BEFORE THE
FEDERAL MARITIME COMMISSION

Notice of Inquiry 46 CFR Part 531 Non-Vessel-Operating Common Carrier Service Arrangements	Docket No. 05-06

Comments of
the U.S. Department of Justice

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I. Introduction

The United States Department of Justice ("Department") files these comments in support of the possible change by the Federal Maritime Commission ("Commission" or "FMC") to exempt non-vessel-operating common carriers ("NVOCCs") from certain tariff publication requirements of the 1984 Shipping Act in order to permit unaffiliated NVOCCs to participate as carriers in NVOCC Service Arrangements ("NSAs").[1]

A. Background on NVOCCs

NVOCCs provide a variety of services for their customers, the underlying shippers. By negotiating service contracts with vessel-operating common carriers ("VOCCs") for the aggregated volume of their underlying shippers' cargoes, NVOCCs can obtain discounts which the underlying shippers cannot. 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, supply-chain management and other logistical services.

NVOCC services are valuable to many shippers, particularly smaller ones, as evidenced by the fact that many book shipments through NVOCCs instead of directly with VOCCs. Shippers generally can obtain lower rates from NVOCCs than from VOCCs on small shipments. Also, it often is more efficient and less expensive for shippers to rely on NVOCCs for additional

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[1] The Commission's current Notice of Inquiry ("NOI"), issued on August 30, 2005, and amended on September 1, 2005, requests comments on whether "it would be useful if the exemption permitted NSAs to be jointly offered by unaffiliated NVOCCs" and sets forth fifteen specific questions. FMC Docket No. 05-06, 70 Fed. Reg. 52345 (Sep. 2, 2005). Since many of these questions seek input on specific business issues beyond the Department's expertise, the Department focuses these comments on the proposed change's potential to affect competition.

services than to contract with additional providers on their own. NVOCCs provide shippers with competitive alternatives to VOCCs and others.

In 1998, the Ocean Shipping Reform Act ("OSRA"), 46 App. U.S.C. § 1715 (1998), gave VOCCs and their shippers the right to enter freely into confidential service contracts, without the need to publish commercially sensitive terms and conditions. However, up until January 19, 2005, all NVOCCs had to operate under the tariff filing requirements of the 1984 Shipping Act, and were not allowed to enter into confidential agreements with underlying shippers, thereby limiting the NVOCCs' ability to compete with VOCCs.

B. The Commission's Proposed Exemption Will Further Deregulate Ocean Shipping and Encourage NVOCC Competition

The current NOI follows a series of rule changes in which the Commission has used its exemption authority under §16 of the 1984 Shipping Act, later broadened by the OSRA, to relieve NVOCCs from certain tariff publication requirements. Such exemptions allow NVOCCs to compete more readily for shippers' ocean transportation business by being able to offer confidential service arrangements with shippers, an ability that VOCCs have enjoyed since passage of the OSRA.

In a Final Rule that became effective on January 19, 2005, the Commission exempted NVOCCs from certain tariff publication requirements of the 1984 Shipping Act by allowing individual NVOCCs to offer NVOCC Service Arrangements ("NSAs")[2] to NSA shippers, provided that such NSAs are filed with the Commission and their essential terms are published in

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[2] An NSA is essentially a contract between an NVOCC acting as a carrier and an NSA shipper to provide shipping services at a pre-determined rate for a certain minimum quantity of cargo. *See* 46 C.F.R. § 531.3(p) (2005).

the NVOCC's tariff ("NSA Rule"). FMC Docket No. 04-12, 69 Fed. Reg. 75850 (Dec. 20, 2004). While the "essential terms" of an NSA are made public, the exemption under the NSA Rule allows the contracting parties to keep competitively-sensitive aspects of the arrangement (such as price and quantity) confidential.

Through its definitions of "NSA" and "NSA Shipper," the Commission restricted NVOCCs from entering into two types of NSAs: (1) those involving NVOCCs acting as shippers; and (2) those involving multiple unaffiliated NVOCCs acting as carriers. However, the Commission has since issued a Final Rule which amended the original NSA Rule and eliminated the first restriction. Carrier NVOCCs may now enter into NSAs with shipper NVOCCs and shippers' associations with NVOCC members. FMC Docket No. 05-05, 70 Fed. Reg. 56577 (Sep. 28, 2005).

