

STB EX PARTE NO. 598

EXEMPTION OF FREIGHT FORWARDERS IN THE
NONCONTIGUOUS DOMESTIC TRADE FROM RATE
REASONABLENESS AND TARIFF FILING REQUIREMENTS

49 CFR Part 1319

Decided February 13, 1997

AGENCY: Surface Transportation Board.**ACTION:** Final Rules.**SUMMARY:** The Board exempts freight forwarders in the noncontiguous domestic trade from tariff filing requirements. This action eliminates an unnecessary regulatory burden and should provide freight forwarders with additional flexibility to meet the needs of their customers.**EFFECTIVE DATE:** These rules are effective March 30, 1997.**FOR FURTHER INFORMATION CONTACT:** James W. Greene, (202) 927-5612. [TDD for the hearing impaired: (202) 927-5721.]**SUPPLEMENTARY INFORMATION:** In a notice of proposed rulemaking (Notice) served November 20, 1996, and published at 61 Fed. Reg. 59,075 (1996), the Board requested comments on whether to exempt freight forwarders from rate reasonableness and tariff filing requirements in the noncontiguous domestic trade, pursuant to 49 U.S.C. 13541. Under section 13541--enacted by the *ICC Termination Act of 1995*, Pub. L. No. 104-88, 109 Stat. 803 (1995) (*ICCTA*)--the Board is directed to exempt a person or class of persons from an otherwise applicable statutory provision when it finds: (1) that the application of that provision is not necessary to carry out the transportation policy of 49 U.S.C. 13101; (2) either that the application of that provision is not needed to protect shippers from the abuse of market power or that the transportation or service is of limited scope; and (3) that it is in the public interest to exempt.

We received comments in response to the Notice from the Caribbean Shippers Association, Inc. (CSA), Crowley American Transport, Inc. (Crowley), Export Transports, Inc. (Export), the Government of Guam (GovGuam), NPR, Inc. d/b/a Navieras (NPR), Samuel Shapiro & Company, Inc. (Shapiro), Sea-Land Service, Inc. (Sea-Land), and the United States Department of Transportation (DOT).¹ Two of the commenters (Export and Shapiro) are freight forwarders, one (CSA) is a shipper, three (Crowley, NPR and Sea-Land) are water carriers, and two (DOT and GovGuam) are government entities. CSA, DOT, Export and Shapiro favor the proposed exemption, and Sea-Land does not object to it. Crowley, NPR and GovGuam oppose the exemption.

Coverage of the Exemption

Several of the comments reflect some uncertainty or misperception as to the nature and scope of the proposed exemption. Prior to the *ICCTA*, regulatory authority over the noncontiguous domestic trade² was shared by the Federal Maritime Commission (FMC) and the Board's predecessor, the Interstate Commerce Commission (ICC). The FMC had authority over "port-to-port" (all-water) movements, while the ICC had exclusive jurisdiction over "intermodal" (land-water) movements provided under joint rates. The *ICCTA* transferred responsibility for both types of transportation to the Board.

The FMC and ICC used differing terminology to refer to an entity that, acting as a carrier, consolidates shipments for further movement, and that then uses an underlying carrier for line-haul transportation. The ICC, the *ICCTA*, and the Notice in this proceeding used the term "freight forwarder" to refer to this type of carrier [49 U.S.C. 13102(3), (8)], while the FMC referred to this type of entity as a "non vessel operating common carrier" (NVOCC). By contrast, what the FMC characterized as a freight forwarder is an entity that can provide services involving transportation by a water carrier³ similar to those provided by a "broker" involving transportation by a motor carrier. *See*, 49

¹ Crowley requested that the time for filing comments be extended. An extension until January 21, 1997, was granted in a decision served January 3, 1997.

² The term "noncontiguous domestic trade" means transportation now subject to jurisdiction under 49 U.S.C. Chapter 135 that involves traffic originating in or destined to Alaska, Hawaii, or a territory or possession of the United States. 49 U.S.C. 13102(15).

³ A "water carrier" under the *ICCTA* is known as a "vessel operating common carrier" (VOCC) in FMC parlance.

