FEDERAL MARITIME COMMISSION

46 CFR PART 572

[DOCKET NO. 92-16]

CONFERENCE INDEPENDENT ACTION PROVISIONS

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission ("FMC" or "Commission") is amending its regulations governing the filing of agreements submitted to the Commission pursuant to the Shipping Act of 1984 ("1984 Act" or "Act"), for the purpose of clarifying independent action ("IA") provisions. The final rule: (1) interprets the term "adopt" as it pertains to the filing of IAs that match an originating carrier's IA; (2) specifies the conditions under which conference members may adopt another member's IA time/volume rate ("TVR"); (3) prohibits conferences from establishing notice periods, other than the notice period required by section 5(b)(8) of the 1984 Act, for taking initial IAs; (4) prohibits conference provisions that provide authority for the allocation of costs on a usage basis for publishing and maintaining member lines' IAs; and (5) allows conference provisions that authorize automatic expiration dates for IAs contingent upon the member line's consent.

EFFECTIVE DATE: (Insert date 30 days after date of publication in the *Federal Register*).

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SUPPLEMENTARY INFORMATION:

The Commission initiated this proceeding by an Advance Notice of Proposed Rulemaking ("ANPR") published in the *Federal Register*, 57 FR 14551 (April 21, 1992), requesting comment on certain conference policies and procedures concerning IA. The FMC received twenty-one comments. Subsequently, a Notice of Proposed Rulemaking ("NPR") was published in the *Federal Register*, 57 FR 31481 (July 16, 1992). The proposed rule: (1) interpreted the term "adopt" as it pertains to the filing of IAs that match an originating carrier's IA; (2) specified conditions under which conference members could adopt another member's IA TVR; (3) prohibited conferences from establishing notice periods, other than the notice period required by section 5(b)(8) of the 1984 Act, for taking initial IAs; (4) prohibited conference provisions that provide authority for the allocation of costs on a usage basis for publishing and maintaining member lines' IAs; and (5) prohibited conference provisions that authorize automatic expiration dates for IAs.

The Commission received eighteen comments in response to the NPR. Comments were submitted by the following conferences: the Asia North America Eastbound Rate Agreement, the "8900" Lines and the Mediterranean North Pacific Coast Freight Conference

("ANERA *et al.*"); the South Europe/USA Rate Agreement ("SEUSA"); the North Europe-USA Rate Agreement and the USA-North Europe Rate Agreement ("North Europe Conferences" or "NEC"); the Venezuelan American Maritime Association, Atlantic and Gulf/West Coast South America Conference, United States/Central America Liner Association, Central America Discussion Agreement, United States Atlantic & Gulf/Hispaniola Steamship Freight Association, Hispaniola Discussion Agreement, United States Atlantic and Gulf/Southeastern Caribbean Steamship Freight Association, Southeastern Caribbean Discussion Agreement, Jamaica Discussion Agreement, United States/Panama Freight Association, PANAM Discussion Agreement, Puerto Rico/Caribbean Discussion Agreement, the Caribbean and Central American Discussion Agreement, Ecuador Discussion Agreement, and United States Atlantic and Gulf/Ecuador Freight Association ("Latin American Agreements"); the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic and Gulf Freight Conference ("Japan Conferences"); the Inter-American Freight Conference ("IAFC"); and the Transpacific Westbound Rate Agreement ("TWRA").

Shipper comments were submitted by the Agriculture Ocean Transportation Coalition ("AgOTC"); the American Paper Institute, Inc. ("API"); Calcot, Ltd.; International Paper; the National Industrial Transportation League ("NIT League"); the National Forest Products Association ("NFPA"); the Society of the Plastics Industry, Inc. ("SPI"); Sun-Diamond Growers of California; and Union Camp Corporation. The United States Department of Justice ("DOJ") and Department of Transportation ("DOT") also submitted comments. A

number of commenters take essentially similar positions. Accordingly, we will make representations without individual attribution, unless otherwise appropriate.

Before addressing the specific comments regarding particular provisions of the proposed rule, it is necessary to address two general issues raised by the comments. First, TWRA opposes the proposed rule on the basis that it allegedly imposes requirements beyond the scope of the Commission's statutory authority. It argues that the proposed rule is contrary to the statutory requirements governing the filing, effectiveness, and modification of agreements, and the opportunity for hearing as set forth in sections 5(a), 6(b) and (c), and 11(c) of the 1984 Act, 46 U.S.C. app. 1704(a), 1705(b) and (c), and 1710(c). The rule is said to mandate deletion of agreement provisions currently on file and in effect with the Commission which were allowed to become effective pursuant to the standards of section 5, which have not changed. In other words, TWRA believes that the Commission is adding standards for agreement rejection or modification that are not found in section 5 or in any other section of the Act. It alleges that the proposed rule reflects a Commission determination to modify agreements by adopting rulemaking standards, after it proved impossible for the Commission to reject or modify the same provisions by applying the statute itself.

