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BEFORE THE
FEDERAL MARITIME COMMISSION

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

Petition of the National Customs Brokers and Forwarders Association of American, 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

Petition of Danzas Corporation d/b/a Danmar Lines Ltd., Danzas AEI Ocean Services, and DHL Danzas Air and Ocean
Petition No. P1-04

Petition of BDP International, Inc.
Petition No. P2-04

Petition of FedEx Trade Networks Transport & Brokerage, Inc.
Petition No. P4-04

COMMENTS OF THE FASHION ACCESSORIES SHIPPERS ASSOCIATION, INC. IN REPLY TO THE JOINT SUPPLEMENTAL COMMENTS REQUESTING EXPEDITED ADOPTION OF A CONDITIONAL EXEMPTION FROM TARIFF PUBLICATION

The Fashion Accessories Shippers Association, Inc. ("FASA"), by its undersigned attorneys, hereby files its comments in reply to the Joint Supplemental Comments Requesting Adoption of a Conditional Exemption From Tariff Publication, filed August 2, 2004, (the "Supplemental Comments") in the above captioned dockets. By Order of the Commission dated September 2, 2004, the Commission ordered the Joint Supplemental Comments accepted and afforded interested persons until September 30 to respond to them. These Comments are submitted in conformance with that Order.

FASA urges the Commission to either (i) consider the JSC as the initiation of a new proceeding and reopen the record for a public examination of the newly proposed conditional exemption or (ii) reject the proposed conditional exemption and proceed to determine the pending petitions.

Introduction

FASA is one of many commenters on the petitions listed in the above caption which are pending before the Commission. As a group, these petitions raise some of the most important issues to the ocean shipping community (specifically, to the small-the small-medium sized shippers which FASA represents) since the enactment of the Ocean Shipping Reform Act of 1997 ("OSRA") amending the Shipping Act of 1984 (the "Act"). As repeatedly stressed in comments from diverse segments of the ocean shipping industry, there are fundamental issues before the Commission regarding its statutory authority to grant exemptions from core features of the Act. Thus, it is irrelevant that the Joint Commenters "...have reached a common approach..." (Supplemental Comments page 2) to resolve these issues. Contrary to the assertion of the Joint Commenters "...that is unnecessary for the FMC to engage in any time-consuming further inquiry, fact finding or study of the issues involved in the petitions..." (Supplemental Comments, page 4) FASA believes that it is not only necessary, but critical for the Commission to afford these petitions the full deliberation and examination on the public record required by the Act and by fundamental, procedural fairness. The Act does not contemplate rulemaking by coalition action and the "cut through" urged by the Joint Commenters would brush aside the rights of numerous smaller, less vociferous, members of the shipping community whose interests deserve the agency's protection.

The Commission is urged by Joint Commenters to adopt "...the conditional tariff exemption as expeditiously as possible" (JSC page 2) and they "...urge immediate action by the Commission to approve the conditional exemption...". (JSC pages 2-3 FN 2). However, "[n]one of the Joint Commenters intends or desires to withdraw its existing petition". (JSC page 2 FN 2) and therefore the FMC should "...continue to move forward with consideration of those proposals." Id. Thus, the JSC adds a new, separate (unnecessary and unauthorized) procedural dimension to the petition process. More importantly, the conditional exemption sought by the Joint Commenters would "[i]n the meantime" (Id.) essentially confer all the relief requested in the underlying petitions which are sub judice. Adoption of the conditional exemption could make any contrary, final determination by the Commission seem inconsistent with its prior action. The Commission's deliberative process should not be compromised by the premature adoption now of the conditional exemption. For the reasons stated herein, FASA respectfully requests that the conditional exemption sought by the JSC be rejected or a separate proceeding initiated that would afford the further opportunity to develop a record specifically addressed to the proposed conditional exemption.

Section 16 of the Act Does Not Confer Authority to Adopt the Conditional Exemption

The proposed conditional exemption continues flaws contained in the pending petitions most notably by continuing to urge amendments to the Act in the form of Section 16 exemptions. The JSC does not squarely address the objections briefed by FASA and by others Commenters on the petitions that the Act requires NVOCCs to maintain tariffs and bars them from service contracting.

FASA believes that Section 16 should not be used to repeal one of the few remaining features of ocean carriage, namely tariff publication by NVOCCs. In enacting OSRA,

Congress viewed the privatization of tariffs as a benefit but emphasized its role in common carriage. As summarized in the Senate Report on Senate Bill 414 one of the "Major Provisions" of OSRA was to:

> 2. Reduce the expense of the tariff filing system and privatize the function of publishing tariff information while maintaining current tariff enforcement and common carriage principles with regard to tariff shipments. (Emphasis Added)
>
> Report of the Committee on Commerce, Science and Transportation on § 414 July 31, 1997 page 6.

