'TRANSPORTATION INSTITUTE

5201 Auth Way
Camp Springs, Maryland 20746
(301) 423-3335 (MD)
(202) 347-2590 (Wash , D C)
Telecopier (301) 423-0634

www trans-inst org

Pacific Coast Office
World Track Center West
2200 Alaskan Way, Suite 11 0
Seattle, WA 98121
(206) 413-I 738
Telecopier (206) 443-0917

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OFFICE OF THE SECRETARY
FEDERAL MARITIME COMM

October 10, 2003

Bryant L. VanBrakle
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Suite 1046
Washington, D.C. 20573

Dear Mr. VanBrakle:

Enclosed are the consolidated comments of the Transportation Institute in the matter of the petitions of United Parcel Service, Inc. (P3-03), the National Customs Brokers and Forwarders Association of America, Inc. (P5-03), Ocean World Lines (P7-03), BAX Global, Inc. (P8-03), and C.H. Robinson Worldwide, Inc (P9-03). A copy of these comments has been forwarded to you electronically and has also been served on the respective petitioners.

Sincerely,

James L. Henry

JLH: tlh

Enclosure

Before the
FEDERAL MARITIME COMMISSION

Washington, D.C.

In the Matter of the Petitions of United Parcel Service, Inc. (P3-03), the National Customs Brokers and Forwarders Association of America, Inc. (P5-03), Ocean World Lines (P7-03), BAX Global, Inc. (P8-03) and C.H. Robinson Worldwide, Inc. (P9-03)

Transportation Institute Comments

Transportation Institute files these comments in response to the above-referenced petitions filed by United Parcel Service, Inc. ("UPS"), the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA"), Ocean World Lines ("OWL"), BAX Global, Inc. ("BAX"), and C.H. Robinson Worldwide, Inc. ("Robinson").

1. Identity and Interest of Transportation Institute.

Transportation Institute is a non-profit organization dedicated to maritime research, education, and promotion. The Institute's member companies participate in all phases of the nation's deep sea foreign and domestic shipping trades, with all of their vessels under United States registry. Because of its members' participation in the ocean commerce of the United States, Transportation Institute has a direct and substantial interest in seeing that the Shipping Act is administered and implemented in a manner that is consistent with the intent of Congress and the long-term stability of the industry and

the U.S. commerce that depends on the availability of secure and predictable transportation services.

2. Comments on the Petitions.

Although each of the petitions takes a different approach to the issue, they all speak to a common theme – to what extent must non-vessel-operating common carriers (NVOCCs) make their ocean transportation rates public. As common carriers under the Shipping Act, NVOCCs share a number of obligations with vessel-operating common carriers (VOCCs). Most prominently, they take legal responsibility for delivery of the cargo that they accept from their customers. Just like VOCCs, NVOCCs are also required by law to publish the rates that they charge customers. NVOCCs fulfill that requirement through tariff publication; VOCCs do so either through tariff publication or the filing of service contracts and the publication of essential terms.

Unlike VOCCs, however, NVOCCs do not operate the vessels on which the cargo is actually carried. That fact, which Congress found raised concerns about both the ability of NVOCCs to provide service and also their financial accountability, led Congress when it passed the Ocean Shipping Reform Act (OSRA) to reject an amendment that would have granted service contracting authority to NVOCCs.[1] Recognizing then that there are explicit Congressional distinctions and objectives that are embodied in the statutory requirements that apply to NVOCCs and VOCCs, we consider below the five petitions currently pending before the Commission.

[1] An amendment to OSRA offered by Senator Gorton that would have authorized NVOCCs to use service contracts in addition to tariffs as a rating mechanism was rejected by a 72 to 25 roll call vote. See 144 Congressional Record S. 3311 (April 21, 1988).

a. The Petitions That Seek Service Contract Authority!.

Three of the petitions before the Commission -- those of UPS, BAX, and Robinson – seek authority for one or more NVOCCs to enter into confidential service contracts, a result that Congress considered and rejected. A fourth, the OWL petition, proposes essentially the same result, although it calls what is otherwise a service contract by a different name.[2] We address these four petitions together in this section. The fifth petition, that tiled by NCBFAA, approaches the rate publication issue from the tariff angle instead of the service contract angle, and we address that petition separately below.

The UPS and Robinson petitions share a legal deficiency that makes it impossible for the Commission to grant those petitions as they are currently structured. Specifically, those petitioners invoke the exemption authority of Section 16 of the Shipping Act as a basis for the requested relief. The problem with this approach is that Section 16 only provides authority for the Commission to "exempt [covered persons] . . . from any requirement of this Act. . . ." 46 U.S.C. App. § 1715 (emphasis added). Service contracting authority is obviously not a "requirement" of the Act; it is instead an affirmative privilege granted by the Act. Section 16 therefore simply does not authorize the Commission to grant affirmative relief of the nature sought by the petitions.

