(S E R V E D)
(January 16, 1990)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

[DOCKET NO. 89-07]

INQUIRY INTO LAWS, REGULATIONS AND POLICIES OF THE GOVERNMENT OF ECUADOR AFFECTING SHIPPING IN THE UNITED STATES/ECUADOR TRADE

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission issues a Final Rule in Docket No. 89-07 finding unfavorable conditions to exist in the foreign oceanborne trade between the United States and Ecuador, which arise from certain laws and regulations of the Government of Ecuador. In order to meet or adjust unfavorable conditions found the Commission assesses a fee of $50,000 per outbound voyage from the United States to Ecuador on Maritima Transligra, S.A., an Ecuadorian-flag carrier.

In addition, the Commission revises Part 586 of the Code of Federal Regulations to incorporate as a single section the present Part 586, and to add this Final Rule to that Part as a new section. For this reason, the final rule issued in the separate proceeding in Docket No. 87-6, Actions to Adjust or Meet Conditions Unfavorable to Shipping in the U.S./Peru Trade, 54 FR 12,629 (March 28, 1989) is reprinted herein as a recodification which makes no substantive change in the rule and does not otherwise affect its status.

DATE: Effective [Insert date 45 days after date of publication in the Federal Register].

FOR FURTHER INFORMATION:

Robert D. Bourgoin, General Counsel
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5740

SUPPLEMENTARY INFORMATION:

Pursuant to the authority of section 19(1)(b) ("Section 19"), Merchant Marine Act, 1920 ("1920 Act"), 46 U.S.C. app. 876(1)(b), as implemented by 46 CFR Part 585, the Federal Maritime Commission ("Commission" or "FMC") is authorized and directed to make rules and regulations affecting shipping in the foreign trade of the United States in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade of the United States and which arise out of, or result from, foreign laws, rules or regulations, or from competitive methods or practices employed by owners, operators, agents or masters of vessels of a foreign country.

The types of conditions which the Commission has found to be unfavorable to shipping in the foreign trade of the United States are set forth at 46 CFR 585.3. Among these are conditions which: (1) preclude vessels in the foreign trade of the United States from competing in the trade on the same basis as any other vessel; (2) reserve substantial cargoes to the national-flag or other vessels and fail to provide, on reasonable terms, for effective and equal access to such cargo by vessels in the foreign trade of the United States; and (3) are discriminatory or unfair as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign competitors, 46 CFR 585.3(a), (b) and (d).

BACKGROUND

The Commission instituted this proceeding by Notice of Inquiry issued on March 15, 1989 (54 FR 10,721) ("March Notice") to determine whether certain laws, regulations and policies of the Government of Ecuador ("GOE") created conditions unfavorable to shipping in the United States/Ecuador trade ("Trade") within the meaning of Section 19. The basis of this inquiry was the allegation by Overseas Enterprises, Inc. ("OEI"), a U.S.-owned company, that it has been unable to reestablish a liquid bulk service in the Trade due to GOE Resolution No. 012/87.[1] In addition to the issuance of the March Notice, the Commission requested information from the U.S. Department of State ("DOS") about its efforts to resolve the situation through diplomatic channels.

On May 18, 1989 (54 FR 21,473), the Commission issued a Notice of Further Comments ("May Notice") to provide interested parties an opportunity to submit additional comments on the status and operations of OEI, as well as on shipping conditions in the Trade. In the May Notice, the Commission advised, however, that GOE Resolution No. 012/87, on its face, appears to create conditions unfavorable to shipping in the Trade within the meaning of Section 19.

Subsequently, based on the comments received to the March and May Notices and on information submitted by DOS, the Commission on August 18, 1989, issued a Notice of Proposed Rulemaking ("Proposed Rule") (54 FR 34,914) pursuant to Section 19 to address the

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[1] Resolution No. 012/87 of March 1987, reserves solid and liquid bulk import cargo from the United States to Ecuador for Ecuadorian-flag vessels belonging to Ecuadorian shipping companies, or foreign vessels chartered by Ecuadorian shipping companies, or vessels flying the flag of the United States. The stated rationale in Resolution No. 012/87 for narrowing the application of the cargo reservation law solely to the trade between the United States and Ecuador is that 88 percent of Ecuador's imported bulk cargo originates "in the Gulf of the United States."

apparent unfavorable shipping conditions caused by GOE cargo reservation laws.[2] The Proposed Rule would impose a fee of $100,000 per outbound voyage from the United States to Ecuador on Maritima Transligra, S.A. ("Transligra"), an Ecuadorian-flag parcel tanker carrier. The Supplementary Information to the Proposed Rule explained that the reason sanctions would be imposed only on Transligra is because it is the chief, if not sole, beneficiary of Resolution No. 012/87.