The proposed rule does not add new standards for rejecting agreements. Rather, it seeks to clarify the Commission's requirements for conference agreement IA provisions in accordance with the language and intent of section 5(b)(8) of the Act. We recognize that certain conference agreements currently contain IA provisions that would conflict with the requirements of the proposed rule. These provisions raised issues of inconsistency with the

intent of section 5(b)(8) at the time of their filing, but were permitted to become effective since the Commission contemplated an overall review of conference IA provisions. Nothing precludes the Commission from refining its regulations on agreement requirements as conditions warrant and issues arise, even if agreement provisions reflecting those issues are currently in place and may require modification once the amended regulations are in effect. Further, section 17(a) of the Act, 46 U.S.C. app. 1716(a), specifically provides the Commission with the authority to prescribe rules and regulations as necessary to carry out the 1984 Act. Additionally, TWRA's concern that the subject rule would require changes to its agreement while depriving it of an opportunity for a hearing under section 11 is unwarranted. Should a conference fail to conform its agreement to the rule within the time prescribed and the Commission were to initiate action to obtain compliance, the conference would have an opportunity for hearing under section 11.

Second, the North Europe Conferences request oral argument limited to those provisions of the proposed rule that concern a conference member's adoption of, and participation in, another member's IA TVR. No other commenter has requested oral argument. Scheduling of oral argument would delay the Commission's consideration of this proceeding, and the Commission does not believe that oral argument would add significantly to the extensive record already developed. For these reasons, NEC's request is denied. Further comments and discussion on the specific issues of the proposed rule are addressed below.

Issue 1: The Meaning of "Adopt"

The Commission proposed the addition of section 572.801(f)(1) requiring that any adoption of an independent action rate or service item or a particular portion of such rate or service item must be identical to the initial independent action. Any change made to the original independent action by another member line would be a new IA subject to the filing provisions of the applicable agreement. The Commission proposed that in order to comply with section 5(b)(8) of the 1984 Act, conference agreement provisions must use the term "adopt" when referring to the adoption of one member's independent action by another member line. The term adopt would refer to the filing of independent action by carriers who wish to offer a rate or service item which matches exactly the independent rate or service item of the originating carrier, with the exception that in the case of an IA TVR, the actual dates offered by an adopting carrier may vary from the dates offered by the originating carrier, so long as the duration of the adopting IA is the same as the originating IA.

All shippers, except one, support the proposed rule. SPI argues that the proposed definition is too restrictive because permitting carriers to modify IAs to accommodate a shipper's needs is pro-competitive and, therefore, consistent with the purpose of the 1984 Act. In addition to the partial adoption of an IA which the proposed rule would permit, SPI suggests allowing minor modifications to transit time and service standards. SPI contends that it is inconsistent to read section 5(b)(8) as allowing partial adoption while prohibiting slight modifications to an IA because the adoption of either results in a slightly different IA than the initial IA. Both types of IA allegedly do not have detrimental effects on the initiating carriers when the rate terms are not changed.

DOJ, DOT, and most conferences comment favorably on the proposed rule's treatment of "adopt." NEC support the proposed rule as it applies to the meaning of adopt, but oppose that part which requires that the adoption of an IA TVR must be for an equal duration, even if this requires such an adoption to have a later termination date. This issue will be addressed later in the section on adoption of IA TVRs.

The Japan Conferences, SEUSA, and the Latin American Agreements also support our interpretation of "adopt" in the proposed rule. The Latin American Agreements believe that the proposal would simplify conference administration of independent actions, eliminate questions on applicable notice periods and "adopting" IA, and increase competition in the IA process to the benefit of the conferences, member lines and shippers. Alleged potential benefits to member lines include the ability to take IA without the fear of losing business to another member line due to the competitor's evasion of the conference's waiting period. It also is argued that shippers would benefit from the lack of ambiguity in the rate and service item being offered, and the increased incentive of a member line to take independent action.

TWRA and ANERA *et al.* do not support the proposal. TWRA believes that conference agreement provisions which allow for the adoption of an IA at a rate level above the original IA is a permissible option which allows additional flexibility. It argues that the Act does not prohibit such provisions as long as an agreement provides for adoption as specified in section 5(b)(8) -- *i.e.*, when agreements afford the adoption of an IA at rates higher or lower than the original IA, the requirements of section 5 are satisfied. TWRA

states that no statement of policy in the Act or its legislative history requires the FMC to promote the taking of IA or prohibit any disincentive to IA.

