FEDERAL MARITIME COMMISSION

IN THE MATTER OF THE LAWFULNESS OF UNLICENSED PERSONS ACTING AS AGENTS FOR LICENSED OCEAN TRANSPORTATION INTERMEDIARIES - PETITION FOR DECLARATORY ORDER	**Docket No. 06-08**

Served: February 15, 2008

BY THE COMMISSION: Commissioners A. Paul ANDERSON, Joseph BRENNAN and Harold J. CREEL, Jr.; Commissioner Rebecca DYE, dissenting.

ORDER

I. INTRODUCTION

Team Ocean Services, Inc. ("Team Ocean" or "Petitioner"), a licensed non-vessel-operating common carrier ("NVOCC") and ocean freight forwarder, has petitioned the Federal Maritime Commission ("Commission" or "FMC") for a declaratory order pursuant to Rule 68 of the Commission's Rules of Practice and Procedure, 46 C.F.R. §

502.68. The Petition seeks a ruling from the Commission regarding the lawfulness of licensed ocean transportation intermediaries' ("OTIs") use of unlicensed and unbonded agents to provide NVOCC and ocean freight forwarding services to the public.[1] Notice of filing of the Petition was published in the Federal Register on August 18, 2006, 71 Fed. Reg. 47811 (2006), and three comments were received in response.

II. THE PETITION

Team Ocean states that it currently provides OTI services to the public through a central office and 20 unincorporated branch offices. All OTI services are performed by *bona fide* Team Ocean employees at those locations. Team Ocean maintains the appropriate bond amounts for its central office and each of the branch offices. Team Ocean seeks to change this business model and, in lieu of its current branch offices, employ unlicensed, unrelated agents to provide OTI services in its name. Petition at 2. It proposes to use written agency agreements which "would permit the agent to hold out, and to provide ocean transportation services as an OTI on behalf of and in the name of Team Ocean," including, but not be limited to: (1) marketing of export and import OTI services; (2) booking of cargo with vessel-operating common carriers ("VOCCs"); (3) preparing shipping documents; (4) issuing Team Ocean's house bills of lading; (5) accepting import cargo shipments for delivery to consignees or other designated parties; (6) arranging for delivery of cargo for export shipments; and (7) any other activities generally performed by OTIs. *Id.* at 2-3.[2]

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[1] The Petition is specifically limited to "matters involving conduct or activity regulated by the Commission under statutes administered by the Commission." Petition at 1.

[2] Team Ocean asserts that its current branch office structure resulted from an October 2003 compromise of civil penalties in the amount of $100,000, for allegations that Team Ocean violated the Commission's Regulations at 46 C.F.R. Part 515 by allowing unrelated entities to use Team Ocean's OTI license. It should be noted that

While the Petition discusses Team Ocean's operations and its specific need for a declaratory ruling, the relief sought is industry-wide. In its conclusion, Team Ocean requests the Commission to issue an order, effective industry-wide, declaring that it is lawful for OTIs - NVOCCs and freight forwarders - to employ unlicensed, unrelated entities or individuals as agents for the purpose of providing the full range of NVOCC and ocean freight forwarder services, as defined in the Commission's regulations. *Id.* at 6-7.

In support of its Petition, Team Ocean relies solely upon an informal opinion letter provided by the Commission's General Counsel in 2006. *See* General Counsel Legal Opinion dated January 26, 2006 ("2006 Legal Opinion"). That legal opinion relied only upon principles of agency law to conclude it would be lawful for agents of a licensed OTI to perform services, "in particular, non-vessel-operating common carrier (NVOCC) services" without obtaining a license from the Commission. Petition at 4. Team Ocean seeks a declaratory order from the Commission pursuant to Rule 68 because it recognizes that the General Counsel's opinion, although favorable to its position, is not binding upon the Commission. *Id.* at 6.

III. COMMENTS

In response to the Federal Register notice, the Commission received submissions from three entities: 1) the National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA"), 2) Landstar Express of America, Inc., and Landstar Logistics, Inc.

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the compromise also resolved allegations of violations of section 10(a) of the Shipping Act of 1984, ("1984 Act"), 46 U.S.C. 41102(a), by Team Ocean's unlawful access to service contracts, false identification of shippers and consignees on master bills of lading, and violations of sections 10(b)(1) and 10(b)(2) of the 1984 Act, 46 U.S.C. 41104(b)(1) and (b)(3), by allowing its customers to obtain transportation at rates less than those established in Team Ocean's published tariffs.

(collectively referred to as "Landstar"), and 3) ABS Consulting ("ABS").

NCBFAA "supports the position espoused by Team Ocean" only with respect to the use of unlicensed agents by NVOCCs. With respect to ocean freight forwarders, NCBFAA believes the use of agents is prohibited by the 1984 Act, with the exception of sales agents. NCBFAA Comments at 2. NCBFAA contends that NVOCCs "necessarily rely on the services of many third parties" in providing service to the public, including the services of "trucking companies, packing services, consolidators, warehouses, steamship lines, breakbulk companies" and overseas receiving and forwarding companies. NCBFAA argues that none of these service providers are operating as NVOCCs, and do not need to be separately licensed. NCBFAA Comments at 3-4. NCBFAA further opines that to license or otherwise regulate agents would be practically and administratively "difficult" or "impossible." Similarly, NCBFAA urges the Commission not to require that agency arrangements be reduced to writing as "it would be impossible, not just impractical, for NVOCCs to enter into written agreements with all of their various agents." NCBFAA Comments at 12.

Landstar relies principally upon the Restatement (Third) of Agency (2006) to argue that "bona fide" agents of licensed NVOCCs should not be subject to the licensing requirements of the 1984 Act, and that agency relationships based on consent of the parties, and control by the principal, are sufficient to protect the public. Moreover, Landstar believes there is no public policy or regulatory reason for persons providing OTI services as agents to be licensed. Comments of Landstar at 3. Landstar relies upon the Commission's decision in Docket No. 98-28,[3] a rulemaking proceeding which did not restrict OTIs "from entering arrangements with warehouses, truckers,

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[3] *Licensing, Financial Responsibility Requirements and General Duties for Ocean Transportation Intermediaries*, 28 S.R.R. 629 (1999). ("Docket No. 98-28").

consolidators, container lessors, and others who are unlicensed, but necessary to an NVOCC's operations," to contend that OTI agents do not need to be licensed.

ABS, an OTI consultant, urges the Commission to reject Team Ocean's Petition on the basis of both its form and content. ABS argues that the current licensing and bonding requirements create "a *level* playing field for *all* OTIs competing with Team [Ocean]" and that Team Ocean's Petition is an attempt to "gain an unfair advantage over their competition, as they no longer would have to abide by the FMC's OTI rules and bonding requirements." Comments of ABS at 2 (emphasis in original). Consequently, ABS suggests that "[i]f Team Ocean would be allowed to proceed, then *all* the bonding and licensing requirements for branch offices *or* affiliated/incorporated branch offices for all OTIs should be eliminated. That's not a good idea in my view." *Id.* at 3. ABS would support the use of unlicensed agents by a company such as Team Ocean but only if each of the unlicensed agents is known to the Commission, undergoes a background investigation, and is covered by a bond rider in the amount of at least $100,000.