In the Supplementary Information the Commission found that the record in this proceeding supports the conclusion that the GOE Resolution, on its face, appears to create conditions unfavorable to shipping. The Commission stated that to the extent that the Resolution applies only to the U.S./Ecuador bulk trade, leaving most other Ecuadorian bulk trades open to third-flag carriers, it is discriminatory.[3] The Commission explained that the Resolution allows Ecuadorian shipping companies to charter and employ foreign-flag vessels in the Trade, whereas U.S. shipping companies may employ only U.S.-flag vessels in the Trade. It advised that even if, as the GOE represents, U.S. companies may employ third-flag vessels in the Trade if they operate at least one U.S.-flag vessel,

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[2] In addition, the Commission proposed revising Part 586 of the Code of Federal Regulations to incorporate as a single section the present Part 586, and to add the Proposed Rule to that Part as a new section.

[3] Exceptions to this may be the Ecuador/Brazil-Argentina trades wherein the GOE states in its April 7, 1989 letter to DOS that 100 percent of the cargo generated by those two countries destined for Ecuador is reserved for "itself."

troubling questions are raised as to whether Ecuadorian laws dictating the fleet mix and other registration requirements for U.S. or other non-Ecuadorian citizens' participation in U.S. trade create conditions unfavorable to shipping.

The Commission noted that the exclusion of third-flag operators pursuant to Resolution No. 012/87 alone may create unfavorable trade conditions and that comments received to date indicated shipper support for OEI's position that GOE cargo reservation laws create such conditions. It stated that "nothing in the second round of comments justifies or offsets the discriminatory nature of the Resolution noted therein."

The Commission dealt, at length, with the jurisdictional issue raised by Transligra, that the reach of Section 19 is limited to U.S.-flag vessel operators and thus may not be invoked by an entity such as OEI which is said to arrange and coordinate shipping transactions between vessel owners and operators and U.S. exporters. The Commission rejected Transligra's position regarding the scope of Section 19.

The Commission found that Section 19 was intended by Congress to protect not only U.S.-flag carriers, but U.S. interests in the efficient movement of U.S. export and import commerce. It explained that while FMC rules do not specifically refer to an entity such as OEI in delineating who may file a petition for relief under Section 19 at 46 CFR 585.4, the rule is applicable to "any person, including, but not limited to . . ." the entities named. The Commission saw no reason to exclude non-carrier maritime businesses, such as OEI, from the broad coverage available under Section 19. The Commission noted that its rule clearly states its applicability to any owner, operator or charterer of "bulk or tramp," as well as liner vessels. OEI, as a U.S. company seeking to participate in transactions to provide bulk vessel capacity in the Trade for service to U.S. exporters, was therefore found to be within the range of shipping interests protected by Section 19.

Interested parties were invited to file comments to the Proposed Rule, including the sanctions proposed and likely effect of those sanctions on Transligra's rates. Comments have been received from the DOS, OEI, Transligra, Nedlloyd Lines ("Nedlloyd") and Shippers for Competitive Ocean Transportation ("SCOT").

SUMMARY OF COMMENTS

A. DOS

DOS reports that the GOE has expressed willingness to seek a mutually acceptable settlement regarding OEI's concerns. DOS understands that the GOE has been in contact with OEI to offer a shipping agreement with Transligra. It advises that a meeting between U.S. Government officials, officials from the Ecuadorian Embassy and principals from OEI is currently being arranged. DOS states that it will report on that meeting as soon as possible.

B. OEI

OEI reports that "nothing of substance" has occurred since the Commission's Proposed Rule to remove the unfavorable conditions found therein. OEI states that it continues to be barred from the Trade. OEI therefore supports the Commission's proposed action to impose sanctions against the Ecuadorian-flag carrier.

