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October 10, 2003

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By Hand Deliverv

Mr. Bryant VanBrakle
Secretary
Federal Maritime Commission
800 N. Capitol Street, N.W.
Washington, DC 20573

Re: Consolidated Response of BAX Global Inc. to
Pending Petitions for Rulemaking – Petition No. P9-03

Dear Mr. VanBrakle:

Enclosed for filing, please find the original and 15 copies of the Consolidated Response of BAX Global Inc. to Pending Petitions for Rulemaking and Exemptions Relating to Confidential Service Contracts and Non-Vessel-Operating Common Carriers – Petition No. P9-03.

Please stamp and return the extra copy in the envelope attached hereto for return to us by our messenger. Thank you for your attention to this matter.

Very truly yours,

Thompson Coburn LLP

By
Edward J. Sheppard

Enclosures

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BEFORE THE
FEDERAL MARITIME COMMISSION

Petition Nos. P3-03, P5-03, P7-03, P9-03

CONSOLIDATED RESPONSE OF BAX GLOBAL INC. TO PENDING PETITIONS FOR RULEMAKING AND EXEMPTIONS RELATING TO CONFIDENTIAL SERVICE CONTRACTS AND NON-VESSEL-OPERATING COMMON CARRIERS

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October 10, 2003

BEFORE THE
FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.

Petition Nos. P3-03, P5-03, P7-03, P9-03

CONSOLIDATED RESPONSE OF BAX GLOBAL INC. TO PENDING PETITIONS FOR RULEMAKING AND EXEMPTIONS RELATING TO CONFIDENTIAL SERVICE CONTRACTS AND NON-VESSEL-OPERATING COMMON CARRIERS

Pursuant to the Notices published in the Federal Register on Tuesday, September 23, 2003, 68 Fed. Reg. 55,245-46, BAX Global Inc. ("BAX") submits this Consolidated Response to the following Petitions currently pending before the Federal Maritime Commission (the "FMC" or the "Commission"):

- P3-03: Petition of United Parcel Service, Inc. for Exemption Pursuant to Section 16 of the Shipping Act of 1984 to Permit Negotiation, Entry and Performance of Service Contracts (('UPS Pet.");
- P5-03: Petition of National Customs Brokers and Forwarders Association of America, Inc. for Limited Exemption from Certain Tariff Requirements of the Shipping Act of 1984 ("NCBFAA Pet.");
- P7-03: Petition of Ocean World Lines, Inc., for a Rulemaking to Amend and Expand the Definition and Scope of "Special Contracts" To Include All Ocean Transportation Intermediaries ("OWL Pet."); and
- P9-03: Petition of C.H. Robinson Worldwide, Inc. for Exemption Pursuant to Section 16 of the Shipping Act of 1984 to Permit Negotiation, Entry and Performance of Confidential Service Contracts ("CHR Pet.").

Specifically, BAX notes that on September 11, 2003, it filed a Petition for Rulemaking with the Commission, which has been designated P8-03 ("BAX Pet.") and which addresses all of the essential concerns raised in the Petitions cited above. BAX refers the Commission to its Petition and will not repeat here the arguments made in its Petition. Instead, BAX files this consolidated response to address three issues: (1) the importance of addressing the issues raised in these Petitions through an organized and

comprehensive rulemaking with defined standards rather than through piecemeal exemption petitions; (2) the importance of limiting the exemption or rulemaking to a limited class of NVOCCs that meet certain financial and regulatory standards, rather than to include all NVOCCs, regardless of their financial and regulatory criteria.; and (3) to respond to the imaginative, but cumbersome and unworkable rulemaking requested by Ocean World Lines, Inc. ("OWL").

A consistent theme in all the Petitions pending before the Commission is that in view of fundamental changes in the ocean shipping industry that have occurred since passage of the Shipping Act of 1984 (the "1984 Act")' and the Ocean Shipping Reform Act of 1998 ("OSRA"),[2] some form of third party logistics provider service contract authority is essential. BAX agrees with that assessment and submits that the best solution for the industry, the public, and the Commission will be achieved through the single rulemaking proposed by BAX. Granting service contract authority to well qualified, financially-stable, experienced, and regulatorily-compliant companies will set an appropriate standard for other NVOCCs to strive to meet.