ANERA *et al.* argue that the Congressional intent of the 1984 Act was for minimal regulation so that carriers and shippers could be given the most possible leeway in structuring their commercial relationships. By requiring that each conference include what ANERA *et al.* consider a commercially inflexible definition of adopt, the FMC allegedly will have abandoned the overall structure and spirit of the Act. ANERA *et al.* suggest that this part of the proposed rule would in fact restrict the right of IA. This argument is based on the assumption that allowing a member to alter the terms of an adopting IA for its own use is functionally similar to what the 1984 Act permits in allowing a member to take a new IA on a rate or service item on which an IA had already been taken. ANERA *et al.* contend that the Commission can no more prohibit the former than can it prohibit the latter.

ANERA *et al.* and TWRA argue that the Commission's concerns underlying its interpretation of "adopt" are wholly speculative. ANERA *et al.* argue that altering an IA fosters competition and provides shippers with greater rate and service options. They contend that any disincentive to the original IA taker is a result of commercial factors rather than the conference's IA provisions. TWRA rejects any possible adverse effects, suggesting that there might be greater disincentive to taking an original IA when the adopting IA is identical rather than higher.

The Commission is not persuaded by the arguments made by ANERA *et al.* and TWRA in opposition to this section of the proposed rule. Section 5(b)(8) provides that any conference member may adopt ". . . the independent rate or service item . . . " (emphasis

added). Use of the word "the" in conjunction with "rate or service item" suggests that the original and the adopted IA rate or service item must be the same. If a following carrier alters an IA, it is not adopting the rate or service item of the initiating carrier, but is merely copying the initiating carrier's action of breaking from the conference price. In such circumstances, whether the following carrier establishes a higher or lower IA than the initiating carrier, a new IA rate or service item is created and should be subject to the conferences' notice provisions. We agree with ANERA *et al.* that a new IA on a rate or service item upon which an IA has been taken is functionally similar to adopting and modifying an IA. For that reason, we believe that the altered adopted IA creates a new IA, subject to the same conferences' notice periods. The proposed rule closes the option of adopting an IA at a higher rate without the required notice. A carrier with superior service who wishes to take IA from the same rate or service item but at a higher rate may do so by simply taking a new IA subject to the conference notice periods. We would point out in this regard that nothing in the Act or Commission regulations prohibits a conference from reducing the notice period for new IAs from the statutorily imposed 10 days if it so chooses.

SPI contends that the proposed rule is inconsistent because it allows for partial adoption of an IA but not for the slight modification of adopting IAs. The proposed rule allows the partial adoption of IAs to provide carriers with some permissible degree of flexibility. Without this flexibility, the originator and the adopter of the IA would have to operate identically, serving within the same port range, using the same size containers, etc. A partial adoption does not create a disincentive to taking IA, as alleged by SPI, because

the portion adopted is identical to the original IA. Rather, it enhances the ability of carriers to adopt IA.

With due consideration given to the comments received, the Commission shall proceed with a final rule on this issue. However, a slight modification to the proposed rule is necessary to allow an adopting IA to have a different expiration date than the original IA, in cases where member lines adopt IAs less than 30 days before their expiration. Section 8(d) of the Act, 46 U.S.C. app. 1707(d), requires carriers to give 30 days' notice prior to the effective date of any rate increase. If the expiration date of the original IA was not extended, then member lines could never adopt an IA that is lower than the conference rate within 30 days of its expiration, because of the statutory notice requirement for rate increases. For example, if a member line, on October 3, adopts an IA that is lower than the conference rate and that originally was filed on October 1 with an expiration date of October 31, sufficient time would not exist for the adopting carrier to keep the adopted IA in effect for 30 days to comply with the required notice. Therefore, the final rule will allow an adopted IA to remain in effect beyond the original IA in order to comply with the statutory 30-day notice requirement.

Issue 2: Adoption of and Participation in Time/Volume Rates

Section 572.801(f)(2) of the proposed rule specifies the conditions under which conference members can adopt another member's IA TVR. It allows a member line to adopt an initiating member's IA TVR before its effective date, in its entirety, without change to the original rate offering. Adoption of an initiating member's IA TVR after its effective

date would be permitted, provided the adopting carrier appropriately adjusted the beginning and ending date of its adopting IA TVR to make the duration the same as the originating IA TVR. The proposal would prohibit member lines from participating in an IA TVR already filed by another member line. Member lines could, however, offer joint TVRs if permitted to do so under the terms of their conference agreement. The proposed rule also allows any TVR participated in by another conference member prior to any final rule in this proceeding to remain in effect until 90 days after the effective date of such final rule.

Comments received from shippers, shippers' associations, DOJ and DOT support the proposal in its present form. Favorable comments also were received from the Japan Conferences.