IV. DISCUSSION

A. An Evolving Industry

The OTI industry has evolved significantly from the time "non-vessel-operating common carrier" was first statutorily defined in the 1984 Act.[4] Testimony of NVOCC representatives during House hearings leading up to the 1984 Act characterized NVOCC operations as generally limited to less-than-container load cargo with full

[4] The Commission's predecessors first recognized the concept of a "non-vessel-operating common carrier," *i.e.*, a carrier that did not operate the vessels in its service as a common carrier in *Bernhard Ullman v. Puerto Rico Express*, 3 F.M.B. 771 (1952). The statutory definition in the 1984 Act was intended to codify the Commission's case law definition.

container service restricted to cargo moving to or from the U.S. interior.[5] Today, NVOCCs, while continuing to serve small and medium size shippers, have become significant operators in nearly all United States trades, routinely entering into service contracts involving hundreds or thousands of containers. Ocean freight forwarders, as well, have refined their operations, expanded their services, particularly logistics services, and have become integral to enhancing the efficiency of the overall transportation process.

The Commission recognizes the necessity for its regulatory efforts to keep pace with industry developments while it continues to carry out its mandate to protect the shipping public and foster fairness and efficiency in maritime commerce. Accordingly, the Commission reviewed and substantially revised its NVOCC and freight forwarder regulations following passage of the 1984 Act, again with enactment of the NVOCC Act of 1990 ("NVOCC Act"), Pub. L. No. 101-595, and, most recently, following enactment of the Ocean Shipping Reform Act of 1998 ("OSRA"), Pub. L. No. 98-237. Pursuant to OSRA, the Commission reviewed and amended its existing OTI rules in Docket No. 98-28, including, *inter alia*, extending the Act's licensing requirements to NVOCCs in the United States and addressing the regulation of foreign-based NVOCCs. Also, recognizing the changing nature of freight forwarder operations, the Commission codified forwarders' authority to enter into special contracts with their customers, including provision for placing forwarder personnel at a principal's place of business, and authorized use of electronic data interchange. Docket No. 98-28, *supra* at 651.

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[5] *See* testimony of NCBFAA representatives. *Hearings before the Subcommittee on Merchant Marine of the Committee on Merchant Marine and Fisheries House of Representatives*, 96th Cong. 151 (1979) (statement of William R. Casey, President, NCBFAA *et al.*); *Oversight Hearings before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary House of Representatives*, 97th Cong. 177 (1982) (statement of Raymond P. DeMember, Executive Vice President, International Association of Non-Vessel-Operating Common Carriers).

In a significant development in 2004, the Commission responded to initiatives from the OTI industry and used its exemption authority under section 16 of the 1984 Act to authorize NVOCCs to contract directly with their customers utilizing "NVOCC Service Arrangements." Most recently, the Commission's Bureau of Certification and Licensing has completed an electronic version of the OTI Application Form FMC-18 and made it available on the Commission's website. During this time, the Commission also revised and improved its investigatory processes used in connection with OTI licensing. The Commission is now an active partner with other regulatory and law enforcement organizations and regularly exchanges information with these entities and participates in coordinated investigations. Internally, the Commission's monitoring and auditing programs have been substantially revised and enhanced. In all of its processes and activities, the Commission's focus has been on its statutory obligations to maintain an effective and efficient licensing and bonding program to protect the shipping public with minimal government intervention.

Over the years, the Commission has worked with the industry to meet developing commercial needs and to reduce and eliminate unnecessary regulatory burdens. The request to use unlicensed agents to perform OTI services does not involve the elimination of an unnecessary regulatory burden, but instead seeks the exemption of a category of entities performing OTI services from licensing and bonding requirements. From the time Congress first required licensing and bonding of freight forwarders in 1961 to the present, the Commission has consistently rejected utilization of unlicensed agents to provide OTI services. To grant the instant Petition now would seriously undermine the Congressionally imposed requirement for licensing and bonding of NVOCCs and freight forwarders. Accordingly, Team Ocean's Petition is denied on the grounds that the current licensing and bonding requirements protect the shipping public from incompetent, inexperienced, and potentially unscrupulous OTI operators; and further the nation's security interests.

B. Providing OTI Transportation Services

Sections 19(a) and (b) of the 1984 Act, 46 U.S.C. 40901(a) and 40902 provide, as pertinent, that:

> (a) No person in the United States may act as an ocean transportation intermediary unless that person holds a license issued by the Commission. . . .
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> (b) No person may act as an ocean transportation intermediary unless that person furnishes a bond, proof of insurance or other surety in a form and amount determined by the Commission to insure financial responsibility. . .

When Congress determined that "no person may act" as an OTI without being properly licensed and bonded, that proscription was intended to prohibit any person from providing OTI services unless that person had obtained a license from the Commission and furnished an appropriate bond or other surety. The presumption underlying the Petition, however, is that only an entity holding out in its own name as a common carrier requires a license pursuant to Section 19, while an "agent," that provides the same OTI services to the public in the name of its principal, is not subject to licensing or bonding. Petition at 2-4. The Commission, however, is not aware of any legislative history or case law that would indicate Congress intended to distinguish between persons who "act" as OTIs, on the one hand, and persons who provide OTI services on the other. Such an interpretation would require the former to be licensed and bonded, while the latter would operate unregulated, neither licensed nor bonded. Whether an entity is holding out to provide OTI services in its own right or is doing so on behalf of another, the harm to the public of introducing unknown,

unlicensed and unbonded entities into the transportation supply chain is the same.[6]

C. Legislative Intent in Imposing Licensing and Bonding Requirements on OTIs

The responsibility of an agency or a court is, wherever possible, to interpret a statute so as to carry out the evident purpose of Congress, and not to "construe a statute so as to arrive at absurd or unreasonable results or so as to contravene a congressional purpose." *U.S. v. American Trucking Association,* 310 U.S. 534, 542-43 (1940). The Commission endorsed this principle of statutory construction in *Crowley Liner Services v. Puerto Rico Ports Authority*, 29 S.R.R. 395, 400 (2001) ("Crowley Liner Services") and cases cited therein.[7] In *Public Citizen v. Dept. of Justice,* the Supreme Court held "[w]here the literal reading of a statutory phrase would 'compel an odd result' (citation omitted), we must search for other evidence of congressional intent to lend the term its proper

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[6] Since 1962, the Commission has recognized that holding out in an entity's own name is not a prerequisite to classification as a common carrier. *Puget Sound Tug & Barge Co. v. Foss Launch & Tug Co., et al.*, 7 F.M.C. 43, 46-47 (FMC 1962). In *Puget Sound*, the holding out of one party to a two-carrier arrangement was imputed to the second party so as to make both entities common carriers subject to the Shipping Act:

> [W]here, as here, the "holding out" to carry cargo for the public is *indirect* this holding out will nevertheless be attributed to the carrier, and considered to bring it within the scope of the ancient phrase saying that a common carrier is a carrier which holds *itself* out to carry for the public. *Id.* at 48. (Emphasis in original.)