C. SCOT

SCOT states that it supports the Commission's findings that conditions unfavorable to shipping exist in the Trade due to GOE laws and regulations. Further, SCOT supports the Proposed Rule and the imposition of the sanctions prescribed.

D. Nedlloyd

Nedlloyd supports the findings and proposed actions of the Commission. Nedlloyd, however, reiterates earlier comments that the conditions found unlawful in the Trade involving transport of liquid bulk commodities also exist in the liner trade. Therefore, it suggests that any final rule issued by the Commission should advise that GOE restrictions in the liner trade between the U.S. and Ecuador will not be tolerated. Nedlloyd is concerned that efforts by liner operations to remove GOE restrictions on carrier selection in U.S. export commerce will be ignored by Ecuadorian interests.

Nedlloyd supports the Commission's use of sanctions derived from the Foreign Shipping Practices Act of 1988 ("1988 Act"), 46 U.S.C. app. 1710a, in the non-liner context. It believes that imposition of per voyage monetary sanctions can properly be viewed as a fee or charge which would equalize the benefits created by the GOE cargo reservation laws. Nedlloyd points out, however, that if Transligra attempts to use its monopoly position to protect itself against the adverse economic effects of such proposed sanctions by raising its rates to cover the cost of the fee, then the Commission may need to revise its sanctions to concentrate on vessel exclusion. Nedlloyd suggests that the possibility of imposing an alternative sanction be noted in any final rule in the event that monetary penalties do not adjust effectively unfavorable conditions in the Trade.

E. Transligra

Transligra argues that OEI, as agent for and affiliate of O.N.E. Shipping, Ltd. ("ONE"), a foreign-flag carrier, does not represent U.S. shipping interests, but rather the interests of foreign-flag carriers. Transligra contends that Section 19 protection does not extend to foreign-flag interests and should not be applied for the benefit of such agents.

Transligra details the corporate relationship between OEI and ONE and states that the two entities are operated and controlled by the same principal and are, therefore, one and the same company.[4] Transligra asserts that ONE uses OEI as its agent for export trade from the U.S. for tax reasons.

Transligra renews and expands its position that Section 19 is limited solely to protection of the U.S. merchant marine and not

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[4] Transligra has attached to its comments an affidavit of Magnus E. Olsen, President of ONE, which was filed with the United States District Court, Southern District of New York, in connection with another case. The affidavit, along with prior filings from ONE to the FMC in Docket No. 87-11, Actions to Adjust or Meet Unfavorable Conditions to Shipping in the United States/Colombia Trade, provide the basis for Transligra's comments on the corporate relationship between ONE and OEI.

foreign-flag carriers. Transligra continues to maintain that foreign-flag carriers and U.S. importers and exporters were not the intended beneficiaries of Section 19.

Transligra states that Congress enacted a separate provision in the 1920 Act to offer protection to U.S. shipper interests and, therefore, these interests were not commingled with U.S.-flag carrier interests under Section 19. It refers specifically to section 20 of the 1920 Act which amended section 14 of the Shipping Act, 1916 ("1916 Act") to add a new section 14a which strengthened agency powers to deal with predatory practices of foreign-flag carriers which were injurious to U.S. carriers and shippers.

Transligra states that even if U.S. shippers were protected under Section 19, it would be necessary for them to provide a substantial showing of harm. It contends that in this proceeding no U.S. shippers have alleged actual or threatened harm and that no individual shipper has averred that it intends to employ ONE in the Trade and is being prevented from doing so by GOE Resolution No. 012/87. Shippers employing Transligra are said to have presented no evidence of the existence of unfavorable rates or service conditions.

Transligra states that the Commission's position that adequacy of service is irrelevant under Section 19 is inconsistent with that section. Transligra's argument regarding adequacy of service is said to reach the ultimate issue of shipper harm rather than provide justification for GOE Resolution No. 012/87. Shipper interests allegedly have suffered no harm and no conditions unfavorable to U.S. shippers in the Trade are argued to exist. Transligra suggests that rules made pursuant to Section 19 are to adjust or meet conditions unfavorable to shipping. Transligra takes the position that it must be provided with the opportunity to show that conditions in the Trade are not unfavorable.