One of the shippers' associations supporting the proposed rule requests that the language be modified to specifically require the shipper's consent on TVRs jointly filed by member lines. We are not adopting this suggestion. A carrier may file a TVR rate whether or not it has an agreement with a specific shipper for that shipper to use the rate. While a carrier TVR rate may have been initiated for a certain shipper, there is no requirement that a carrier have the shipper's consent prior to publishing the rate. A TVR rate would be available to any shipper who can meet the applicable requirements. Additionally, the shipper's consent would not appear to be necessary since the shipper is aware that the TVR is jointly offered beforehand, and would give its consent upon agreeing to the joint TVR.

Comments submitted by various conferences favor the proposed rule to the extent that it provides for the adoption of an initial IA TVR. The main issue of contention among the conferences, except the Japan Conferences, is the prohibition of member lines from

participating in an IA TVR already filed by another member line. The conferences oppose this prohibition and disagree that participation could create a disincentive in the initiation of IA TVRs. In general, the conferences argue that prohibiting participation infringes upon a member line's statutory right to adopt an initial IA and is contrary to the Congressional intent of the 1984 Act. They contend that the effects of prohibiting participation would reduce shippers' options and dampen competition.

SEUSA and ANERA *et al.* present similar arguments. They claim that prohibiting participation prevents the adopting carrier from getting cargo under its adopting IA TVR because IA TVRs are generally shipper specific, and it is unlikely that a shipper will have enough cargo for two TVRs of the same commodity (i.e., the original IA TVR and the adopting (non-participating) IA TVR). Thus, they conclude that a member line must be able to adopt and participate in an original IA TVR or forego carrying certain cargo.

The intent of mandatory IA and adoption of IA is to enhance competition by giving member lines and shippers the option to establish their own tariff rates independent of the collective rate actions of the conference. The proposed rule would provide for the adoption of IA TVRs in accordance with section 5(b)(8). However, it is our opinion that participation in original IA TVRs already filed by a member line should be prohibited for two major reasons.

First, the adopting IA language in the statute would appear to cover a rate offering that is materially identical to the original IA offering. A rate offering that has material differences should be treated as a new IA rate. Since a TVR has two fundamental components -- rate and volume -- any change to either component would make a

substantially different, and thus new, TVR. When another carrier seeks to participate in a previously filed IA TVR, it changes the original IA TVR making it a new rate offering, not an adopting IA. It is a new rate offering because the volume component of the original IA-TVR offering has changed. The participating IA-TVR carrier, unlike the originating IA-TVR carrier, does not offer a rate discount conditioned upon a certain volume of cargo being tendered only to itself. The participating IA-TVR carrier offers a rate discount conditioned upon a certain volume of cargo being tendered to itself, the originating IA-TVR carrier, or any combination thereof. The participating IA-TVR carrier severs the inextricable link between rate and volume that is fundamental to the original IA-TVR offering. The participating IA-TVR carrier would be prepared to give the discount, even if it is tendered a single container, so long as the shipper gives the remaining requisite containers to the originating IA-TVR carrier. This certainly is not the same rate offering made by the originating IA-TVR carrier. The statute does not appear to sanction such an interpretation of adopt.

Second, we believe that the prospect of member lines participating in original IA TVRs could inhibit the initiation of IA TVRs. When a carrier offers a TVR, it has determined the volume of cargo necessary to earn a profit at the discounted rate. If a carrier is forced to share the volume of cargo due to an adopting carrier's participation in the IA TVR, then the originating carrier may not receive sufficient revenue to generate the anticipated profit. As a consequence, a member line may be reluctant to initiate IA TVRs for fear that its original arrangement may be materially altered by the participation of another member line without the originating member line's consent, resulting in loss of

cargo and revenue. Inhibiting member lines from taking IA restrains competition and limits the options of both the carrier and the shipper in contravention of the intent of section 5(b)(8) of the 1984 Act.

NEC also oppose the requirement that the duration of the adopted IA TVR be the same as that of the initial IA TVR. Further, NEC find the phrase "in its entirety" in section 572.801(f)(2) of the proposed rule to be inconsistent with the "particular portion" clause of the definition of adopt in section 572.802(f)(1).

The Commission disagrees with NEC on both points. The nature of TVRs requires that an adoption of an original IA TVR be for the same duration and "in its entirety without change to any aspect of the original rate offering (except beginning and ending dates in the time period)." An alteration in the volume, rate, or time (as regards duration) of an original IA TVR does not constitute an IA TVR adoption, but a new rate offering. Permitting different beginning and ending dates of an IA TVR adoption after its effective date preserves the duration of the original IA TVR. Otherwise, if the duration changes, a shipper may be unable to move the required volume of cargo as specified in the original IA TVR. Adopting only a particular portion of an original IA TVR with regard to rate, volume, or duration also creates a new rate offering. The proposed rule correctly defines what constitutes an adoption of an original IA TVR, and its conditions for adoption are clear.

NEC object to the requirement that any currently effective TVR in which two or more member lines participate must be terminated within 90 days from the effective date of the rule. NEC oppose the severity of the 90-day provision for termination and request

that the subject filings be allowed to expire on their own terms. IAFC also opposes the 90-day provision.