[7] *See Assoc. of NVOCCs v. Atlantic Container Line*, 25 S.R.R. 167. 174-75 (ALJ), *affirmed* 25 S.R.R. 734 (1990); *Vinmar, Inc. v. China Ocean Shipping Co.*, 26 S.R.R. 130, 135 ("do not read a statute literally if this would lead to an odd result and one contrary to Congressional intent"); *Reduced Rates – Atlantic Coast Ports to Puerto Rico*, 9 F.M.C. 147, 148-49 (1965).

scope." 491 U.S. 440, 454-55 (1989), and:

> When aid to the construction of the meaning of words, as used in the statute, is available, there can certainly be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' *Id.* at 455.

The touchstone of statutory construction is the application of the law in the spirit of the policy that motivated Congress to act. *Crowley Liner Services, supra*; *American President Lines, Ltd. - Modification of Description Covering Subsidized Atlantic/Straits Service,* 1 MA 143, 2 S.R.R. 633 (1963) *citing* SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4701. The spirit and basic policy that motivated Congress to enact the bonding and licensing provisions of the Shipping Acts of 1916 and 1984, the NVOCC Act, and OSRA were to provide protection to the shipping public from unqualified and potentially unscrupulous service providers.[8] Granting the Petition and allowing unknown and possibly unqualified agents to provide OTI services for which a license would otherwise be required, would eviscerate the licensing and bonding requirements imposed by Congress, and would defeat the statute's clear and evident purpose of protecting the shipping public.

The Shipping Acts of 1916 and 1984, as amended, have long been recognized as remedial statutes. *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B. 308, 311-12 (1934); *Tariff Filing Practices of Containerships, Inc.*, 9 F.M.C. 56, 69 (1965). The Acts' remedial purposes are particularly evident in the licensing and bonding provisions. The Freight Forwarder Act (Pub. L. No. 87-

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[8] *See* H. R. REP. NO. 101-785, *supra*; 136 CONG. REC. E2211 (1990); S. REP. NO. 105-61, at 31-32 (1997).

254), initiating the licensing and bonding requirements for freight forwarders, was adopted as remedial legislation in 1961 following a series of hearings conducted by the House Merchant Marine and Fisheries Committee and, separately, by a predecessor of the Commission. These hearings revealed widespread malpractices and discrimination, including direct and indirect rebating, assessment of incorrect charges and charges for services not provided, and shoddy performance, as described in the House and Senate Reports accompanying the new Act.[9] S. REP. NO. 87-691 *reprinted in* 1461-2 U.S.S.C.C.A.N. 2699. Congress's remedy was to require forwarders to become licensed and bonded under a Commission-administered standard of "fit, willing and able."

Bonding requirements for NVOCCs were first required by the NVOCC Act of 1990, Pub. L. No. 101-595, also enacted as a remedial statute, again as a result of hearings which disclosed an increasing pattern of unlawful conduct.[10] Congress noted that the Commission received:

> . . . complaints concerning NVOCC practices from all segments of the ocean transportation industry – shippers, importers, ocean freight forwarders, ocean common carriers, terminal operators, and ports. These offending NVOCC practices include: failure to deliver

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[9] Investigation of Practices, Operations, Actions, and Agreements of Ocean Freight Forwarders and Related Matters, and Proposed Revision of General Order 72, No. 765 and Investigation of Practices and Agreements of Common Carriers by Water in Connection With Payment of Brokerage or Other Fees to Ocean Freight Forwarders and Freight Brokers, No. 831, 6 F.M.B. 327 (1961); and Investigation Into the Activities of Foreign Freight Forwarders and Brokers, Comm. on Merchant Marine and Fisheries, H.R. REP. NO. 84-2939 (1956).

[10] The licensing requirement for NVOCCs in the United States followed eight years later as part of OSRA. S. REP. NO. 105-61, at 30-31 (1997).

> cargo, failure to honor loss and damage claims, and abandonment of cargo at ports throughout the world. These problems are exacerbated by the fact that many NVOCCs lack significant tangible assets. H.R. REP. NO. 101-785, at 2-3 (1990).

When a statute is recognized as remedial, it is to be broadly construed so as to "suppress the evil and advance the remedy." NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 60:1 (6th ed. 2001).[11] The policy that a remedial statute should be construed so as to effectuate its intended remedial purpose is firmly established. SINGER, *supra* § 60:1. *See California v. United States,* 320 U.S. 577, 584 (1944); *Tariff Filing Practices of Containerships, Inc.,* 9 FMC 56, 69-70 (1965); *Peyton v. Rowe,* 391 U.S. 54 (1968); *Tcherepnin v. Knight*, 389 U.S. 332 (1967); and *Nepera Chemical, Inc. v. Fed. Maritime Comm'n*, 662 F.2d 18 (D.C. Cir. 1981). Even where there is ambiguity in a remedial statute, it should be construed to address the problems that are within the spirit or reason of the law or within the "evil" it was designed to remedy. Reasonable doubts are to be resolved in favor of applicability to a particular case.[12]

As noted, the overriding legislative intent with respect to licensing OTIs is to protect the public from unqualified and potentially unscrupulous OTI service providers by mandating that "[n]o person may act as an ocean transportation intermediary unless that person" is

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[11] Similarly, in Blackstone's words, "It is the business of judges so to construe the Act as to suppress the mischief and advance the remedy." Blackstone's Commentaries, at 87.

[12] *Id.*

licensed and bonded.[13] Allowing licensed OTIs to introduce unknown and unqualified "agents" to provide OTI services to the public would undermine Congress's intent in enacting section 19 of the 1984 Act. Accordingly, the Commission will continue to construe section 19 to ensure that the universe of OTI service providers is subject to the licensing and bonding requirements. Where the legislative intent is discernible, as it is in this instance, the role of an agency or court is not to seek out loopholes for the purpose of defeating or undermining that intent, but instead is to interpret the statute so as to give credence to the legislature's intent. *Investigation of Containerships, Inc., supra* at 69 (1965).

D. Commission Implementation of OTI Licensing and Bonding Requirements

The 1984 Act, as amended by OSRA, does not authorize licensed NVOCCs or freight forwarders to utilize unlicensed "agents" to provide OTI services to the public. Prior to the enactment of OSRA, the licensing requirement and, therefore, the restriction on the use of agents was limited to freight forwarders. In *Independent Ocean Freight Forwarder License Application, James J. Boyle & Co.*, 10 F.M.C. 121 (1966), the Commission considered whether the freight forwarding activities of applicant Boyle, carried out through use of an unrelated forwarder's license, disqualified Boyle from receiving its own license under the statutory standard of "fit, willing, and able." The Commission concluded that Boyle had knowingly and willfully operated as a freight forwarder without a license and, therefore, was not qualified to receive a license. In doing so, the Commission discussed and rejected Boyle's defense that his actions were those of an "agent" and, therefore, legitimate and held:

[13] S. REP. NO. 105-61, at 31 (1997).

> The pertinent statutory provision and our rules clearly state that only a bona fide employee of a licensee need not himself be licensed. There appears nowhere any provision in the statute or our rules imputing the authorization of a license to carry over to any and all 'agents.' *Id.* at 127.