In this NOI, the Commission is seeking comments on the second restriction, i.e., whether the exemption should be changed to permit NSAs to be jointly offered by unaffiliated NVOCCs acting as carriers.

II. Analysis

A. The Proposed Change has the Potential to Enhance Competition

The Department supports eliminating this restriction and changing the NSA Rule to allow unaffiliated NVOCCs acting as carriers to participate collectively in a single NSA with shippers. As explained in detail in the Department's October 3, 2003 filing in FMC Petition P3-03, confidential service contracts serve procompetitive purposes in that they enhance rate

competition and allow carriers to offer more customized service.[3] The marketplace has recognized the benefits of such arrangements in general, as evidenced by their widespread adoption by VOCCs and the NVOCCs that are currently allowed to utilize them.

The original NSA Rule has already been modified to create a method by which unaffiliated NVOCCs can contract with one another, in which one NVOCC acts as a carrier and others act as shippers. The modification sought in the current docket would create an additional method of collaboration, in which unaffiliated NVOCCs could each act as carriers in contracts with shippers. The former arrangement is vertical in form while the latter is horizontal in form; however, both represent a means by which unaffiliated NVOCCs could contribute services which meet the demands of underlying shippers.

In general, competition is best served when firms can contract with one another in a variety of ways. Hypothetically, for example, it might be more efficient in some situations for participating NVOCCs to jointly and severally assume liability for cargo. To the extent that this is more easily accomplished when unaffiliated NVOCCs participate in NSAs jointly as carriers, the exemption sought in the current docket would result in more efficient contracting in the ocean shipping industry.[4] This view is consistent with the Department's previous filings with the Commission in which the Department stated its view that exempting NVOCCs from all tariff

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[3] *See* FMC Petition No. P3-03, 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, at 3-5 ("DOJ Comments in P3-03").

[4] The Department anticipates that NVOCCs and other industry participants will specifically describe how and under what circumstances the proposed contracting will be more efficient.

publication requirements would produce the greatest competitive benefits. *See* DOJ Comments in P3-03; Comments of the U.S. Department of Justice, FMC Docket No. 04-12 (Dec. 3, 2004) ("DOJ Comments in 04-12").

VOCCs already have the ability to cooperate with one another in the manner sought by NVOCCs in the current NOI. Thus the requested modification would serve to put the NVOCCs and the VOCCs on a more equal footing.

The Department believes that removing the restriction on unaffiliated NVOCCs from jointly offering NSAs to shippers will not result in a substantial reduction in competition, but will promote competition in ocean transportation.

B. Antitrust Immunity Will Not Attach to the NVOCCs' Conduct

NSAs and any activity undertaken pursuant to an NSA should not be exempted from the antitrust laws. The Commission has previously expressed concern that a court could interpret the coordinated activity inherent in NSAs involving multiple NVOCCs as immune from the antitrust laws under Section 7(a)(2) of the 1984 Shipping Act. FMC Docket No. 04-12, 69 Fed. Reg. 63981, 63986-87 (Nov. 3, 2004). This concern primarily was based on the holding in *United States v. Tucor,* 189 F.3rd 834 (9th Cir. 1999) ("*Tucor*"), which found certain activity by NVOCCs immune from antitrust prosecution under Section 7(a)(4) of the 1984 Shipping Act. However, as the Department set out in its comments to the proposed rule in FMC Docket 04-12, the decision in *Tucor* is quite narrow and the Department does not believe it supports a claim that exempting NVOCCs from tariff publication requirements when they enter into NSAs would exempt agreements among NVOCCs from the antitrust laws pursuant to Section 7(a)(2) of the 1984 Shipping Act. *See* DOJ Comments in 04-12.