We agree that it may not be appropriate for the Commission to require the removal of effective TVR rates negotiated and agreed to in good faith. Accordingly, the 90-day provision shall be deleted from the final rule.

Issue 3: Notice Period

Section 572.801(b)(2) of the proposed rule would prohibit conference agreement provisions that impose on member lines a period of notice for adopting, withdrawing, amending, postponing or canceling independent actions. Shipper commenters,[1] as well as DOJ and DOT, generally support the proposed rule. The commenters believe the FMC's proposal is consistent with the provisions of the 1984 Act, which do not permit notice period requirements other than the 10-day maximum permitted by statute. Further, they argue that the imposition of any notice periods beyond the statutory period would unnecessarily restrict a carrier's right to IA, and inhibit overall market responsiveness.

While five conferences oppose this provision of the proposed rule, two conferences support it, but with modifications. NEC and IAFC point out the imprecision of the word "notice" and suggest the use of the phrase "advance notice." These conferences contend that a conference should be able to require that members notify it of the adoption of, or other action concerning, an IA in order to be able to incorporate such action in the conference

[1] One shipper, Union Camp, commented that the proposed rule also should include a prohibition against conference requirements that limit or restrict IAs, under which the conference will only accept notice from a specific pre-determined location, position or individual from the member lines. This issue is beyond the scope of this proceeding.

tariff. Further, they argue that prohibiting notice to the conference would mean, in terms of the conferences' tariff operations, that no independent actions would be implemented.

NEC and IAFC, as well as other conferences, allege an inconsistency between various sections of the proposed rule. They note that the definition of "adopt" in section 572.801(f)(1) considers any alteration of an IA to be a new IA that must be filed pursuant to the IA filing and notice provisions of the applicable agreement. It is pointed out that, as currently drafted, this section would allow a member to "adopt" an IA, and immediately amend its adopted IA, thereby creating a new IA which would become effective without a notice period.

NEC argue that the prohibition of advance notice periods for amending IAs within the maximum 10-day period is in conflict with the plain meaning of the Act and its legislative intent, because an amendment to an IA constitutes a new IA subject to the advance notice provisions specified under section 5(b)(8) of the Act. They view adopting, withdrawing, postponing, or canceling an IA, on the other hand, as not changing the substantive content of an IA. Therefore, they urge the removal of the word "amending" from proposed section 572.801(f)(1).

Other conferences believe that they may establish other notice period requirements because section 5(b)(8) of the Act does not explicitly prohibit them. The Japan Conferences contend that the conference notice periods do not add to the 10-day maximum requirement, but rather enable its application. According to these Conferences, Congress intended independent actions to be burdened since it permitted conferences to require up to 10 days' notice on each independent action. These Conferences consider any IA action, other than

an adopting IA, to be an initial or new IA regardless of whether it amends an existing IA, cancels an existing IA, or initiates a new IA. The Japan Conferences conclude, therefore, that they are permitted by the Act to require no more than 10 days' advance notice.

ANERA *et al.* and SEUSA maintain that any notice periods of less than 10 days are lawful. They argue that shorter notice periods on IA activity other than new IAs is not prohibited by the Act. ANERA *et al.* state that no empirical support exists for the FMC conclusion that notice periods of less than 10 days for IA activity other than initial IAs deter carriers from taking IAs. They advise that since shortening its notice period in July 1991, ANERA has received no complaints from either shippers or member lines indicating that notice periods hamper the right of IA. In addition, they contend that the sole effect of their notice periods is to liberalize commercial flexibility within the parameters established by Congress. ANERA *et al.* and SEUSA, along with the Latin American Agreements, suggest that the FMC not impose a broad prohibition of notice periods, but allow for reasonable notice periods of less than 10 days, with the caveat that the Commission could determine their merit on a case-by-case basis.

TWRA argues that the proposed prohibition is without a statutory basis because the Act is silent regarding "restrictive or prohibitive notices of these kinds." TWRA at 13. It also notes the lack of factual record suggesting that notice periods have an inhibiting effect on the exercise of IA.

We do not agree that, because the Act does not explicitly prohibit notice periods on IAs other than initial IAs, such notice periods are permissible. In *Independent Action* -

Notice and Meeting Provisions in Conference Agreements, _ F.M.C._, 23 S.R.R. 1022 (1986), the Commission held that:

> To argue that the Act's alleged silence permits other substantive requirements or conditions which would effectively add to the limited notice requirement, either as a precondition to or as a consequence of independent action, is contrary to the express language of the Act. Any condition, procedure or other mandatory requirement that in effect adds to the 10-day maximum notice requirement or places a mandatory burden on IA is, on its face, per se violative of section 5(b)(8).