In *Rose Int'l, Inc. v. Overseas Moving Network, Int'l, Inc.*, 29 S.R.R. 119 (2001) the Commission, *inter alia,* upheld allegations of Rose, an NVOCC incorporated in New Jersey, that certain alleged agents of respondent OMNI Shipping Services, Inc. (OSSI) were operating as NVOCCs and not as agents. In reaching its decision, the Commission noted that prior to enactment of OSRA in 1998, NVOCCs were not required to be licensed and "there were no prohibitions against NVOCCs utilizing lawful agents to provide NVOCC services." *Id.* at 168. The Commission, however, held:

> This has changed under OSRA; section 19 of the Shipping Act now requires all persons in the United States offering [NVOCC] services, including those persons operating as agents, to be licensed. *Id.* at 168 n.43.

In a series of rulemaking proceedings, the Commission confirmed that the licensing provisions in the 1916 and 1984 Acts require all persons providing forwarding services (and, later, NVOCC services) to be licensed. In *Licensing of Independent Ocean Freight Forwarders,* 13 S.R.R. 241 (FMC 1972), the Commission proposed a rule requiring that a licensee's qualifying individual ("QI") must be (i) the individual proprietor in a sole proprietorship, (ii) an active managing partner of a partnership or (iii) an active officer in a corporation or association.[14] While there was some objection to the proposal on the basis of

[14] Formerly, the QI was not required to be an officer or principal.

burden, the Commission adopted the proposal stating:

> The rule would only further insure that Congressional intent is carried out by requiring that at least one individual qualified to be licensed must come from *among those directly responsible for the daily operations of an applicant* for a forwarder's license. *Id.* at 243 (emphasis added).

Accordingly, the Commission concluded that the QI must be employed by the licensee and "directly responsible" for the entity's daily operations. For that reason, a separately incorporated branch office was (and is) required to have its own QI and to be separately licensed despite holding out in the name of the original licensee. Team Ocean's proposal to substitute unlicensed, separately owned and incorporated agents for its current unincorporated branch offices does not protect the public from inferior OTI services provided by unlicensed, unbonded entities whose experience and good character have not been demonstrated. In the business model proposed by Team Ocean, a potentially unlimited number of separately incorporated, unlicensed, unbonded, and unrelated entities would be providing OTI services under the nominal control of a single QI employed by an unrelated corporation.

In *Licensing of Independent Ocean Freight Forwarders,* 20 S.R.R. 1065 (FMC 1981), the Commission expressed concern over whether a single QI and a single bond were sufficient for a licensee with "many branch offices," whether unincorporated or separately incorporated. After reviewing the comments received and considering the effect on the industry, the Commission concluded that a single QI was not sufficient for a licensee operating through separately incorporated branch offices, though each office held out to provide transportation in the name of the original licensee. The Commission concluded, however, that a licensee operating with unincorporated branch offices could operate under a single license and rely upon the

same QI, although with an additional bonding requirement of $10,000 per branch office. The distinction drawn by the Commission was that an unincorporated branch office is managed by the licensee, staffed by employees of the licensee and is the direct responsibility of the licensee. To bring a claim against such a branch office is to bring a claim against the licensee itself. This is not the case where separate corporations and separate liabilities are involved, which is the situation with separately incorporated branch offices and with unrelated agents. Accordingly, the Commission determined to require, and has continued to require, that separately incorporated branch offices must be separately licensed and have their own QIs regardless of their holding out in the name of the original licensee.[15]

Subsequently, in Docket No. 98-28, the Commission revised its NVOCC and freight forwarder regulations to "apply section 19 of the 1984 Act to all transportation intermediaries."[16] In doing so, the Commission took occasion to emphasize that OTI licenses could be used only by the holder, stating:

> Section 515.31(c) prohibits licensed OTIs from permitting their licenses to be used by persons not employed by the OTI, but provides that an unincorporated branch office may use its parent's license name and number if it reports this information to the Commission and it is covered by the requisite increased financial responsibility. Docket No. 98-28, 28 S.R.R. at 650.

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[15] As an exception to the general rule, 46 C.F.R. § 515.11(c) permits two OTIs to utilize the same QI where "both entities are commonly owned or where one directly controls the other."

[16] S. REP. NO. 105-61, at 31 (1997).

Additionally, in response to comments of U.S. Traffic Service, Inc. ("UST"), the Commission addressed the situation of an entity that did not hold out directly to the public, but provided OTI services only to related companies. 28 S.R.R. at 639. UST argued that where an entity provided OTI services "exclusively for affiliated carriers, it should not have to be licensed. . . ." *Id.* In lieu of licensing, UST proposed that such persons be subject only to a $10,000 bonding requirement, similar to that applicable to unincorporated branch offices. *Id.* The Commission rejected the UST proposal, explaining that, since the entity providing OTI service was separately incorporated, it would, in effect, be limiting its own liability to $10,000. *Id.* The Commission emphasized that an entity's separate corporate status would make it "more difficult for a claimant" to proceed against the parent and its assets. *Id.* Accordingly, a separately incorporated entity is required to obtain its own license, separate bond and QI, even when it does not "hold out" directly to the shipping public.

Similarly, when Worldlink, commenting in Docket No. 98-28, sought a revision to the section to allow separately incorporated branch offices that are owned by a licensee to use the license name and number of its parent, the Commission declined, reaffirming that "...separately incorporated branch offices are required to obtain their own licenses and financial responsibility...." *Id.*

That determination is reflected in the current OTI rules, which prohibit licensees from allowing any person, other than a *bona fide* employee or branch office, from using their license. In this regard, the Commission's regulations at 46 C.F.R. § 515.31(c) state:

> *(c) Use of license by others; prohibition.* No licensee shall permit its license or name to be used by any person who is not a *bona fide* individual employee of the licensee. Unincorporated branch

> offices may use the license number and name of the licensee if such branch offices:
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> > (1) have been reported to the Commission in writing, and
> >
> > (2) are covered by increased financial responsibility in accordance with 515.24(a)(4).

In a supplemental order issued in Docket No. 98-28, the Commission confirmed that rules relating to branch offices which, prior to May 1, 1999, were applicable only to freight forwarders, became applicable to *all* OTIs on that date, including NVOCCs. 28 S.R.R. at 666. Under those rules, "separately incorporated branch offices [of all OTIs] are treated as separate entities," require a separate license, and must provide "their own financial responsibility." *Id.* Under Team Ocean's proposal, however, separately incorporated "agents" would provide all of the OTI services currently performed by Team Ocean's unincorporated branch offices. Such agents, though, would not have met the experience and character standards of the 1984 Act, would not be bonded and would not operate under the direction of a QI. The protection of the shipping public should not turn, and has never turned, on the simple determination of whether an OTI is holding out in its own name or in the name of the principal. The issue is whether an entity which is providing OTI services, whether holding out in its own name or that of a principal, has the requisite experience, character, and financial security to protect the public as contemplated by the 1984 Act.

Having concluded that unlicensed OTIs may not act in the manner suggested by Team Ocean, we now turn to several other issues raised by the Petition and comments.