U.S.C. 13102(2). A freight forwarder, as that term is used here, is equivalent to an NVOCC under FMC regulations. Thus, what the FMC referred to as "freight forwarders" would not be covered by the proposed exemption. Accordingly, CSA's concern that our proposal here is overly broad is misplaced.

NPR suggests that NVOCCs do not function in respect to water transportation as freight forwarders function in respect to land transportation, and as a result, that deregulation of freight forwarders in the motor carrier industry cannot serve as a guide to the deregulation of NVOCCs in the ocean carrier industry. We disagree. Although the term "freight forwarder," as used by the FMC, may refer to a non-carrier, NVOCCs formerly regulated by the FMC *do* function in the same way as freight forwarders function with respect to land transportation. In each case, the forwarder holds out service as a common carrier; performs consolidation and break-bulk; uses an underlying carrier to perform line-haul transportation; and maintains the dual status of both carrier (vis a vis its shippers) and shipper (vis a vis the underlying carrier that it uses). Moreover, the *ICCTA* does not establish different requirements for freight forwarders in the noncontiguous domestic trade depending upon whether they utilize an underlying motor and/or water carrier to provide the transportation that they purchase. Thus, we conclude that there is no functional difference between the two.

Basis for the Exemption

DOT views as an anachronism the provision of the *ICCTA* that imposes tariff filing requirements on forwarders in the noncontiguous domestic trade. As DOT notes, because of the shared regulatory authority over common carriers in the noncontiguous domestic trade prior to the *ICCTA*, carriers could to a large degree choose the regulatory regime that would apply to their activities simply by choosing to structure their services as either port-to-port or intermodal transportation. The freight forwarders in the noncontiguous domestic trade that were subject to the ICC's jurisdiction have provided transportation since 1986 without being subject to tariff filing requirements.

In addition, DOT points out that all other types of transportation intermediaries are already exempt from tariff filing and rate reasonableness regulation. DOT argues that forwarding services are highly competitive, that the market is easily entered, that the public interest has been well served during the last 10 years by an approach that did not require any tariff filing by ICC-

regulated freight forwarders, and that removal of the tariff filing requirement for noncontiguous domestic trade shipments would enhance competition and transportation efficiency.

Export and CSA also support an exemption. Export views tariff filing for freight forwarders in the noncontiguous domestic trade as outdated and unnecessary. CSA agrees that the freight forwarder industry is highly competitive, and argues that the exemption will increase that competitiveness and remove a burdensome administrative cost.

NPR and Crowley express concern that exempting freight forwarders would create an uneven playing field between freight forwarders and water carriers, because freight forwarders would have full knowledge of water carriers' rates in light of the tariff filing requirement, but water carriers would not have similar knowledge of freight forwarders' rates. However, as Crowley acknowledges, both freight forwarders and water carriers may now enter into contracts under 49 U.S.C. 14101 for transportation to which tariff requirements do not apply. Thus, water carriers in many cases may not know freight forwarders' rates now. Moreover, as Sea-Land observes, because water carriers have the same ability to contract, an exemption does not put them into an unfair competitive position.

In examining this argument regarding the eventuality of an uneven playing field, it is important to note that freight forwarders, while performing as carriers vis-a-vis their shippers, must utilize the services of a water carrier, such as Crowley or NPR, to transport the cargo (except for service between Alaska and the lower 48 States, for which a freight forwarder could choose to use the overland services of a motor carrier).⁴ Thus, freight forwarders must also be customers of the water carriers. Freight forwarders typically consolidate shipments, and they may, therefore, qualify for lower unit rates because of the greater volume. Nevertheless, the transportation rates paid by freight forwarders are those established by the water carriers; presumably, any lower unit rates paid for the larger shipments received from freight forwarders reflect the lower unit costs or other advantages to the water carriers associated with such larger shipments. We do not believe that an exemption will, in and of itself, divert traffic from existing water carriers as a result of the uneven playing field that

⁴ We have not received any comments directed specifically to the trade between Alaska and the lower 48 States.