Id. at 1027 (emphasis added).

The Commission believes that notice periods for adopting, withdrawing, canceling, or postponing an IA place an improper burden on the carrier taking IA. These include the extant provisions of certain agreements requiring a member to give the conference forty-eight hours notice of the withdrawal of an IA in order to meet a lower conference rate applicable to the same commodity or service item. Although the conferences argue the administrative necessity of such provisions, the notice periods could be used to disadvantage the IA originator by allowing the conference to undercut the IA rate. The possibility that a member's right of independent action may be inhibited is sufficient to justify the proposed rule.

We do not view the act of adopting, withdrawing, postponing or canceling a previously taken IA, although performed by an individual member line, as creating a new independent rate action or service item that would be subject to the conference's notice provisions. An adopting IA simply allows one member to use another member's original IA as its own. The actions of withdrawing, postponing, or canceling affect only the duration of an IA. The contention that a new IA is created when an IA is withdrawn, canceled or

postponed is without merit since the IA is removed from the conference tariff and the carrier's rate reverts to the conference rate.

In urging the Commission to adopt a less broad prohibition, several commenters suggest that reasonable notice periods should be allowed, subject to case-by-case review by the Commission. We disagree. The proposed rule provides clear guidelines for conferences and avoids filings which otherwise would require negotiated modifications.

NEC and IAFC suggest that the Commission clarify the proposed rule by prohibiting "advance" notice and by deleting the word "amending." We agree that conferences should be able to require notification so that they are able to implement an IA in their tariff. The language suggested by the conferences, however, does not adequately clarify the proposed rule. In fact, it potentially raises even more uncertainty as to the definition of "advance." While conferences need a certain time in which to actually publish their members' IAs in the conference tariff, the amount of time required will be a function of, *inter alia*, the number of IAs to be published by the conference. Conferences should publish the IAs without undue delay. The final rule, therefore, retains the prohibition of specific notice periods.

The Commission agrees with the commenters' suggestion that the word "amending" in this section is inconsistent with other sections of the proposed rule. Amending an IA does indeed create a new IA which should be subject to the conferences' notice provisions. Therefore, the word "amending" shall be deleted from this section in the final rule, and the rule shall be revised to read as follows:

(2) A conference agreement shall not prescribe notice periods for adopting, withdrawing, postponing, canceling, or taking other similar actions on independent actions.

Issue 4: Filing and Maintenance Fees

Section 572.801(g) of the proposed rule would prohibit conference provisions that allow for the allocation of costs on a usage basis for the publishing and maintenance of member lines' IAs. The basis of the proposed rule is that such costs should be treated like other administrative costs, and shared equally by all carriers on a *per capita* basis. Eleven commenters[2] responded in favor of prohibiting filing and maintenance fees on IAs. Seven commenters[3], all representing conferences, responded against the proposal.

Commenters in favor generally contend that they rely on access to competitive, affordable and efficient ocean transportation services, and that filing and maintenance fees contribute in limiting their access to such service. NIT League argues that although conferences have a statutory obligation to provide for IA, there is no basis for allowing them to charge a member the filing and maintenance fees associated with IAs.

The comments opposed generally contend that since the 1984 Act is silent on prohibiting the assessment of usage fees, the proposed rule is contrary to statutory precedent governing the filing, effectiveness and modification of agreements under sections 5(a), 6(b) and (c), and 11(c) of the 1984 Act.

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[2] Commenters in favor of prohibiting filing and maintenance fees on IAs: International Paper; Calcot, Ltd.; AgOTC; API; Union Camp Corp.; Sun-Diamond Growers of California; NFPA; SPI; NIT League; DOT; and DOJ.

[3] Commenters against a rule prohibiting filing and maintenance fees on IAs: TWRA; IAFC; the North Europe Conferences; SEUSA; the Latin American Agreements; the Japan Conferences; and ANERA *et al.*

The Latin American Agreements state that filing and maintenance fees are strictly a commercial matter that should be left to the discretion of the member lines. They contend that the assessment of costs with relation to IA is directly related to the "ministerial task of tariff filing" delegated to the conferences, and that the expense incurred by conferences in filing an IA is a mandatory expense which is incurred for the benefit of the individual member lines. SEUSA maintains that assessing individual conference members the cost of filing their own IAs avoids forcing one member to *de facto* subsidize another member's commercial activities.

The Japan Conferences contend that if information were available to indicate that there has been a negative effect on the level or frequency of IA use, such information would have been made public during this proceeding. They state that conference data show that there was no decrease in the number of IAs taken or increase in the number of IAs canceled before or after introduction of the fees. According to the Japan Conferences, modest increases are shown in the number of IAs taken after the fees became effective.