Transligra comments on the impact of the Proposed Rule stating that the fee of $100,000 on each of its outbound voyages from the U.S. to Ecuador would drive it out of the Trade. It describes the financial losses it would incur from the imposition of such fees. Transligra asserts that the resulting losses would force it to transfer its vessels from Ecuadorian to third-flag, thereby making it ineligible for GOE preference cargo. Further, the Commission is said to have no justification for singling out Transligra, which is one of several Ecuadorian shipping companies, for punitive fees.

Transligra defends GOE reservation of cargo for U.S. and Ecuadorian-flag vessels on the basis that GOE preference laws contribute to the viability of the service provided by vessels of the two countries by establishing a stable cargo base. It maintains that cargo reservation in the Trade is particularly important due to the relatively small volume of trade.

Transligra states that the costs of operating parcel tankers under Ecuadorian-flag are significantly higher than under a third-flag. If GOE cargo preference were terminated, Transligra maintains that it would be forced to withdraw its vessel from the Ecuadorian-flag, thereby leaving the Ecuadorian merchant marine without any parcel tanker vessels.

Transligra further justifies cargo preference laws on grounds that the U.S. merchant marine relies on U.S. preference cargo for its survival. The high cost of operating under a national-flag allegedly must be offset by the availability of preference cargo.

Transligra contends that GOE cargo reservation laws do not hamper the ability of U.S. chemical exporters to compete in the Ecuador market. Transligra asserts that through the assurance of a stable cargo base afforded by GOE preference laws, it has been able to offer an Ecuadorian-flag service that is competitive and reliable, with comprehensive port calls, that meets the needs of shippers in the Trade.

Attached to Transligra's comments is an affidavit of Wil W. Nefkens, Vice President of Transligra. The affidavit is offered in support of the arguments presented in the comments summarized above.

DISCUSSION

Only Transligra, among the commenters, opposes promulgation of the Proposed Rule as a final rule, including the imposition of sanctions. The DOS did not comment on the substance of the Proposed Rule, but reported on the status of action anticipated from the GOE. Of the remaining commenters, OEI and SCOT, in particular, support imposition of the sanctions as proposed.

Nedlloyd supports the Commission's view of the jurisdictional reach of Section 19 and the use of sanctions provided under the 1988 Act. Nedlloyd further asks the Commission to broaden the scope of this proceeding to include the putative effects of GOE cargo reservation policies on the liner trades, if only as a warning to the GOE that restrictive policies affecting the U.S. trades will not be tolerated. No basis appears in this record, however, upon which the Commission might act favorably on Nedlloyd's suggestion.

Nedlloyd further suggests that the Commission provide in any final rule for exclusion of Transligra's vessels as an alternative sanction if Transligra raises its rates to cover the proposed $100,000 per voyage fee. However, this appears to be unnecessary at this time, in view of Transligra's statements concerning the limited profitability of the Trade. Should Transligra attempt to recoup the fees by raising its rates, the Commission expects to hear from affected shippers and will take further action as warranted.

Transligra again argues that the Commission's jurisdiction under Section 19 is limited to the protection of U.S.-flag carriers. This contention was discussed at some length in the Notice of Proposed Rulemaking and rejected. See 54 FR 34,194, 34,197 to 34,198, August 18, 1989. That determination is reaffirmed herein.

In its latest comments, Transligra again argues that Section 19 does not protect the interests of U.S. shippers. It insists that shippers were not Section 19's intended beneficiaries, except to the extent that U.S. ships could be counted on in times of emergency to carry U.S. exports and imports. Transligra reiterates its argument that section 20 of the 1920 Act was the sole section of that Act intended to protect U.S. shippers and exporters. Section 20 amended the 1916 Act, prohibited certain anti-competitive acts of foreign carriers, and provided exclusion of vessels from U.S. ports as an additional sanction for such violations committed by foreign-flag carriers.[5] However, we do not view this as a basis for differentiating section 20 from Section 19 because section 20 also provided for application of the exclusion sanction against foreign carrier members of conferences which discriminated against U.S.-flag carriers in foreign-to-foreign commerce. Therefore, in reality, it provided for protection of U.S.-flag carriers as well as shippers.