In contrast to the UPS and Robinson petitions, the BAX petition, although it does seek service contract authority, does not rely on Section 16 as the basis for the requested

[2] We do not here separately address the OWL petition. That petition essentially invites the Commission to ignore the merits of the central question of whether the Commission has the authority to authorize NVOCC service contracts by calling those contracts by a different name. As is discussed below m the context of the BAX petmon, the Commission could begin a prelmunary rulemaking procedure or notice of inquiry on NVOCC pricing publication issues (subject to clarification of the issues to be studied and subject to the limitations imposed by the Act), but the suggestion made by OWL should not be considered as an option in any such proceeding because of its potential for badly confusing the important commercial, legal, and regulatory differences between NVOCCs and other ocean transportatton mtetmediaries, such as freight forwarders.

relief. Instead, BAX urges the Commission to open a rulemaking proceeding to consider the NVOCC service contract issue. Although the BAX petition provides very little explanation of the statutory authority that the Commission might consider using as a possible basis for the substantive relief requested, there is little doubt that the Commission is within its general authority at least to explore the issue through a further proceeding in order to determine (1) whether it has authority to provide any requested relief and (2) whether it is appropriate to exercise that authority. Given the very preliminary discussion of the issues and the Commission's authority in the BAX petition, however, Transportation Institute believes that a notice of inquiry or an advance notice of proposed rulemaking would be the most appropriate type of proceeding for any such further examination of these issues. The record is simply too sparse at this point to support the issuance of a meaningful notice of proposed rulemaking. The issues and the Commission's authority would have to be substantially clarified before that latter step could be considered.

b. The NCBFAA Petition.

We address the NCBFAA petition separately because it takes an approach that is legally distinguishable from the other petitions. Specifically, instead of asking the Commission to grant service contract authority to NVOCCs, the NCBFAA petition requests relief from tariff filing requirements. At the outset, therefore, the NCBFAA petition at least asks for relief that the Commission is arguably authorized to grant; i.e., it seeks to be relieved from a requirement of the Act, not to be granted new affirmative rights.

The NCBFAA petition actually makes two requests, in the alternative. The first request is for a broad exemption from all tariff publication requirements, as well as from a number of the Section 10 "prohibited acts." That exemption, if granted, would place NVOCCs in a substantially less regulated posture than VOCCs, because VOCCs would still have to either tile service contracts or publish their rates in tariffs, while NVOCCs would not have to report their rates, terms, or conditions of service to the Commission or make them available in any form to the public. Such sweeping deregulation is inconsistent with what the Commission has always considered to be the relatively narrow scope of its powers under Section 16. In addition, many of the Section 10 provisions from which NCBFAA seeks exemption are unrelated to tariff filing. As such, granting an exemption from those provisions would simply remove many of the shipper protections that are inherent in NVOCCs' position under the statute as common carriers. In short, under the full exemption requested by NCBFAA, NVOCCs would retain all of the privileges of common carriers (such as their right to limit their liability for cargo loss and damage), but would retain none of the traditional common carrier responsibilities of non-discriminatory and reasonable service to the public. In this regard, the proposal goes much too far.

For the reasons stated above, the first NCBFAA proposal cannot meet the Section 16 standards; it would both negatively impact competition through regulatory disparity and also be detrimental to commerce by harming shippers. That said, the NCBFAA's alternative proposal of considering a rulemaking to examine the possibility of authorizing range rate tariffs would seem to fall generally within the permissible boundaries of the Commission's Section 16 authority.

NCBFAA does not explore in any detail how a range rate system would work. There are many questions as to what an acceptable rate spread might be, whether all NVOCCs would be able to participate, and what specific information retention and reporting requirements would be necessary to ensure fair treatment of shippers. These (among others) are issues that would have to be examined and discussed in a notice of inquiry or advance notice of proposed rulemaking if the Commission considers them worthy of further review.

3. Conclusion.

For all of the reasons stated above, Transportation Institute believes that the Commission must as a matter of law deny those petitions that seek a Section 16 "exemption" authorizing NVOCCs to enter into service contracts. Section 16 simply does not empower the Commission to provide such relief. Transportation Institute also urges the Commission to deny the NCBFAA's first, sweeping proposal for virtually complete deregulation of NVOCCs. However, Transportation Institute does not object to the Commission's initiation of a preliminary proceeding to examine the NCBFAA range rate proposal or such other clearly defined related issues as the Commission believes are realistically within the Commission's statutorily defined powers to consider.

Respectfully submitted,

James L. Henry
President