A. The Issues Raised in These Petitions Are Appropriately Resolved Through a Rulemaking Proceeding Rather Than Individual, Piecemeal Exemptions.

As discussed at length in the its Petition, BAX urges the Commission to adopt the rulemaking proposed by BAX and to reject the individual, piecemeal exemptions requested by other parties. BAX submits that if the Commission adopts its rulemaking proposal, all of the companies seeking exemptions likely will fall within the scope of the

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[1] Pub. L. 98-237, § 2, Mar. 20, 1984, 98 Stat. 67, 46 U.S.C. app. § 1701 *et seq. (2000).*

[2] Pub. L. 105-258, title I, § 101, Oct. 14, 1998, 112 Stat. 1902.

rulemaking and the relief requested by those companies will be effectively achieved (although through a different route than the petitioners originally requested).[3]

As of the time of tiling this consolidated response, the Commission has pending before it three petitions for exemptions and two petitions for rulemaking relating to the issue of whether NVOCCs should be permitted to have confidential service contract authority (and if so, on what terms and under what conditions) and/or reform of the NVOCC tariff publication requirements under the 1984 Act and FMC implementing regulations. It would be impossible for the Commission to create a consistent, focused policy for this issue through the grant (or denial) of individual exemptions. The only way for the Commission to develop a policy that will provide a long-term solution to this problem is through a broad rulemaking that defines the terms and conditions under which NVOCCs will be permitted to offer confidential service contracts to their customers. Such a rulemaking will allow the Commission to draw a clear line as to the requirements that an NVOCC will be required to meet before it would have such authority and would save the Commission needless expense, and more importantly, the time that would be required for considering numerous petitions for exemptions by NVOCCs seeking such authority. A single rulemaking proceeding will allow the Commission to hear from all interested parties and to resolve the controversy with a single, industry-wide rule rather

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[3] As BAX developed in its Petition for Rulemaking, like all federal regulatory agencies, this Commission has the authority to adopt new regulations addressing novel issues through the rulemaking process. See 46 U.S.C. app. §§ *17 16, 17* 18(b)(3); *National Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States, 883* F.2d 93, 97-98 (D.C. Cir. 1989) (Bader Ginsburg, J.) (confirming Commission's broad rulemaking authority). It is particularly appropriate for an agency to use its rulemaking authority — as opposed to its exemption authority — to resolve issues that address gaps in the law or current regulations, such as the issues currently before the Commission in these numerous petitions. *See Securities & Exchange Comm'n v. Chenery Corp., 332* U.S. 194,202 (1947).

than responding on a piecemeal basis to a succession of individual requests for exemption from the existing regulations.

BAX does not presume to speak for companies other than itself, but does agree with C.H. Robinson that the issues addressed here have increasingly become issues of concern for third party logistic providers in general. BAX merely asserts that there is no need for other companies to apply for an exemption as proposed by C.H. Robinson. Such a procedure would put the industry, the public, and the Commission in the position of having to respond to numerous repetitive petitions with no guidelines to follow. BAX submits that it is better for companies to be able to know what requirements that the Commission will enforce and, if necessary, make the investments and improvements necessary to bring the company to that standard. An *ad hoc* exemption approach is simply too time-consuming and disorganized, and does not achieve any regulatory uniformity or consistency.