In support of its argument that section 20 was meant to provide protection for shipper interests, not to be confused (or "commingled") with the carrier interests protected under Section 19, Transligra also quotes from the legislative history. The quoted passage, illustrating the type of predatory activity to be prohibited by section 20, describes threats by a foreign carrier to withhold service from a foreign shipper who patronizes a competing U.S.-flag carrier. This passage would appear, however, to demonstrate once again that, in this paragraph at least, section 20 was meant to protect U.S.-flag carrier interests. Transligra's argument that section 20 may be differentiated from Section 19

[5] Section 20 revised § 14 and added § 14a of the 1916 Act. Section 14a was repealed by § 20 of the 1984 Act, Pub. L. 98-237, March 20, 1984, 98 Stat. 67.

based upon the interests to be protected by each is not supported by the legislative history cited.

Transligra also uses the legislative history in an attempt to distinguish references to "shipping" and "shippers" in connection with proposed authority for the Shipping Board to approve all regulations dealing with shipping promulgated by other U.S. agencies from references to "ships" made in connection with authorizing the Shipping Board to make rules to counter unfavorable conditions brought about by foreign government (or foreign carrier) actions. Both of these proposals were enacted as part of Section 19: the first as §§ 19(1)(c) and 19(2), and the second as § 19(1)(b). Nothing in the legislative history indicates that, in granting the authority contained in the various paragraphs of Section 19, Congress made or even focussed on the precise distinctions in subject matter ascribed to these terms by Transligra.

Transligra reiterates its argument, made at some length in its previous comments in this proceeding, that the Commission's authority under Section 19 is limited by the statement of purpose language of the preamble to the 1920 Act, which refers to the development and promotion of a U.S.-flag merchant fleet. Specifically, that preamble states that the development and maintenance of a merchant marine "owned and operated privately by citizens of the United States" is necessary "for the national defense and for the proper growth of its foreign and domestic commerce." To those ends, the preamble declared it "to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine." The preamble further states that the U.S. Shipping Board, predecessor of the present Maritime Administration and Federal Maritime Commission, shall, in the disposition of vessels and property, making of rules and regulations, and administration of the shipping laws, keep always in view this purpose, as its primary goal, "insofar as may not be inconsistent with the express provisions of this Act . . ." 46 U.S.C. app. § 861. Unlike Transligra, however, we see nothing in the language of this preamble that precludes protection of the interests of U.S. importers, exporters and maritime businesses in the existence of competitive, efficient shipping services, "for the proper growth of [U.S.] foreign and domestic commerce," from the creation of conditions unfavorable to shipping by foreign governments or owners or operators of vessels.

The preamble, in any event, is not an operative part of the statute, and may not be read to confer authority or to limit authority elsewhere contained in the Act. Yazoo and Mississippi Valley Railroad Co. v. Thomas, 132 U.S. 174 (1889); Association of American Railroads v. Costle, 562 F.2d 1310 (D.C. Cir., 1977); Hughes Tool Co. v. Meier, 486 F.2d 593 (10th Cir. 1973). We, therefore, do not view the language of the preamble as controlling or determinative of the scope of Section 19.

It is incongruent, moreover, for Transligra to argue, on one hand, that the preamble language prevents Section 19 from being read to protect U.S. interests other than U.S.-flag vessels, including shippers, and on the other hand, that the protection of shippers was encompassed in section 20 of the same Act. Such shipper protection is not inconsistent with the language of the preamble. Transligra's arguments with respect to the scope of Section 19 are, therefore, ultimately unpersuasive.

Transligra argues that OEI does not represent U.S. interests, and, therefore, as a matter of fact, may not invoke the Commission's authority under Section 19. Referring to documents filed by ONE in connection with its antitrust suit concerning service to Colombia,[6] and in the related Section 19 petition at the Commission (Docket No. 87-11), Transligra argues that OEI is basically the U.S. arm of ONE, a third-flag carrier whose interests are not entitled to protection under Section 19.

We find no basis in Transligra's present arguments to set aside the Commission's preliminary determination, made in issuing the Proposed Rule, that OEI is within the range of shipping interests protected by Section 19. Transligra itself indicates that OEI is a U.S. corporation wholly owned by one Magnus Olsen,[7] and that OEI in turn owns 50 per cent of the stock of ONE, a Bermuda corporation which operates third-flag vessels in the U.S.

