NVOCC's payment of liquidated damages to the VOCC. The long term effect of successful disciplinary actions by VOCCs is to reduce the vigor of NVOCC competition and raise rates.

E. Tariff Filing Does Not Provide Any Consumer Benefits

Some argue that NVOCCs should not be allowed to enter into service contracts because they do not have either the vessels or the financial resources to guarantee they will fulfill service contract commitments to their shippers. They suggest that shippers should be protected from themselves, *i.e.*, from the consequences of entering into voluntary contractual relationships with parties that may not be able to uphold their end of the bargain.

There is no evidence that shippers need regulatory protection from financially irresponsible NVOCCs. Shippers that compete in global markets are sophisticated business organizations, not ill-informed private citizens. They can check the financial condition of their transportation providers and make informed decisions on whether to rely on a carrier's commitments. The competitive harm created by denying shippers the opportunity to enter into confidential service contracts with NVOCCs outweighs any possible pro-consumer benefits that might be realized by saving shippers from themselves.[4]

If the Commission decides that shippers cannot protect themselves from financially irresponsible carriers, however, it should adopt objective measures narrowly tailored to address that specific problem.[5] But preventing all NVOCCs from negotiating confidential service contracts would not be appropriate, even if some consumer protection measures were necessary.

III. Conclusion

In conclusion, the Department of Justice urges the Commission to grant an exemption from the Shipping Act's tariff-publication requirements that would allow UPS and all other NVOCCs to enter into confidential service contracts. That exercise of the Commission's broad exemption

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[4] Shippers cannot avoid all risks by booking shipments on VOCCs. In recent years, several VOCCs have gone bankrupt, leaving shippers' containers strewn around the globe.

[5] For example, NVOCCs might be required to post bonds to guarantee that all service contract obligations will be fulfilled if the carrier defaults on its obligations under the service contract. The Justice Department believes that even narrowly-tailored measures, such as a bonding requirement, would lessen competition and harm commerce in the U.S. liner trades by imposing unwarranted costs on carriers, and by unnecessarily limiting the number of carriers that can compete for shippers' business. That harm to competition, however, would be far less than a total prohibition of NVOCC service contracts.

authority is authorized by Section 16 of the Act and would remove barriers to competition and improve commercial conditions in the U.S. liner trades.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have served the foregoing document upon the known parties to Petition No. P3-03, and related Petition Nos. P5-03, P7-03, P8-03 and P9-03, by mailing a copy to the persons noted below, this 10th day of October, 2003.

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