NPR and Crowley claim will result from an exemption. *See, Cent. & Southern Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 323-24 (D.C. Cir. 1985), cert. denied, 474 U.S. 1019 (1985) (*Cent. & Southern*) ("the shipper has an incentive to disclose ['secret rates'] to start a bidding war between carriers interested in his business"). But in any event, while there may be some small shipment traffic handled by freight forwarders that would otherwise be handled by NPR and Crowley in small lots, the forwarders themselves will consolidate these small shipments into larger shipments that NPR and Crowley can handle.

Crowley suggests that our proposal to exempt freight forwarders from the tariff filing requirement is based on an unfounded assumption that tariff filing in the noncontiguous domestic trade is likely to end eventually for water carriers also. We make no such assumption. Rather, we note that in the past surface freight forwarders and air freight forwarders were exempted from tariff filing requirements while the underlying motor and air carriers were still required to file tariffs. A differing tariff filing status for freight forwarders and water carriers in the noncontiguous domestic trade is no less appropriate than was a different tariff filing status for surface freight forwarders and motor carriers, or air freight forwarders and air carriers.

Finally, we note that the argument that tariff filing exemptions will upset the existing competitive balance have been raised, and rejected, many times before. *See, Improvement of TOFC/COFC Regulation*, 46 Fed. Reg. 14,348, 14,349 (1981), *aff'd*, *American Trucking Associations v. ICC*, 656 F.2d 1115 (5th Cir. 1981); *Improvement of TOFC/COFC Regulations*, 3 I.C.C.2d 869, 879 (1987); *Exemption of Motor Contract Carriers from Tariff Filing Requirements*, 133 M.C.C. 150 (1983), *aff'd*, *Cent. & Southern*. Nothing on this record suggests that we should take a different approach here.

Breadth of the Exemption

GovGuam does not oppose relieving segments of the domestic offshore freight forwarder industry from tariff filing and rate reasonableness standards, where appropriate; however, it states that such action must be tailored to operative trade conditions. GovGuam indicates that, while there are some large volume domestic offshore trades where many freight forwarders vigorously compete for business, other trades with less cargo volumes may have significantly fewer competitors, to the point where market power in the freight

forwarding segment can be attained and abused. GovGuam contends that Guam is such a non-competitive trade.

GovGuam suggests that we undertake an origin/destination-oriented investigation in which freight forwarder tariffs might be required from/to certain origins/destinations in the noncontiguous domestic trade but not others. According to GovGuam, individual domestic offshore trade exemptions "should only be granted in those trades that: (1) evidence a significant number of directly competing freight forwarders; (2) have a historical record of a low incidence of rate malpractices; (3) include only a de minimis amount of cargo not suitable for direct tendering to underlying ocean water carriers; and (4) have in place an adequate [Board] program for the regulation of rate levels of underlying ocean water carriers."

With regard to this argument, we have consulted informally with FMC staff members regarding noncontiguous domestic trade tariffs, and they advise us that they are not aware of any protests or suspension requests relating to freight forwarder (NVOCC) tariffs in that trade. Thus, it would appear that any such proceedings, at least in recent years, have been limited to water carrier (VOCC) tariffs, which will not be affected by the exemption. Similarly, while GovGuam asserts that NVOCC/freight forwarder "malpractices"⁵ in the foreign trades can be documented, there is no indication from FMC staff that such practices involve any Guam tariffs that would be affected by the exemption.

In any event, upon further examination, we conclude that, while the tariff filing requirement for the noncontiguous domestic trade would apply to freight forwarders absent this exemption,⁶ the rate reasonableness requirement for water transportation does not apply to freight forwarders. Under 49 U.S.C. 13701(a)(1)(B), a rate for a movement *by or with a water carrier* in noncontiguous domestic trade must be reasonable. We interpret this language as embracing only local rates of a water carrier and joint rates in which a water carrier is a participant. Because freight forwarder rates are not subject to the rate reasonableness requirements of 13701, we would have little regulatory oversight over those rates, even if tariff filing continued to be required.