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[6] O.N.E. Shipping, Ltd. v. Flota Mercante Grancolombiana, S.A., et al., ____ F.Supp. ___ (S.D.N.Y., 1986) aff'd in part, 830 F.2d 449 (2d Cir., 1987), cert. denied ___ U.S. ___, 109 S.Ct. 303 (1988).

[7] The record does not reflect whether Olsen is a U.S. citizen, but Transligra does not allege that he is not.

trades with South America. Transligra alleges that the purpose of the corporate structure of ONE/OEI is to provide a means by which U.S. taxes on the major share of ONE's freight income may be avoided. The relevance of these tax considerations for application of Section 19, however, is not apparent. As we stated in the proposed rule, OEI is engaged in the business of "shipping in the foreign trade" in much the same way as non-vessel operating common carriers and ocean freight forwarders.

Transligra charges that GOE cargo preference policies are similar to the cargo reservation and subsidy practices of the U.S. government, and more necessary because of the lesser economic power of Ecuador. The Commission on previous occasions has found these arguments groundless.[8] The cargo reserved to U.S.-flag carriers under U.S. cargo preference legislation is specifically government-generated cargo, that is military or foreign-aid cargo, which constitutes a very small proportion of the total cargo moving in our trades. Unlike the Ecuadorian scheme, U.S. cargo preference laws do not affect the far greater amount of commercial cargo moving in our trades.[9] The GOE, by contrast, seeks to subsidize

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[8] See, e.g., Actions To Adjust or Meet Conditions Unfavorable To Shipping In The United States/Peru Trade, Proposed Rule, 52 F.R. 11,832, 11,835 (April 13, 1987); Order Denying Petition, 24 SRR 308, 312 (June 18, 1987); Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Venezuela Trade, Interim Report on Current Status of Proceedings, 21 SRR 1621, 1626-1627 (February 25, 1983).

[9] In addition, contrary to Transligra's suggestion, the U.S. government has terminated all construction subsidies to the U.S. merchant marine.

its merchant marine not from GOE coffers or those of Ecuadorian shippers, but solely from the revenues of U.S. shippers.

Transligra further argues that the sanctions contained in the Proposed Rule should not be imposed because: 1) Transligra has been unfairly singled out among Ecuadorian-flag carriers for imposition of sanctions; 2) Transligra would be unable to pay the fees based on the limited profitability of the Trade; 3) imposition of the fees would force Transligra to forgo the cargo preference and remove its vessel from the Ecuadorian flag, depriving U.S. shippers of the only existing Ecuadorian-flag parcel tanker in the Trade; and 4) Transligra would be unable to raise its rates to absorb the penalties because its rates are subject to approval by the GOE as well as "competitive pressures."

These reasons, and its remaining arguments with respect to "adequacy of service," present no basis upon which to set aside the Proposed Rule. Transligra's arguments are also internally inconsistent. The monopoly status conferred on Transligra by the GOE makes it immune to "competitive pressures." Transligra, as the operator of the sole Ecuadorian-flag parcel tanker, is the beneficiary of these GOE laws affecting the liquid bulk trade from the U.S. Thus, singling out Transligra from among Ecuadorian-flag carriers for imposition of sanctions does not appear to be inappropriate in a proceeding dealing with exclusion of all third-flag vessels, other than those chartered by Transligra, from the liquid bulk trade.

Transligra alleges that it has been denied the opportunity to show that no party representing U.S. interests has been harmed. It argues that such harm is a necessary basis for finding that conditions unfavorable to shipping exist. Transligra charges that the Commission's refusal to consider the adequacy of service offered in the Trade as a factor in determining whether conditions unfavorable to shipping exist establishes a new standard, under which the exclusion of any carrier from a U.S. foreign trade by government action creates a condition unfavorable to shipping, *per se*. Transligra's argument that the Commission has promulgated a *per se* standard for Section 19 is without basis.