E. Regulatory "Ambiguity"

NCBFAA and Landstar suggest that the Commission's OTI regulations are ambiguous and do not prohibit licensed OTIs from utilizing unlicensed entities to provide OTI services. NCBFAA Comments at 4-6; Landstar Comments at 3. The Commission disagrees. As discussed above, the Commission's regulations at 46 C.F.R. § 515.31(c) specifically prohibit an OTI (freight forwarder or NVOCC) from allowing its license to be used by *"any person who is not a bona fide individual employee"* of the licensee. No further proscription is necessary. Both NCBFAA and Landstar stress that the language in section 515.31(a) specifying that foreign unlicensed OTIs must use licensed agents in the United States implies that licensed OTIs in the United States are not so restricted. Such an implication would be incorrect. The requirement that foreign unlicensed NVOCCs utilize licensed NVOCCs in the United States was intended to emphasize that a foreign, unlicensed OTI must use a licensed OTI for every OTI service, even something as ministerial as processing bills of lading.[17] The limited references to "agents" or "employees and agents" in the Commission's regulations are intended to prevent OTIs from avoiding responsibility for their actions by alleging the fault lies with an employee or agent. *See, e.g.*, 46 C.F.R. § 515.4(b)(2) and § 515.31(c). The reference to NVOCCs entering into arrangements with origin and destination agents in 46 C.F.R. § 515.2(l)(8) refers to the practice of contracting with third parties to provide specific services at origin and destination, as discussed under Vendor Services, *infra.*

F. Vendor Services

The Commission sees no legal or policy reasons to prohibit licensed OTIs from contracting with unlicensed third parties to

[17] *See* discussion in the Notice of Proposed Rulemaking, Docket No. 98-28.

provide specific, limited services, on a vendor basis, as part of the overall transportation services offered. The practice of licensed OTIs contracting with outside persons for specific services, including nearly all of the services listed in NCBFAA's Comments as necessary to the operations of NVOCCs,[18] does not raise the same concerns of protection of the public and transportation security. NCBFAA has indicated in its Comments that its members routinely contract out services to third-party vendors and that it is essential to their operational efficiency and flexibility that they be able to continue these relationships. It has never been the Commission's policy to prohibit such arrangements. If the services provided by a third party on behalf of a licensed OTI are sufficiently minimal as not to require licensing of the provider (i.e., vendor), a licensed OTI would not be prohibited from contracting for those services with an unlicensed entity.[19]

The Commission appreciates that there is no "bright line" separating those entities providing "minimal" OTI services and those "engaged in a full spectrum of OTI services, such as booking vessel space, preparing documentation, and soliciting cargo," as those terms are used in the Notice of Proposed Rulemaking in Docket No. 98-28. 63 Fed. Reg. at 70711. The Commission has recognized the difficulty of drawing such a distinction and, in the Final Order in Docket No. 98-28, declined to do so in a rulemaking setting.[20] Specifically, in response to comments requesting the Commission to "provide

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[18] Services listed include sales, warehousing, trucking, consolidation, container leasing, and processing bills of lading.

[19] *See also* Docket No. 98-28, 28 S.R.R. at 649 (concluding that a proposed restriction on freight forwarders compensating sales agents (subsequently amended) "would not adversely affect NVOCCs from entering arrangements with those unlicensed persons providing trucking services and the like.")

[20] Docket No. 98-28, 28 S.R.R. at 637.

guidance as to what constitutes 'minimal' services as opposed to a 'full spectrum' of OTI services," the Commission declined, stating:

> The Commission is reluctant to set forth a rigid standard as to when an entity is operating as a freight forwarder or an NVOCC, particularly in light of the innovations and technological advances made in the industry. 28 S.R.R. at 637.

G. Security Issues

In denying the Petition, the Commission also is cognizant that transparency in the supply chain is essential to transportation security. An increase in the number of unlicensed agents translates into fewer regulated entities and fewer known persons in the transportation system. However, the trend in regulation of international commerce, from Customs controls, to export rules, to port access, has been to require stricter regulation of entities and individuals involved in transportation on all levels. Greater emphasis is being placed on transparency and on systems that focus on risk assessment. The Commission's licensing process is often the primary means to identify those persons responsible for the transportation of goods in the U.S. import and export trades. Under the scheme proposed by Petitioner, however, the Commission would have little or no information as to the identity, qualifications, character, or even contact information of the entities actually providing such services, and could not represent to other federal agencies that reliance on a Commission-issued license provides assurance that the service provider is a known entity.[21]

[21] Petitioner's offer to require its agents to identify themselves as such (Petition at 3) could not be reasonably implemented or enforced. Similarly, Team Ocean's willingness to establish control over its agents through training supervision, audits, standard operating procedures, etc. is equally unenforceable.

Moreover, in the event the Commission were to grant the Petition, licensing and bonding would be seriously compromised. The number of bonded branch offices would diminish over time as "agents" would be permitted to provide the OTI services now provided by branch offices, only without licenses or bonds, and irrespective of qualifications. Granting the relief requested would act as a disincentive to applying for an OTI license since the same OTI services could be provided as the agent of a licensed OTI, or as the agent of multiple licensed OTIs, without undergoing the licensing and bonding process. Persons or entities who were unable to qualify for an OTI license in terms of experience or character, or who had been denied a license, would be able to provide OTI services as "agents" of licensees. These unknown agents would not need to be familiar with the 1984 Act or the Commission's OTI regulations, and would not be required to have any experience working in the industry. They would, however, be authorized to provide complete OTI services for which a license and bond are now required.

H. Complementary Purposes of Licensing and Bonding

The argument has been raised that the qualifications of an agent, including its experience and character, are not critical since shippers can rely for protection upon the surety bond of the principal. Landstar Comments at 5-6. The purposes of licensing and of bonding, however, are complementary, not duplicative, and it is only by continuing to require both licensing and bonding that shippers will be protected. The purpose of licensing is to protect the shipper from incompetent and potentially unscrupulous operators by imposing standards of experience and character, as discussed, *supra*. Bonding is intended to provide some means of recompense to a shipper in the event an OTI fails to fulfill its transportation obligations. Congress found bonding alone to be insufficient when it introduced mandatory licensing of NVOCCs with enactment of OSRA. Additionally, bonding of a principal, even under circumstances where the bond would presumably cover the agent, does not reduce the security risks

from introducing unknown and unqualified agents into the transportation pipeline. There is concern over the sufficiency of a single $50,000 or $75,000 bond where a licensed OTI may have a significant number of otherwise unidentified and unlicensed agents. In its Petition, Team Ocean states that it intends to name at least 20 unlicensed agents at the commencement of its new model arrangement; if the Petition were to be granted, it could be expected that this number would increase, perhaps quickly, and all supported by a single bond. Petition at 2.