⁵ GovGuam uses the term malpractices to refer to "overcharges, 'hidden charges,' and 'after the fact' charges."

⁶ See, 49 U.S.C. 13702(b)(2)(C) which sets forth specific requirements for freight forwarder tariffs.

Expansion of the Exemption

CSA suggests that we broaden the exemption to "include motor carrier initiated rates in the domestic offshore trades." With regard to motor carrier "initiated" rates, the only motor carrier tariffs required to be filed with the Board are those containing joint rates with water carriers in the noncontiguous domestic trade. We do not read the *ICCTA* as requiring the filing of a motor carrier tariff where the entire service is held out by the motor carrier (notwithstanding that some of the service may be performed by a water carrier under substitute service rules established by the motor carrier). As to joint rates with water carriers, however, the tariff filing requirement is not dependent upon who "initiates" the rate.⁷ Under 49 U.S.C. 13541(d), we are precluded from exempting a water carrier from the tariff filing requirement in the noncontiguous domestic trade, and we read this prohibition to include both the local and joint rates of a water carrier.

Other Concerns

GovGuam also expresses concern about the restrictions of the Jones Act, the lack of Board financial reporting requirements for water carriers,⁸ and certain provisions of the *ICCTA* that insulate from legal challenge motor and water carrier rate increases of up to 7.5% annually; allow carriers to enter into confidential transportation contracts; exempt certain commodities from tariff filing requirements; and provide no mechanism for the suspension of proposed rate increases. As GovGuam indicates, certain of these issues may be addressed in the noncontiguous domestic trade study mandated by section 407 of the *ICCTA*, and others can be addressed in other forums; however, we do not believe that these concerns are closely related to whether freight forwarders should be required to file tariffs. Thus, they will not be addressed in this proceeding.

⁷ The term joint rate is defined in 49 CFR 1312.1(b)(8) as a rate that applies over the lines or routes of two or more carriers made by an agreement between the carriers, effected by a concurrence or power of attorney.

⁸ We note, in this connection, that the financial reporting requirements imposed by the FMC in the noncontiguous domestic trade were limited to VOCCs; no such requirements were imposed on NVOCCs.

Conclusion

As indicated in the Notice, the noncontiguous domestic trade freight forwarder industry is highly competitive, and any person meeting basic fitness and financial responsibility requirements can become a freight forwarder and provide service to the public. Elimination of the tariff filing requirement will eliminate an unnecessary burden. To the extent that the exemption affects the rates and services offered to the public, we expect that the reduced burden will result in lower rates and additional competition. Additionally, as also noted in the Notice, water carrier services will continue to be available at tariff rates to both forwarder and non-forwarder shippers, and section 13701 of the *ICCTA* requires that those rates be reasonable.

We conclude that the tariff filing requirement for freight forwarders in the noncontiguous domestic trade is not necessary to carry out the transportation policy of 49 U.S.C. 13101 or protect shippers from the abuse of market power, and that the elimination of that requirement would be in the public interest. We will, therefore, grant the exemption and adopt the regulations set forth below.

Small Entities

The Board certifies that this rule will not have a significant economic effect on a substantial number of small entities. The rule removes an unnecessary regulatory burden and, to the extent that it affects small entities, the effect should be favorable.

Environment

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects

49 CFR Part 1319

Exemptions, Freight forwarders, Tariffs.

By the Board, Chairman Morgan and Vice Chairman Owen.

APPENDIX

For the reasons set forth in the preamble, the Board adds a new part 1319 to title 49, chapter X, of the Code of Federal Regulations to read as follows:

PART 1319 - EXEMPTIONS

Sec.

1319.1 Exemption of freight forwarders in the noncontiguous domestic trade from tariff filing requirements.

Authority: 49 U.S.C. 721(a) and 13541.

§ 1319.1 Exemption of freight forwarders in the noncontiguous domestic trade from tariff filing requirements.

Freight forwarders subject to the Board's jurisdiction under 49 U.S.C. 13531 are exempted from the tariff filing requirements of 49 U.S.C. 13702.