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BEFORE THE
FEDERAL MARITIME COMMISSION
WASHINGTON, D.C.

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COMMENTS OF SCHENKEROCEAN LIMITED ON THE PROPOSED RULES FOR NVOCC NEGOTIATED RATE ARRANGEMENTS

FMC Docket No. 10-03
June 4, 2010

Schenkerocean Limited (hereinafter "Schenker") is a registered non-vessel operating common carrier pursuant to 46 CFR 515.21(a)(3). It is affiliated by common ownership with Schenker, Inc. a Federal Maritime Commission licensed ocean freight forwarder domiciled in the United States.

SCOPE OF COMMENTS SOUGHT BY THE COMMISSION.

The Commission voted at its meeting of February 18, 2010, exercising its discretion under Section 16 of the Act, codified at 46 U.S.C. § 40103, to propose exemption of licensed NVOCCs by regulation from the following requirements of the Act, and sought public comments on these proposed exemptions::

a) Section 8(a), the NVOCC would not have to maintain a public automated tariff system tariffs showing its rates;
b) Section 8(b), the NVOCC would not be bound by the rules that require that tariff rate increases only be effective upon 30 days' notice;
c) Section 8(e), the strict refund procedures currently in the statue and rules would not be applicable to NVOCCs; and
d) Section 10(b)(2)(A), the NVOCC would not be subject to the regulation, and corresponding penalty sections, that requires it to charge only its filed rates.

The Commission, considering the preceding exemptions for NVOCCS, also requested comments on whether the following sections of the Act, which are couched in tariff language, still have relevance to NVOCCs or whether they should also be exempted:

a) Section 10(b)(4), which prohibits NVOCCs from unfair or unjustly discriminatory practices in services pursuant to a tariff, and
b) Section 10(b)(8), which prohibits common carriers from undue or unreasonable preference or advantage or undue or unreasonable prejudice or disadvantage for tariff service..

Additionally, the Commission sought comments on whether the proposed rules should also apply to unlicensed but registered NVOCCs as those are described pursuant to 46 CFR 515.21(a)(3).

SUMMARY OF COMMISSION'S PROPOSED RULES AND COMMENTS..

A. THE NRA AND THE "ELIGIBLE" NVOCC: REGISTERED NVOCCs SHOULD BE INCLUDED. THERE IS NO REASONABLE REGULATORY BASIS FOR DISCRIMINATING AGAINST A CLASS OF NVOCCS.

The centerpiece of the Commission's proposed regulation would be to allow NVOCCs the option to employ negotiated rate arrangements (NRAs) in place of published rates. An NRA would be defined by the proposed regulations as "a written and binding arrangement between a shipper and an **eligible** NVOCC to provide specific transportation service for a stated cargo quantity, from origin to destination, on and after the receipt of the cargo by the carrier or its agent (or the originating carrier in the case of through transportation)." (Emphasis supplied). The Commission in its comments and proposed modifications/additions to the current rules makes it amply clear that an "eligible NVOCC" can only be a licensed and bonded NVOCC. New Proposed Commission rule, §532.1 states that the purpose of the new rule is to exempt "**licensed and bonded non-vessel-operating common carriers (NVOCCs)**" from tariff rate publication and other enumerated requirements of the Shipping Act. (Emphasis supplied). §532.2 further states that the exemptions apply to NVCCs "duly licensed pursuant to 46 CFR 515.3".

The National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA") in its petition, to which the Commission is responding by subject Proposed Rule-Making, requests that the exemption be also applicable for NVOCCs unlicensed but registered pursuant to 46 CFR 515.21(a)(3). The Commission acknowledges this request, and its solitary commentary is that the "[t]he Commission will consider comments on whether the exemption should be extended to such NVOCCs." The Commission, as required by the Administrative Procedure Act, 5 USC §706 (2) (A), does not provide any underlying rationale or factual assertions to justify the exclusion of registered NVOCCs from the proposed exemption. Its sole comment is that it will consider comments.

Schenker, for the following reasons, submits that the exemption should be extended to all NVOCCs which are lawfully either licensed **or registered** with the Commission by maintaining appropriate licenses and/or bonds pursuant to the Commission's regulations:

1) Many multi-nationals and related U.S. domiciled logistics companies, such as Scheneker, which participate in global trade lanes (not solely U.S. trade lanes) opted for many business, tax, legal, and regulatory reasons to operate through the "registered" non-U.S. domiciled NVOCC model. Since the U.S. side of these NVOCC activities are by regulation compulsorily managed by a U.S. licensed Ocean Transportation Intermediary, the shipping public as well as the Commission has regulatory access to mandated bonds of both the registered NVOCC as well as the bond of the licensed OTI in the U.S. There is, in fact, substantial bond coverage

in the registered NVOCC regulatory model to adequately cover regulatory contingencies. 46 CFR 515.3 clearly provides:

> Any unlicensed foreign-based entity, not operating in the United States as defined in §515.3, providing ocean transportation intermediary services for transportation to or from the United States, shall furnish evidence of financial responsibility in the amount of $150,000. **Such foreign entity will be held strictly responsible hereunder for the acts or omissions of its agent in the United States.** (Emphasis Supplied).