This conclusion is further supported by the recent decision of the Fourth Circuit Court of Appeals, holding that certain collusive conduct involving an NVOCC was not entitled to immunity from the antitrust laws. *United States v. Gosselin World Wide Moving, N.V.*, 411 F.3rd 502 (4th Cir. 2005). This most recent ruling gave the Commission "some assurance that the courts are not likely to find that NVOCCs acting concertedly in NSAs to be immune from the prohibitions of the antitrust laws," and led the Commission to issue its Final Rule, allowing NVOCCs and shippers' associations with NVOCC members to act as shipper parties in NSAs. FMC Docket No. 05-05, 70 Fed. Reg. at 56579.

The Department believes that the conduct permitted by the proposed rule change will not be afforded antitrust immunity. The Commission should make clear that it does not contemplate granting any such immunity.

C. The Proposed Conduct will Remain Subject to Investigation and Antitrust Enforcement

The NOI seeks comments on whether the proposed rule change could cause a substantial reduction in competition. As stated above, the Department believes that, on the whole, the proposed change will be procompetitive in that it will allow for greater contracting flexibility by NVOCCs, which could result in better prices and services for shippers. There is a possibility, of course, that unaffiliated NVOCCs could enter into agreements that cause anticompetitive effects. While such a possibility exists, it should not serve as an obstacle to implementing an otherwise procompetitive rule, especially as antitrust immunity would not apply to any such agreements, and potential anticompetitive conduct would be subject to investigation and antitrust prosecution.

In analyzing agreements among NVOCCs, the Department would look to the *Antitrust Guidelines for Collaborations Among Competitors,* Issued by the Federal Trade Commission and the Department, April 2000 ("Guidelines"). These Guidelines are intended to cover a variety of agreements between horizontal competitors, such as those involving unaffiliated NVOCCs. The Guidelines set out the two types of analyses used to determine the lawfulness of an agreement among competitors: per se and rule of reason.[5]

Per se unlawful agreements are agreements so likely to harm competition and so unlikely to generate offsetting procompetitive benefits that they do not warrant the time and expense required for particularized inquiry into their effects. Types of agreements that have been held per se illegal include agreements among competitors to fix price or output, rig bids, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce. *See* Guidelines, Section 1.2. For example, an NSA between or among unaffiliated NVOCCs that amounted to nothing more than naked market allocation would be considered per se illegal.

All other agreements are evaluated under the rule of reason, which involves a factual inquiry into an agreement's overall competitive effect. Agreements analyzed under the rule of reason include agreements that are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity. The central question under the rule of reason is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or to reduce output, quality, service, or innovation below what likely would prevail in the absence of the

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[5] The Department may prosecute criminally conduct that is considered per se illegal. *See* Guidelines, Sections 1.2 and 3.2.

relevant agreement. *See* Guidelines, Section 3.1.

As emphasized in the Guidelines, the Department's analysis is flexible and highly fact intensive, with the degree of inquiry dependent on the market circumstances and nature of the agreement. The NOI requests comments on whether there should be mandated limits on the number or combined market share of NVOCCs participating in a single joint NSA and whether NVOCCs should be "required to obtain Department of Justice business review letters prior to offering joint offered NSAs." NOI, Spec. 9. The Department does not believe that such mandates are necessary or desirable. The relevant inquiry to determine whether a particular joint venture causes anticompetitive effects is a highly factual one. The myriad of potential factual circumstances precludes the specification of a simple set of limits. Nor should NVOCCs be asked to routinely request business review letters and undergo the inquiry which that process entails. These entities can obtain antitrust counsel and can refer to the Guidelines, which state the antitrust enforcement policy of the Department with respect to competitor collaborations.

As indicated above, agreements involving unaffiliated NVOCCs generally are likely to be procompetitive. Should a particular agreement raise anticompetitive concerns, the Department could investigate and, if warranted, initiate a challenge. The Department, however, has no desire to impede efficiency-enhancing agreements or collaborations.

III. Conclusion

For these reasons, the Department supports revising the definition of an NSA to permit agreements involving unaffiliated multiple NVOCCs acting as carriers. This will allow the marketplace to operate more freely, subject to oversight under the antitrust laws.

Respectfully submitted,

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