There are also concerns that, in the case of a separately incorporated agent, the ability of a shipper to obtain compensation or to claim against the OTI bond may be more difficult. A principal *may* be liable for the acts of its agents if the agent is acting within the scope of employment or when acting with apparent authority. However, there are actions by an agent for which a principal would not be held liable. Such a determination is necessarily fact-specific and imposes an additional burden on a shipper to attempt to make that determination prior to entering into a transaction with the agent; alternatively, the parties must seek to allocate such responsibilities after the loss, likely in the context of a judicial proceeding with compulsory process and attendant legal costs. In order to access the bond covering the principal, a shipper may need to convince a court and then the bonding company that the principal was liable for the acts of the agent. In the UST discussion, *supra*, the Commission was concerned that a shipper might have to "pierce the corporate veil" to reach the OTI principal. In the case of unrelated, separately incorporated agents, such as those proposed by Team Ocean, the shipper's only option would be to show that the principal was responsible for the acts of its agent, arguably a more difficult prospect.

I. Prior Opinion Letter

Team Ocean fails to cite any statutory authority or case precedent in support of the relief sought; instead it relies on an

unpublished legal opinion of the Commission's General Counsel, dated January 26, 2006.[22] That opinion responded to an inquiry from Landstar with respect to its use of unlicensed, unbonded agents to provide OTI services. In responding in the affirmative, the General Counsel concluded that Landstar had described a *bona fide* agency arrangement and, therefore, that the unlicensed, unbonded agents could lawfully provide OTI services on its the behalf. The opinion, however, addressed only the principles of agency law and did not consider the requirements of the 1984 Act or the statutory obligations of the Commission.

Any consideration of an agency/principal relationship can only be undertaken in the regulatory context of the 1984 Act, as amended. This context includes the Commission's obligation to protect the public through effective implementation of the OTI licensing and bonding requirements imposed by Congress. Based on the language of section 19 of the 1984 Act, its legislative history and remedial purpose, and the Commission's consistent case precedent on the importance of licensing and bonding, the Commission concludes that only licensed persons are permitted to provide OTI services to the public. Accordingly, whether or not a *bona fide* agency relationship can be established between a licensed OTI and an unlicensed, unqualified agent, the unqualified agent may not provide licensed services on behalf of the licensee. Such arrangements with unlicensed persons introduce unknown, unqualified entities into the transportation supply chain, fail to protect the shipping public and compromise the security interests of the United States.

V. CONCLUSION

The Commission's role under section 19 of the 1984 Act is to protect the shipping public through licensing and bonding of those

[22] As noted in the opinion letter, it is not binding on the Commission.

providing OTI services. The Commission's current regulatory structure is supported by the Shipping Act, its legislative history, and Commission case law and regulation. From the time Congress first required licensing and bonding in 1961 to the present, the Commission has consistently rejected utilization of unlicensed agents to provide OTI services. The Commission's current regulatory structure protects the shipping public from unqualified and potentially unscrupulous operators, preserves the integrity of the licensing process, and aligns the Commission with the nation's security interests. Significant change in agency practice at this time would undermine the Commission's contribution to homeland security efforts, and move against the current trend toward more effective regulation in support of a secure and transparent supply chain. Therefore, the Commission denies the Petition and will continue to require OTI services to be performed only by licensed OTIs.

NOW THEREFORE, IT IS ORDERED, That the Petition of Team Ocean Services is denied.

By the Commission.

Karen V. Gregory
Assistant Secretary

Commissioner Dye, Dissenting

For the reasons discussed below, I dissent from the majority and would grant the Petition filed by Team Ocean Services.

DISCUSSION

The Team Ocean Petition presents two distinct issues for the Commission's consideration: 1) whether licensed NVOCCs can use unlicensed agents to perform NVOCC services on their behalf and 2) whether licensed freight forwarders can use unlicensed agents to perform forwarding services on their behalf. Each of these questions ought to be evaluated separately. However, as a threshold matter, I believe that section 19 of the Shipping Act, 46 U.S.C. § 40901 (2006), does not require the FMC to license agents who only provide OTI services on behalf of a licensed OTI principal.

A. The Use of Agents by Licensed NVOCCs

1. Section 19 of the Shipping Act

Section 19(a) of the Shipping Act states that: "A person in the United States may not act as an ocean transportation intermediary unless the person holds an ocean transportation intermediary's license issued by the Federal Maritime Commission."[1] 46 U.S.C. § 40901(a). Since an NVOCC is an OTI, 46 U.S.C. § 40102(19), an OTI license is required when any person acts as an NVOCC. In order to determine when a person is acting as an NVOCC, it is necessary to determine whether that person is acting as a common carrier. 46 U.S.C. § 40102(16). Under the statutory definition, a common carrier is a person that "holds itself out to the general public to provide

[1] Section 19 also requires proof of financial responsibility in order to "act as an ocean transportation intermediary." 46 U.S.C. § 40902(a).

transportation by water" and that "assumes responsibility for the transportation from the port or point of receipt to the port or point of destination." § 40102(6).

The Commission has previously applied the "holding out" analysis to determine when a person is acting as a common carrier. In the Rose case, the Commission used the "holding out" analysis to determine that the respondent NVOCC, OSSI, was actually a sham set up so that its purported agents could offer their own NVOCC services without complying with the requirements of the Shipping Act.[2] Rose International, Inc. v. Overseas Moving Network International, Inc., 29 S.R.R. 119, 167-69, 171-73 (2001). In finding that the purported agents of OSSI had violated the Shipping Act by holding out to provide their own NVOCC services, the Commission applied this "holding out" analysis in the context of determining when a person acts as an NVOCC.

The Commission affirmed its reliance on this "holding out" analysis to determine an NVOCC's status in the OSRA rulemaking. The Commission explained that:

> [I]n determining whether a person is acting as a common carrier, and thus as an NVOCC, as defined by section 3(6) of the 1984 Act [now § 40102(6)], the Commission has consistently held that no single factor determines a common carrier's status, but an essential characteristic to be evaluated is "whether he holds himself out to carry goods from whomever offered to the extent of his ability to carry."

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[2] Since the Rose case arose before the enactment of OSRA, the Shipping Act did not require the licensing of NVOCCs. Therefore, the Commission found that the purported agents of OSSI had violated the Shipping Act by acting as NVOCCs without individual tariffs and bonds. Rose International, 29 S.R.R. at 173. If the same activity occurred today, it would also be a violation of section 19 since the purported agents would not have been individually licensed.

Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries: Notice of Proposed Rulemaking, 63 Fed. Reg. 70710 (Dec. 22, 1998) (internal citations omitted). Thus, the "holding out" analysis should continue to be the primary method for determining NVOCC status under section 19.

By applying this "holding out" analysis to determine when a person is acting as an NVOCC, section 19 of the Shipping Act would not require separate licenses for agents of licensed NVOCCs. Accord General Counsel Legal Opinion, dated October 9, 1998, at 2-3.[3] When a licensed NVOCC enters into an agency relationship with an unlicensed person, the unlicensed agent is typically not "holding out" to provide its own NVOCC services. Rather, the agent holds out to provide the services of its licensed principal. Under common law agency principles, an agency relationship is one in which the agent and principal agree that the agent will "act on the principal's behalf and subject to the principal's control." Restatement (Third) of Agency § 1.01 (2006). Thus, section 19 only contemplates licensing the principal in an agency relationship, as the entity that "holds out" to provide its own NVOCC services.