Therefore, there is no regulatory debility which results from the Commission perspective by including registered NVOCCs in the proposed rule.

2) The exclusion of registered NVOCCs from the proposed regulations would create a second class NVOCC which, in fact, would be seriously disadvantaged in competing with licensed NVOCCs which opt to be exempt from tariff publication. The rationale considered at length by the Commission in proposing the exemption for publishing rates for NVOCCs clearly recognized the costly burden of publishing tariffs; the lack of prompt flexible commercial response to pricing and service to the marketplace inherent in the tariff publishing environment; and the fact that the shipping public did not rely much, if at all, on the tariff system. The Commission provides no justifying rationale whatsoever for excluding---i.e., discriminating against---registered NVOCCs. Since by definition registered NVOCCs are generally non-U.S. companies, it might be anticipated that certain foreign governments might find this exclusion discriminatory and would explore retaliatory measures to impose on U.S licensed NVOCCs. In any case, the Commission, contrary to Administrative Procedures Act mandates, does not provide any reasonable justification for putting foreign-domiciled NVOCCs at a competitive disadvantage to domestic licensed NVOCCs.

3) The most numerous and prominent context in which registered NVOCCs are involved in the U.S. trades involves agency relationships between those foreign domiciled registered NVOCCs and arms-length (not related) small and medium-sized U.S. licensed OTIs which act as their agents in the U.S. The net effect of requiring these registered NVOCCs to remain in the tariff publishing quagmire is to equally burden their U.S. partners with the whole litany of reasons the Commission determined was the basis for removing the burden from licensed NVOCCs. In other words, the cost of tariff publication, the regulatory exposure/risk, and the lack of marketplace responsiveness in pricing and services would continue to be the environment for foreign domiciled registered NVOCCs, and these conditions would necessarily continue to be shared with their U.S. licensed OTI partners under most profit split schemes in use in this industry today. We trust that this is not an intended consequence---i.e., implementation of a proposed rule that discriminates

against foreign-domiciled registered NVOCCs, as well as their U.S. licensed OTI agents. .

For all the above reasons, Schenker respectfully requests that the Commission reconsider the exclusion of registered NVOCCs from the proposed regulations exempting NVOCCs from the requirement to publish tariff rates.

B. THE NRA SHOULD INCLUDE ADDITONAL TERMS REFERENCING THE APPLICATION OF TARIFF CHARGES SO THAT IT BECOMES A SELF-SUFFICIENT, RATE-DEFINING, PRICING/SERVICE DOCUMENT.

The Commission invites comments "on additional terms to be required in the NRA documentation", and on which "elements should be required to qualify the NRA for a "safe harbor" status that affords a presumption that the corresponding shipment is not subject to the tariff rate publication requirement." Schenker submits that the negotiating/contracting practice which has evolved commercially entails all cost factors pertaining to the contemplated shipping transactions, including those relating to surcharges that apply. These references to surcharges inevitably will become part and parcel of the NRA "document"---i.e., the universe of written exchanges between the NVOCCs and their shipper customers. These written exchanges will inevitably contain surcharge references so that the parties are fully cognizant of the full pricing structure of the intended transport. The Proposed Rule relating to NRAs states as follows:

> §532.5-Requirements for NVOCC Negotiated Rate Arrangements
> In order to qualify for the exemptions to the general rate publication requirement as set forth in section 532.2, an NRA must:
>
> (a) be in writing;
>
> (b) be agreed to by both shipper and NVOCC prior to the date on which the cargo is received by the common carrier or its agent (including originating carriers in the case of through transportation);
>
> (c) clearly specify the rate and to which shipment or shipments such rate will apply; and
>
> (d) may not be modified after the time the shipment is received by the carrier or its agent (including originating carriers in the case of through transportation).

Schenker submits that the NRA, in order to provide a sole source binding writing with all the components of the transportation costs, must provide some reference to the applicability of charges which are necessary to define the rate(s) themselves. For example, the NRA should provide the flexibility of including references to charges which may assist in defining the rate(s) which have been negotiated and which form part of the rate structure of the NRA. These rate defining references which should form part of the NRA, or at the very least should not be

prohibited from being part of the NRA. These rate-defining provisions would include terms such as:

a) "All surcharges included."; or
b) "The following surcharges are included in rate(s):(_____(name surcharges _____); other applicable surcharges are as follows:_____ _____."; or
c) "All surcharges as per Rules Tariff."; or
d) "All surcharges charged to the Carrier by the underlying carrier shall be passed on to the Shipper."
e) Or any other variation of above that will assist in defining the intended rate(s) that apply to the shipping transactions.