As the exemption petition filed by C.H. Robinson notes, if the Commission declines to issue a rulemaking, it is likely that it will be bombarded with numerous exemption petitions.[4] It is thus only a matter of time before the Commission is flooded with various petitions and exemption requests on the issues of service contract authority and/or NVOCC tariff reform. In considering whether these issues are better addressed through a rulemaking proceeding rather than through a series of exemption petitions, it is

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[4] For example, C.H. Robinson notes in its Petition that its "proposed exemption, if granted, not only to [C.H. Robinson], but also to other financially responsible NVOCCs as they might apply for an Exemption, would be beneficial to commerce and would increase competition." CHR Pet. at 14. It comments later that it expects "that the ocean carrier-owned logistics companies such as Maersk Logistics, APL Logistics, Crowley Logistics, and others will be seeking similar treatment as CHRW . . . for basically the same reasons." *Id.* at 16.

significant that there currently are three exemption petitions pending before the Commission and that C.H. Robinson, for example, spends the bulk of its Petition for exemption informing the Commission that other companies are going to ask for the same exemption as C.H. Robinson and that those companies are entitled to that relief.

Allowing NVOCCs that meet the criteria proposed by BAX in its Petition to offer confidential service contracts without an individualized exemption will set an appropriate standard that will allow the Commission to continue appropriately to regulate and supervise U.S.-based and foreign NVOCCs. This will also provide the Commission and the ocean shipping public with the necessary confidence that only qualified companies, with adequate capital and experience, are granted this privilege. BAX therefore urges the Commission to adopt the rulemaking in its Petition in place of the individual exemption petitions filed by the other Petitioners.

B. The Solution Given by the Commission to the Issues Raised in These Various Petitions Should be Extended to all Qualified NVOCCs.

In its Petition for Rulemaking, BAX proposed that the ability to enter confidential service contracts be granted to qualified NVOCCs. Specifically, BAX proposed the following criteria must be met before an NVOCC be permitted to exercise this authority:

1. A substantial US. related transportation presence, with $100 million annual transportation related gross revenue by itself or affiliated companies;

2. Publicly-held (either directly or through a parent) or is a third party logistics company (e.g., ocean freight forwarder, NVOCC) that is related to an ocean common carrier serving the U.S. trades; and

3. Holding itself out to be a multi-modal logistics maritime transportation provider and historically compliant with U.S. regulations as administered by the Federal Maritime Commission prior to applying to qualify for the right to offer service contracts.

BAX submits that meeting these minimum standards is necessary to alleviate the concerns of the underlying shipper community and the Congress as to the *bona fides* of NVOCCs. It is significant that the minimum standards proposed by BAX are strikingly similar to the characteristics both UPS and C.H. Robinson outlined about themselves as support for their respective requests for exemptions to offer confidential service contracts to their shipper-clients.[5]

Although BAX agrees in principle that the tariff requirements for *some* NVOCCs be lifted, BAX believes that the NCBFAA's request for reform of the FMC's tariff publication requirements does not adequately respond to the urgent need of service contract authority for well-qualified NVOCCs. Due to the clear congressional intent surrounding NVOCC tariff publication, there is simply no basis at this time for allowing *all* NVOCCs to be exempted (in whole or in part) from these statutory and regulatory obligations. Some may argue that reforming the 1984 Act's tariff publication provisions is a subject reserved solely for congressional consideration and action. While BAX supports efforts to reform the 1984 Act's tariff publication requirements, considering the NCBFAA's exemption request at this time needlessly clouds the more fundamental issue of service contract authority for well-qualified NVOCCs.

BAX recognizes that there continue to be NVOCCs for which the sorts of issues that the Commission has traditionally associated with the NVOCC community, which

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[5] See, e.g., UPS Pet. at 14 ("UPS has the financial wherewithal to stand behind service contract commitments to shippers. It is a large public company, with annual revenues in excess of $3 1 billion."); CHR Pet. at 25-28 (focusing on (a) value-added services; (b) history of financial stability; (c) lack of long-term liabilities; (d) capital investments; and (e) regulatory history, as factors the Commission should consider in granting exemptions to allow NVOCCs to participate in confidential service contracts).

include indifference to Shipping Act regulatory requirements, financial instability, and lack of a U.S. base. As C.H. Robinson aptly describes in its Petition:

> [T]here are also some NVOCCs that to a large degree are "paper" NVOs, and bring little, or no value-added services to their customer base. These NVOCCs are merely "wholesalers" of transportation. They buy and sell transportation space, and nothing else. The financial stability of these types of NVOCCs tend (sic) to fluctuate with the "ups and downs" of freight rates. As margins get tighter, their margins become slim or disappear altogether. These NVOCCs whose main product is "price" would be largely unaffected by the granting of the Exemption requested.