The "holding out" analysis places emphasis on an entity's interaction with the public. An entity would not be considered an NVOCC unless it was holding out to provide NVOCC services to the general public on its own behalf. In Common Carriers by Water, the Commission noted that a person may hold out to provide transportation to the public "by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise." Common Carriers by Water—Status of Express Companies, Truck Lines and Other Non-Vessel Carriers, 6 F.M.B. 245, 256 (1961). In

[3] This legal opinion, issued shortly before the enactment of OSRA, applied the "holding out" analysis to conclude that an agent of an NVOCC would not need its own tariff and bond to perform NVOCC services such as preparing and processing bills of lading on behalf of its principal.

Containerships, the Commission recognized that solicitation and advertising are important factors in determining whether a person is "holding out." Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc., 6 S.R.R. 483, 489 n.7 (1965). In Rose, the Commission considered whose services the purported agents were actually advertising and marketing, who was listed on the bill of lading, and whether the shipper-customers were aware of the existence of the NVOCC principal. 29 S.R.R. at 167-69, 171-73. As illustrated in these cases, the "holding out" analysis depends on how the entity in question presents itself to the shipping public.

According to common law principles, an agency relationship does not require an agent to disclose the existence and identity of its principal to third parties with whom it deals on the principal's behalf. See Restatement (Third) of Agency § 1.04(2). However, the "holding out" analysis would appear to require the disclosure of the principal in an NVOCC agency relationship because the shipping public must be aware that the agent is not holding out to provide NVOCC services in its own right. The Commission could, of course, issue regulations imposing upon the OTI principal the obligation to ensure that its agents clearly disclose the existence of the agency relationship and the identity of the OTI principal to all affected parties. However, it has not done so.

In addition to the "holding out" requirement, a common carrier also "assumes responsibility" for the safe transportation of the cargo from the point of receipt to the point of destination. 46 U.S.C. § 40102(6)(A)(ii). In Common Carriers by Water, the Federal Maritime Board noted that an entity may be considered a common carrier even if it attempts to disclaim liability because liability may be imposed by operation of law. 6 F.M.B. at 256. However, "[a]ctual liability as a common carrier over the entire journey including the water portion is essential" to determine NVOCC status. Id. Although the Commission has not focused on this aspect of common carrier status, favoring the "holding out" analysis, it remains an essential element of

the "common carrier" definition in the Shipping Act. 46 U.S.C. § 40102(6)(A)(ii).

Section 19 of the Shipping Act generally would not require a separate OTI license for an agent acting on behalf of a licensed NVOCC principal because the agent does not typically "assume responsibility" for the transportation of the cargo. An NVOCC assumes this responsibility when it contracts with a shipper to transport its cargo from one point to another. Some agents of licensed NVOCCs may never participate in the contract formation process with the shipper-customer, and therefore they could not "assume responsibility" for the transportation of the cargo.

Furthermore, an NVOCC agent that is authorized to form contracts on behalf of its principal is not a party to those contracts if the NVOCC principal is disclosed. Restatement (Third) of Agency § 6.01. As discussed above, I believe that an agent of a licensed NVOCC must disclose the identity and existence of its principal to the public to avoid NVOCC status under the "holding out" requirement. Therefore, an NVOCC agent forming contracts on behalf of its licensed principal would not assume responsibility for the transportation of the cargo as long as its licensed principal is disclosed. Since such NVOCC agents would be acting on behalf of a licensed principal without "holding out" and without "assuming responsibility," section 19 of the Shipping Act would not require them to obtain separate OTI licenses.

I also believe that common law agency principles offer adequate protection to third parties dealing with an agent. Under the common law, a principal can be held liable for any breach of contract or torts committed by its agent within the scope of the agent's authority. See Restatement (Third) of Agency §§ 6.01-.03, 7.08. In addition, when the principal is disclosed, for example on the bill of lading, the shipper will know which parties to sue in the event of a breach of contract or other injury. The licensed principal will be

subject to the Commission's jurisdiction and will have proof of financial responsibility.

As the commenters noted, many licensed NVOCCs currently use unlicensed agents for different aspects of their businesses. NCBFAA at 3-4; Landstar at 1-2, 4. Team Ocean contends in its Petition that it would like to change its model of operations from branch offices to agency arrangements "solely for commercial reasons," suggesting that such a business model would be profitable for some OTIs like Team Ocean. Petition at 2. Due to modern technology and advancements in logistics, it is likely that NVOCCs will continue to discover new ways in which they can use agency relationships in order to make their businesses more efficient. The policy adopted by the majority would stifle this business innovation.

2. The Commission's regulations and caselaw

Although section 19 does not require separate licenses for agents of licensed NVOCCs, it is not clear from the current Commission regulations whether or not the Commission has condoned the use of unlicensed agents by licensed NVOCCs. However, it is evident that the Commission's regulations contain no per se prohibition on their use. Therefore, I would grant the Team Ocean Petition in order to clarify this ambiguity and affirm that licensed NVOCCs may use unlicensed agents as long as the agent does not hold out to provide its own NVOCC services. Rather than prohibiting the use of all unlicensed OTI agents, I would favor issuing a Notice of Inquiry to consider whether the Commission should amend its regulations regarding the use of NVOCC agents.

The current FMC regulations do not directly address the issue of licensed OTIs using unlicensed agents. Section 515.4(b)(1) states that an OTI license is not required for individual employees or unincorporated branch offices of licensed OTIs, but § 515.4(b)(2) goes on to mention that "[e]ach licensed [OTI] will be held strictly

responsible for the acts or omissions of any of its employees or agents rendered in connection with the conduct of its business." Similarly, § 515.31(c) asserts that: "No licensee shall permit its license or name to be used by any person who is not a bona fide individual employee of the licensee." However, it is not clear whether this rule would prohibit NVOCC agents, especially given that their use is acknowledged in § 515.4(b)(2) and § 515.2(l)(8) (stating that NVOCC services may include "entering into arrangements with origin or destination agents"). While some of these regulations seem to discourage the use of unlicensed NVOCC agents, §§ 515.4(b)(1), 515.31(c), other regulations explicitly acknowledge their use, §§ 515.4(b)(2), 515.2(l)(8). The ambiguity in these regulations has created uncertainty in the NVOCC industry.

Significantly, the Commission chose to explicitly prohibit the use of unlicensed agents acting on behalf of *unlicensed* OTIs in § 515.3: "Only persons licensed under this part may furnish or contract to furnish [OTI] services in the United States on behalf of an unlicensed [OTI]." I would agree with NCBFAA and Landstar that the Commission could have created an equally clear prohibition applying to licensed OTIs. NCBFAA at 4, 10-11; Landstar at 4. The absence of such a prohibition indicates that the Commission did not intend to prohibit the use of unlicensed agents by licensed OTIs. Otherwise, there would be no reason for limiting the language in the last sentence of § 515.3 to only unlicensed OTIs.

In addition, I believe the majority's reliance on the Boyle case is misplaced. That case involved an unauthorized agency arrangement between a forwarder employee and an unlicensed person, not an agency relationship authorized by a licensed principal. Independent Ocean Freight Forwarder License Application: James J. Boyle & Co., 7 S.R.R. 571 (1966). Thus, this case is not conclusive on the question of whether a licensed OTI principal may lawfully authorize an unlicensed agent to perform OTI services on its behalf.