The above are merely illustrative of types of references now found in service contracts, Non-vessel Operating Common Carrier Service Arrangements ("NSAs"), and tariff line items of current published rates, which assist the parties in defining the applicable rates. This ability would assist the negotiating/NRA process immensely. Therefore, Schenker respectfully submits that the Commission address this item so that it provides a clear indication that references such as those noted above are permissible in the NRA context. This removes all potential ambiguities in the exchanges between NVOCCs and their shipper customers in the NRA process. In fact the Commission has acknowledged in the Proposed Regulation at §532.2 (g) as much by indicating that the following current regulation would no longer apply to exempt NVOCCs:

> **§ 520.4 Tariff contents.**
>
> (a) *General.* Tariffs published pursuant to this part shall:
>
> (4) State separately each terminal or other charge, privilege, or facility under the control of the carrier or conference and any rules or regulations that in any way change, affect, or determine any part of the aggregate of the rates or charges;

From the above, it is then clear that it is the Commission's intent to allow language similar to that indicated above in the context of an NRA. Schenker respectfully requests that the Commission address and clarify this understanding.

C. SCHENKER REQUESTS CLARIFICATION OF §532.5 (d) TO ALLOW FOR NRA AMENDMENTS AND MODIFICATIONS.

Schenker also respectfully requests clarification of the following provision in the Proposed Regulation:

> §532.5-Requirements for NVOCC Negotiated Rate Arrangements
> In order to qualify for the exemptions to the general rate publication requirement as set forth in section 532.2, an NRA must:

> (d) may not be modified after the time the shipment is received by the carrier or its agent (including originating carriers in the case of through transportation).

In the Section-by-Section analysis for §532.5-Requirements for NVOCC Negotiated Rate Arrangements, the Commission states :

> "NRAs must be concluded and in place prior to the date the cargo is received by the common carrier or its agent (including originating carriers in the case of through transportation). **These requirements are based on the applicable rate provision of the Commission's tariff regulations found at 46 CFR § 520.7(c).** The Commission wishes to note that the regulation as proposed does not allow for any modification to the NRA after the cargo is received by the carrier or its agent (or the originating carrier in the case of through transportation)." (Emphasis Supplied).

The Commission's current tariff regulations at 46 CFR § 520.7(c) state:

> *Applicable rates.* The rates, charges, and rules applicable to any given shipment shall be those in effect on the date the cargo is received by the common carrier or its agent including originating carriers in the case of rates for through transportation.

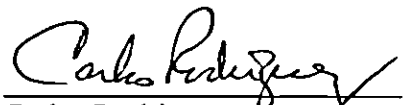
The issue arises in that in the Commission's Proposed Rule §532.5 (d), if taken literally is ambiguous at best. That section states that an NRA " may not be modified after the time the shipment is received by the carrier or its agent (including originating carriers in the case of through transportation)." This section appears to indicate that an NRA may never be modified or amended by the parties. However, current 46 CFR § 520.7(c) makes it clear that in the tariff context, the rates that apply are those that are in the tariff as of the date the cargo is received by the NVOCC or when the trucker picks up the cargo in the case of through transportation. It appears that the intent of §532.5 (d) is that of 46 CFR § 520.7(c)---i.e., to crystallize the applicable rate at the time the cargo is tendered to the NVOCC. The way that §532.5 (d) is drafted it appears to say that rates contained in NRAs may never be amended. From the tone of the Proposed Rules, it is Schenker's interpretation that the parties are free to amend or modify the rate levels (up or down) upon agreement by them to do so. This would be so even for rate increases since the "30 day" rule (§520.8 (a)) has been specifically exempted as well as §520.14, the Special Permission section which would allow increases of rates on less than 30 day notice. Schenker respectfully requests that this be clarified by the Commission---i.e., that the Commission clarify that the parties may modify the rates contained within an NRA at any time, whether to increase or decrease the rate, if the parties agree to do so in a writing following the prescribed Proposed Regulations for NRAs. The NRA has all the characteristics of a contract, and should be flexible to the parties so as to allow amendments freely, if agreed to by the parties in writing.

D. SCHENKER ACCEPTS THE PROPOSED RULES WHICH WOULD EXEMPT NVOCCs FROM THE REQUIERMENTS OF SECTION 10(B)(4), WHICH PROHIBITS NVOCCS FROM UNFAIR OR UNJUSTLY DISCRIMINATORY PRACTICES IN SERVICES PURSUANT TO A TARIFF, AND SECTION 10(B)(8), WHICH PROHIBITS COMMON CARRIERS FROM UNDUE OR UNREASONABLE PREFERENCE OR ADVANTAGE OR UNDUE OR UNREASONABLE PREJUDICE OR DISADVANTAGE FOR TARIFF SERVICE..

Schenker supports the exemption of the above noted statutory provisions in that an NVOCC that opts to become exempt from tariff publication of rates has in effect removed itself from all corresponding statutes and regulations which refer to tariffs. In other words, an exempt NVOCC could not readily violate a provision that prohibits discriminatory practices in services pursuant to a tariff, nor could it violate prohibitions related to unreasonable preferences or advantages or undue or unreasonable prejudices or disadvantages related to its tariff services. These sections of the Shipping Act should be added to the list of exempt provisions for NVOCCs which opt to become exempt.

For all of the foregoing reasons, Schenker supports the NCBFAA Petition, and respectfully requests that the Commission address the matters raised herein with regard to exempting NVOCCs from the specified tariff obligations currently required by the Commission's rules and regulations.

Respectfully submitted,



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On Behalf of:
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