CHF Pet. at 19. Minimum qualifications must be set by this agency before the service contract authority is granted. There is simply no reason to keep financially-stable companies that meet the criteria proposed by BAX in the same category as the less financially secure and less reputable operations that Congress might have been concerned about when enacting OSRA.

C. The Rulemaking Proposed by OWL Should be Rejected in Favor of the Rulemaking Proposed by BAX

BAX agrees with the positions advanced by UPS and C.H. Robinson that the relief requested in its Exemption Petition and BAX's rulemaking petition is within the Commission's rulemaking and exemption authority. See UPS Pet. at 21-23; CHR Pet. at 20-24. The ocean shipping industry indeed has changed significantly since the enactment of OSRA five years ago, and the change requested by BAX through its rulemaking petition is both necessary and appropriately within the Commission's authority under Section 16, 46 U.S.C. § 1715.

Apparently fearing that the Commission lacks this authority, in its petition, OWL asks the Commission to expand the definition and scope of the term "special contracts" at 46 C.F.R. §§ 5 12.2(u) and 5 15.41(c) to include the activities of both freight forwarders and NVOCCs. OWL's proposed rulemaking needlessly complicates the service contract

issue before the Commission. From inception, the "special contracts" rules have applied to freight forwarding services -- not NVOCCs. There is ample legislative history and FMC case law illustrating that the duties, functions, and activities of freight forwarders are distinct from those of NVOCCs.[6] Although OSRA created the legal entity of "Ocean Transportation Intermediary," the definitions of freight forwarder and NVOCC are preserved in the Shipping Act. OWL's proposal ultimately must fail due to the fact that forwarders and NVOCCs are not the same business or regulatory entity, and there is simply no need for the Commission to take the convoluted route suggested by OWL. The result that BAX believes OWL is seeking can be more easily obtained through the adoption of the petition for rulemaking filed by BAX, and BAX therefore urges the Commission to follow the simpler and more direct route proposed by it.

Conclusion

A set of regulations permitting sufficiently qualified NVOCCs to offer confidential service contracts will benefit the U.S. international shipping trade, and will recognize that there now exist well-qualified NVOCCs that have the financial background and industry experience sufficient to be enjoy this privilege. A rulemaking proceeding will also be an efficient and organized method for the Commission to address this issue in a single action, rather than through a disorganized hodge-podge of exemption petitions by companies that may or may not provide the Commission with the basis for establishing a policy sufficient for other NVOCCs and the public to follow.

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[6] *See* H.R. 101-785, 101st Cong. (1990); *Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries; Final and Interim Rule, 65 Fed.* Reg. 11,156 (March 8, 1999) (to be codified at *46* C.F.R. pt. *5 10* et al.); *Order Denying Petition of Nat 'I Customs Brokers & Forwarders Ass'n of America for Issuance of a Rulemaking or, in the Alternative, for a Declaratory Order* (F.M.C. 1999); *Rose Int'l, Inc. v. Overseas Moving Networks Int'l, Ltd. 29* S.R.R. 119 (F.M.C. 2001).

While BAX Global Inc. agrees with certain aspects of the other Petitions in principle, it respectfully requests that the Federal Maritime Commission consolidate and incorporate the individual exemption requests of United Parcel Service, Inc. and C.H. Robinson Worldwide, Inc. in an overall rulemaking in order to best achieve a result which would permit qualified third party logistics provider (NVOCCs) service contract authority. BAX Global Inc. also asks the FMC to defer consideration of the NCBFAA's petition at this time. Finally, BAX Global Inc. requests that the Federal Maritime Commission deny the Petition for Rulemaking of Ocean World Lines, Inc. in favor of the rulemaking proposed by BAX Global Inc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply in Support of the Petition for Rulemaking has been served upon the persons or organizations on the following service list, this 10th day of October 2003, in the manner indicated below:

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