This latter argument fails to consider that the prohibition of filing and maintenance fees could have led to an increase in the number of IAs taken above its current levels. Moreover, the issue is not whether the conferences should be permitted to cover expenses, but rather that the charges do not create any disincentive, no matter how minimal, to carrier IA use. This is especially true where conferences assess regular maintenance fees against carriers with active IA rates even when the IAs remain unchanged. In order to ensure that carriers and shippers make full use of IAs, the administrative expenses associated with IA should be shared on a *per capita* basis rather than on a usage basis (especially in the case

of maintenance fees). Therefore, the final rule prohibits conference provisions that provide authority for the allocation of costs on a usage basis for the publishing and maintaining of member lines' IAs.

Issue 5: Automatic Expiration Dates

Section 572.801(h) of the proposed rule would prohibit a conference from designating an expiration date for an independent action taken by a member line in the absence of an expiration date specified by the member itself. Conferences generally advocated that it was permissible for them to impose automatic expiration dates with the understanding that member lines can specify as part of the independent action any expiration date they choose. The argument rests on two grounds. First, the 1984 Act does not specifically prohibit conferences from assigning expiration dates to IAs. Second, the imposition of expiration dates is merely a procedural matter related to keeping conference tariffs from becoming cluttered with outdated and unused IAs. The Japan Conferences state that members filing IAs have a tendency simply to leave IAs on file long after their usefulness is past, and, as a result, tariffs become more expensive to maintain and more difficult for shippers and others to use. They urge the Commission to revisit the proposed rule and reconsider the realistic (not hypothetical) possibilities presented by automatic expiry dates.

Shippers, DOJ, and DOT challenge the assertion that there is no extra burden placed upon member lines that take IA. They contend that conference-imposed expiration dates are not permitted under the 1984 Act and that the imposition of conference-assigned expiration dates does result in a constraint on the right of IA.

Upon review of the comments and further consideration of the issue, the Commission now believes it unlikely that conference-determined expiration will result in a restriction on IA, so long as the right of member lines to determine the duration of their IAs is not impeded, and member lines are given ample opportunity to choose and designate the duration of their IAs. Moreover, there actually may be positive results in allowing this practice to occur. Maintaining a tariff is a large expense both for carriers and conference offices. Keeping costs under control could improve the efficiency of conference operations, which would benefit the shippers who ultimately pay to cover these costs. Accordingly, the proposed rule shall be modified to allow for conference-determined expiration dates by consent of the member line, with the understanding that member lines must be given the opportunity to determine the duration of their IAs.

Although the Commission, as an independent regulatory agency, is not subject to Executive Order 12291, dated February 17, 1981, it nonetheless has reviewed the rule in terms of that Order and has determined that this rule in not a "major rule" as defined in Executive Order 12291 because it will not result in: (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Inasmuch as this final rule will affect only common carriers by water, conferences of such carriers, ports, and marine terminal operators, and will result in a lessening of current

regulatory burdens, the Federal Maritime Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that the rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small government jurisdictions.

The collection of information requirements contained in this regulation have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980, as amended, and have been assigned OMB control number 3072-0045 for 46 CFR 572. Public reporting burden for this amendment is estimated to vary from 18 to 22 hours per response, with an average of 20 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, including suggestions for reducing this burden, to Norman W. Littlejohn, Director, Bureau of Administration, Federal Maritime Commission, Washington, D.C. 20573-0001; and to the Office of Information and Regulatory Affairs, Attention: Desk Officer for the Federal Maritime Commission, Office of Management and Budget, Washington, D.C. 20503.

List of Subjects in 46 CFR Part 572:

Administrative practice and procedure, Antitrust, Maritime carriers, Rates and fares.

Therefore, pursuant to 5 U.S.C. 553 and sections 5, 6, and 17 of the Shipping Act of 1984, 46 U.S.C. app. 1704, 1705, 1716, Part 572 of Title 46, Code of Federal Regulations, is amended as follows:

Part 572 - [AMENDED]

1. The authority citation for Part 572 continues to read:

Authority: 5 U.S.C. 533; 46 U.S.C. app. 1701-1707, 1709-1710, 1712, and 1714-1717.

2. Paragraphs (a)(4) and (a)(5) of section 572.502 are revised to read as follows:

§ 572.502 Organization of conference and interconference agreements.

(a) * * *

(1) * * *

(2) * * *

(3) * * *

(4) Article 13 - *Independent action.*

The regulations for independent action are contained in section 572.801 of this part.

(5) Article 14 - *Service contracts.*

The regulations for service contracts are contained in section 572.802 of this part.

* * * * *

3. A new Subpart H is added reading as follows:

Subpart H - Conference Agreements

§ 572.801 Independent action.

(a) Each conference agreement shall specify the independent action ("IA") procedures of the conference, which shall provide that any conference member may take independent action on any rate or service item required to be filed in a tariff under section 8(a) of the Act upon not more than 10 calendar days' notice to the conference and shall otherwise be in conformance with section 5(b)(8) of the Act.