In any event, the case should not be treated as legal precedent for the use of NVOCC agents since the NVOCC licensing requirement did not exist until the enactment of OSRA in 1998. Furthermore, much has changed in the OTI industry since the Boyle decision. The Freight Forwarder Act of 1961, P.L. 87-254 (1961), was enacted during a time of widespread abuses in the industry, and this case presented one of the first opportunities for the Commission to exercise its new authority to curb such malpractices.[4] Such historical policy concerns have much less relevance in today's industry.

Similarly, I believe that a footnote in the Rose case concerning the use of unlicensed agents by licensed OTIs has little relevance to the current Petition. Rose International, 29 S.R.R. at 168 n.43. I believe that footnote should be read within the context of the Commission's finding that the purported "agents" of the NVOCC were actually holding out in their own right. Thus, I believe the Commission intended only to address NVOCC agents holding out to provide OTI services in their own right, contrasting their treatment under the Shipping Act before and after the enactment of OSRA.

3. Possible changes to Commission regulations

Since section 19 of the Shipping Act and the Commission's current regulations do not prohibit the use of unlicensed agents by licensed NVOCCs, I believe that the question the Commission should consider is whether to amend our current regulations involving an NVOCC's use of agents. I would favor issuing a Notice of Inquiry to solicit more information from the NVOCC community on their use of unlicensed agents. Such information would be helpful in determining

[4] Gerald H. Ullman, The Ocean Freight Forwarder, the Exporter and the Law 49-52 (1967). See also Providing for Licensing and Compensation of Independent Ocean Freight Forwarders, Comm. on Commerce, S. Rep. No. 97-691, at 7 (1961) (on S. 1368, which became P.L. 87-254) ("We recognize that malpractices have been widespread in the past but we are confident that the regulatory authority given the Board in this bill will prevent such practices in the future.").

whether and how the Commission should amend its regulations, and it would give the Commission the opportunity to conduct public hearings to engage in a dialogue with the NVOCC industry.

In addition, any new regulations adopted by the Commission after a Notice of Inquiry would require a notice and comment period, as prescribed by the Administrative Procedure Act, 5 U.S.C. § 553 (2007). The enforcement approach adopted by the majority today, by denying this Petition, has not afforded the OTI community any such opportunity to comment on these important issues.

The majority risks adopting an enforcement policy that will require the resolution of additional complex legal issues. In requiring licenses for all OTI agents, the Commission will need to distinguish between agents and non-agent service providers. As the Restatement makes clear, "[n]ot all relationships in which one person provides services to another satisfy the definition of agency." Restatement (Third) of Agency § 1.01, comment c. Thus, some independent contractors hired by NVOCCs to perform certain tasks may qualify as agents while others may not. The Commission will have to determine which service providers actually qualify as agents under the common law definition of agency.

The Commission may also need to determine which services performed by OTI agents would require a license. In doing so, the Commission would need to identify all the potential services that an OTI agent could perform. Significantly, the Commission has specifically declined to formulate a definitive list of OTI services, electing instead to use a flexible approach that will be able to accommodate future innovation and advancement in the industry. The Commission's current definitions of "freight forwarding services," "NVOCC services," and "transportation-related activities" are not restrictive. 46 C.F.R. §§ 515.2(i), (l), (w). In the OSRA rulemaking, the Commission rejected the suggestion of one commenter to distinguish between providing "minimal" OTI services and a "full

spectrum" of services, asserting: "The Commission is reluctant to set forth a rigid statement for when an entity is operating as a freight forwarder or an NVOCC, particularly in light of the innovations and technological advances made in the industry." Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries: Final Rule and Interim Final Rule, 28 S.R.R. 629, 637 (1999).

The Commission offered a similar response to commenters that advocated a restrictive definition of "transportation-related activities." In adopting an open-ended definition, the Commission asserted: "We embrace the approach advocated by IANVOCC that too narrow a definition 'does not allow for future growth and dynamism of the NVOCC industry...'" Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries: Final Rule and Interim Final Rule, 28 S.R.R. 629, 641 (1999). Thus, the Commission has consistently refused to set forth a definitive list of OTI services because a restrictive definition would become outdated by innovations and advancements in the industry.

The majority's regulatory approach will require the Commission to resolve complex legal issues in defining agency relationships and in defining OTI services. Therefore, I would have preferred a Notice of Inquiry to determine the best regulatory approach for agents of licensed NVOCCs. I disagree with the majority's decision to deny the Team Ocean Petition with respect to NVOCCs because I do not believe that the Shipping Act or the Commission's current regulations prohibit the use of unlicensed agents by licensed NVOCCs. I would have granted the Petition with respect to licensed NVOCCs using unlicensed agents, and I would have issued a Notice of Inquiry to determine whether and how to amend the Commission's regulations regarding NVOCC agents.

B. The Use of Agents by Licensed Freight Forwarders

Although section 19 of the Shipping Act does not generally require separate licenses for agents of licensed freight forwarders, the Commission's regulations have only permitted freight forwarders to enter into paid arrangements with agents for sales work. See 46 C.F.R. § 515.32(b). This limitation on paid arrangements with unlicensed persons was meant to address the problem of freight forwarders sharing their carrier compensation with shippers as a rebate to reduce the tariff price. See Licensing, Financial Responsibility Requirements, and General Duties for Ocean Transportation Intermediaries: Final Rule and Interim Final Rule, 28 S.R.R. 629, 649 (1999). In today's industry, with most cargo moving under individual service contracts, the problem of fee-sharing may no longer have as much significance. In light of such changes in the freight forwarder industry, there may be a question as to whether this historical policy still justifies prohibiting freight forwarders from entering into paid agency relationships for services other than sales work.

Due to modernization of the freight forwarder industry, I believe it would be appropriate for the Commission to consider whether to permit other freight forwarder agency arrangements. While freight forwarders differ from NVOCCs because of their fiduciary relationship with the shipper-principal, freight forwarders' use of unlicensed agents could become more prevalent as the industry continues to evolve, with freight forwarders providing more logistics services in an increasingly automated environment.

I would favor issuing a Notice of Inquiry to determine the best approach to regulating freight forwarder agents. It would be helpful for the Commission to solicit information from the freight forwarder industry on their use or potential use of unlicensed agents. Such an Inquiry could provide the opportunity to conduct public hearings on this issue.

CONCLUSION

I disagree with the majority in that I believe neither section 19 of the Shipping Act nor the Commission's current regulations prohibit the use of unlicensed agents by licensed NVOCCs. I would grant the Team Ocean Petition by issuing a declaratory order stating that licensed NVOCCs may use unlicensed agents as long as the agent does not hold out to provide OTI services in its own right. With respect to freight forwarders, although the Commission's current regulations restrict their agency arrangements to sales work, I believe that this historical restriction ought to be reexamined due to the modernization of the industry. In addition to issuing a declaratory order on Team Ocean's Petition, I would have supported issuing a Notice of Inquiry to solicit more information from the OTI community to assist the Commission in determining whether and how to amend its regulations involving NVOCC agents and whether freight forwarders ought to be permitted to form agency arrangements for services beyond sales work.