The decision to maintain or dispense with common carriage continues to rest with Congress. If anything, NVOCCs emerged from the OSRA legislative process (and contrary to the general trend of OSRA) more, rather than less, regulated since they are currently required to be licensed and bonded.

"Pseudo-Service Contracts"

The conditional exemption would exempt NVOCC's from specified subsections of Sections 8 and 10 of the Act with respect to cargo moving under private contracts filed with the FMC. These "private contracts" are definitionally, structurally and functionally identical to service contracts under Section 8 (c) (2) (A)-(H) of the Act, but cannot legally be service contracts and therefore operate as "pseudo"-service contracts. As proposed, the exemption applies on a quid pro quo basis and when a pseudo-service contract is used to cover a cargo movement. The implications of pseudo-service contracts are inconsistent with the statutory scheme:

(1) Individual VOCC's are responsible for maintaining tariffs and are subject to the prohibitions of Section 10(b) without condition and without the ability to suspend their effect on a shipment by shipment

basis. Under the proposed conditional exemption, an NVOCC might decline to book cargo except with a volume commitment tied to a pseudo- service contract thereby freeing it from any tariff publication except the minimal requirement relating to tariff publication of the essential terms of the pseudo-service contract.

(2) Because the pseudo-service contracts envisioned by the proposed conditional exemption are not legally service contracts under the Act, this aspect might lead to the following unintended and unjust results:

(i) NVOCCs might not consider themselves definitionally subject to Section 10 (c) (7) and (8) of the Act in relation to shippers associations, thus relegating those shippers (defined as such in Section 3(21)(C)) to pursue their remedies outside the Act and outside the Commission's primary jurisdiction, for example, under the anti-trust laws.

(ii) NVOCCs offering pseudo-service contracts might not for the same reason, consider themselves within the definitional scope of Sections 10 (b) (5), (9) and (12).

While the reach of the proposed exemptions from § 10 are specific, the countervailing protections are vague. The shipping community should be required to surrender express statutory protections noted above for the fuzzy assertion that "...the FMC will retain jurisdiction over such agreement [i.e. pseudo-service contracts] to the same extent that it maintains jurisdiction over service contracts regulated under the Shipping Act". (Supplemental Comments, Appendix 1, paragraph 3 (iv)).

Pseudo-Service Contracts Continue the Anti-Competitive Effects Inherent in NVOCCs Service Contracting

The devise of pseudo-service contracts now advanced by the Joint Commenters suggests some acknowledgement that Section 16 cannot be employed to gain the affirmative right to service contract under the Act. Moreover, the pseudo-service contracts continue some of the more notable anti-competitive effects inherent in the underlying petitions that sought the ability to service contract. For example, currently NVOCCs resell cargo space after securing it through service contracts directly with VOCCs. However, NVOCCs cannot now "backup" this volume commitment by volume commitments with service contracts with their customers. As a consequence, to fulfill their commitment to the VOCC's, they must respond to market conditions that affect the saleability of that space, i.e., they must compete in the prices they charge by tariff. Under a regime of pseudo-service contracts, the shipper/customer would be bound to the NVOCC as if it has signed a service contract with a VOCC. The impetus for the NVOCC to compete and respond to changing market conditions would be eliminated as it could rely on the shipper/customer volume commitment. It is not a certainty that its commitment to the NVOCC would end when the NVOCCs contractual volume commitment to the VOCC ended. It may well be that a shipper bound to a pseudo-service contract would be subjected to "dead freight" liquidated damages for not fulfilling its volume commitment even though the NVOCC had fulfilled its overall volume commitment to the VOCC by aggregating the volume of other shipper/customers. Of course, a shipper/customer would not be at risk of having its cargo rerated at the NVOCC's tariff because, under the proposed conditional exemption, there would be no tariff.

Conclusion

The JSC and appended proposed conditional exemption does not remedy the absence of statutory authority under Section 16 of the Act to either exempt NVOCC's from tariff publication and enforcement or enter into private agreements which operate the same way as service contracts. In any event, the JSC must be treated as the commencement of new, separate proceeding or rejected followed by final FMC action on the pending petitions.

Dated: September 29, 2004

Respectfully submitted,

By: _____

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Certificate of Service

I hereby certify that on this 29th day of September, 2004, I have served the foregoing Reply Comments of the Fashion Accessories Shippers Association, Inc. to the Joint Supplemental Comments Requesting Expedited Adoption of a Conditional Exemption from Tariff Publication in FMC Dockets No. P3-03, P5-03, P7-03, P8-03, P9-03, P1-04, P2-04 and P4-04 by (1) e-mail to the FMC; Secretary@FMC.gov and (2) by depositing the original plus 15 copies via overnight mail, postage prepaid, addressed to "Secretary, Federal Maritime Commission, 800 North Capital St., NW, Washington, D.C. 20573-0001".

Christine Culberson