(b)(1) Each conference agreement that provides for a period of notice for independent action shall establish a fixed or maximum period of notice to the conference. A conference agreement shall not require or permit a conference member to give more than 10 calendar days' notice to the conference, except that in the case of a new or increased rate the notice period shall conform to the requirements of § 514(b) or § 580.10(a)(2) of this chapter.

(2) A conference agreement shall not prescribe notice periods for adopting, withdrawing, postponing, canceling, or taking other similar actions on independent actions.

(c) Each conference agreement shall indicate the conference official, single designated representative, or conference office to which notice of independent action is to be provided. A conference agreement shall not require notice of independent action to be given by the proposing member to the other parties to the agreement.

(d) A conference agreement shall not require a member who proposes independent action to attend a conference meeting, to submit any further information other than that necessary to accomplish the filing of the independent tariff item, or to comply with any other procedure for the purpose of explaining, justifying, or compromising the proposed independent action.

(e) A conference agreement shall specify that any new rate or service item proposed by a member under independent action shall be included by the conference in its tariff for use by that member effective no later than 10 calendar days after receipt of the notice and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date.

(f)(1) As it pertains to this part, "adopt" means the assumption in identical form of an originating member's independent action rate or service item, or a particular portion of such rate or service item. If a carrier adopts an IA at a lower rate than the conference rate when there is less than 30 days remaining on the original IA, the adopted IA should be made to expire 30 days after its effectiveness to comply with the statutory 30-day notice requirement. In the case of an independent action time/volume rate ("IA TVR"), the dates of the adopting IA may vary from the dates of the original IA, so long as the duration of the adopting IA is the same as that of the originating IA. Furthermore, no term other than "adopt" (e.g., "follow," "match") can be used to describe the action of assuming as one's own an initiating carrier's IA. Additionally, if a party to an agreement chooses to take

on an IA of another party, but alters it, such action is considered a new IA and must be filed pursuant to the IA filing and notice provisions of the applicable agreement.

(2) An independent action time/volume rate filed by a member of a ratemaking agreement may be adopted by another member of the agreement, provided that the adopting member takes on the original IA TVR in its entirety without change to any aspect of the original rate offering (except beginning and ending dates in the time period) (*i.e.*, a separate TVR with a separate volume of cargo but for the same duration). Any subsequent IA TVR offering which results in a change in any aspect of the original IA TVR, other than the name of the offering carrier or the beginning date of the adopting IA TVR, is a new independent action and shall be processed in accordance with the provisions of the applicable agreement. The adoption procedures discussed above do not authorize the participation by an adopting carrier in the cargo volume of the originating carrier's IA TVR. Member lines may file and participate in joint IA TVRs, if permitted to do so under the terms of their agreement; however, no carrier may participate in an IA TVR already filed by another carrier.

(g) A conference agreement shall not require or permit individual member lines to be assessed on a per carrier usage basis the costs and/or administrative expenses incurred by the agreement in processing independent action filings.

(h) A conference agreement may not permit the conference to unilaterally designate an expiration date for an independent action taken by a member line. The right to determine the duration of an IA remains with the member line, and a

member line must be given the opportunity to designate whatever duration it chooses for its IA, regardless if the duration is for a specified period or open ended. Only in instances where a member line gives its consent to the conference, or where a member line freely elects not to provide for the duration of its IA after having been given the opportunity, can the conference designate an expiration date for the member line's IA.

(i) All new conference agreements filed on or after the effective date of this section shall comply with the requirements of this section. All other conference agreements shall be modified to comply with the requirements of this section no later than 90 days from the effective date of this section. However, any effective IA TVR adopted and participated in by other member lines at the time this section is published shall be permitted to remain in effect until its specified termination date.

(j) Any new conference agreement or any modification to an existing conference agreement which does not comply with the requirements of this section shall be rejected pursuant to § 572.601 of this part.

(k) If ratemaking is by sections within a conference, then any notice to the conference required by § 572.801 may be made to the particular ratemaking section.

§ 572.802 Service contracts.

(a) Each conference agreement that regulates or prohibits the use of service contracts shall specify its rules governing the use of service contracts by the conference or by individual members.

(b) Any change in conference provisions regulating or prohibiting the use of service contracts, whether accomplished by a vote of the membership or otherwise, shall not be implemented prior to the filing and effectiveness of an agreement modification reflecting that change.

(c) For the purpose of this section, conference provisions regulating or prohibiting the use of service contracts include, but are not limited to, those which permit or prohibit conference service contracts; permit or prohibit individual service contracts; permit or prohibit independent action on service contracts; permit or prohibit individual members to elect not to participate in conference service contracts; or impose restrictions or conditions under which individual service contracts may be offered.

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By the Commission.

Joseph C. Polking
Secretary