Transligra's argument is, apparently, that, absent a showing that the exclusion of any carrier results in inadequate service -- *i.e*. lack of capacity in the Trade - no condition unfavorable to the interests of shippers can be said to exist. Under this theory it follows that only the exclusion of a U.S.-flag carrier could be considered a condition unfavorable to shipping under Section 19 so long as adequate capacity can be shown to exist in the Trade.[10]

Transligra's argument ignores the more general, but no less real, detrimental effects of monopoly power on consumers: the total lack of choice of price, service and even routing options

[10] Transligra would apparently recognize as an exception a showing that the limits on service have directly resulted in prices higher than they would otherwise be. Although Pecten Chemicals ("Pecten") stated in comments filed earlier in this proceeding that rates in the Trade are higher than in other trades, Transligra rejects these claims.

among which individual shippers may express a preference. In this case, SCOT, Pecten and others representing the interests of shippers have expressed the need for Commission action to redress these detrimental effects of the GOE-created monopoly power in the Trade. The combination of detriment to these interests as well as the detriment to the U.S.-owned company excluded from participation in the shipping business, OEI, are the basis for the Commission's finding of conditions unfavorable to shipping in the Trade.

Transligra's argument is, moreover, misdirected. The Commission's rejection of Transligra's adequacy of service arguments was not directed to the issue of whether any party with an interest to be protected under Section 19 has been harmed, but whether the existence of adequate service has any bearing on issues involving flag-based cargo reservation schemes. The Commission has clearly held in previous cases that it has not. See, e.g., Actions to Adjust or Meet Conditions Unfavorable To Shipping In The United States/Peru Trade, Order Denying Petition, ____ F.M.C. ____, 24 S.R.R. 308, 312 (June 18, 1987).

Transligra's reliance on the Commission's decision in Petition of Ace Lines, Ltd., ___ F.M.C. ___, 19 SRR 481 (1979) is misplaced. This case is cited for the proposition that foreign policy restrictions affecting a limited segment of trade which do not result in inadequate service to U.S. importers and exporters will not be the subject of Section 19 sanctions. The restriction in the ACE case, however, was found to be based upon appropriate transportation considerations and was not a flag-based preference bestowed on a national-flag carrier.[11]

In spite of the fact that the Commission has several times been informed that the GOE wished to resolve the matter and expected to hold talks to that end, the Commission is aware of no such resolution. Indeed, OEI and SCOT continue to represent the need for imposition of sanctions.

We therefore find no basis in Transligra's comments to set aside our conclusion that conditions unfavorable to shipping exist in the Trade. We further find that the actions suggested in the Proposed Rule to adjust or meet those conditions are warranted.

Transligra insists that the impact of the fee to be imposed under the Proposed Rule would be harshly punitive. It states that each of its U.S. export voyages yields between $80,000 profit and $80,000 loss, averaging $34,200 profit. The affidavit of Wil W. Nefkens, attached to Transligra's comments, states further, without quantification, "that the U.S. Gulf/Ecuador parcel tanker trade is a relatively small volume trade." Nefkens Affidavit at 3-4.

Based upon these representations, the Commission believes a fee in an amount lower than that established in the Proposed Rule would be consonant with the size and profitability of the Trade. We remain, nevertheless, conscious that the effect of GOE

[11] In Ace, an Australian government entity determined that exports of Australian meat should be carried exclusively in refrigerated containers, for reasons of quality control. There were no flag-based restrictions on the ability of containerized carriers offering reefer service to compete in the trade.

Resolution No. 012/87 is the total exclusion from the Trade of third-flag vessels (other than those chartered by Transligra), including third-flag vessels operated by U.S. carriers. A lower fee may be imposed, however, without substantial loss of the desired effect of creating countervailing conditions with respect to the Ecuadorian-flag carrier. Therefore, the Final Rule issued in this proceeding reduces the fee to $50,000 per outbound (ex-U.S.) voyage.

In proposing the rule to meet or adjust conditions unfavorable to shipping in the U.S./Ecuador trade, the Commission also proposed to revise the manner in which it incorporates in the Code of Federal Regulations rules issued in similar proceedings under Section 19. Therefore, the Commission proposed to revise Part 586 of the CFR to add a new section 586.1 descriptive of the function of Part 586 and to redesignate and incorporate as a single section 586.2 all provisions of the current Part 586 which were enacted by the final rule to adjust or meet conditions unfavorable to shipping in the U.S./Peru Trade, published at 54 FR 12629 (March 28, 1989). This U.S./Peru Trade rule is republished herein to reflect the redesignation and conforming changes. No substantive changes have been made in the rule and its status as a final rule is unchanged by this action. The Final Rule in the U.S./Ecuador trade issued in this proceeding is added to Part 586 as section 586.3.

List of Subjects

46 CFR Part 586

Foreign trade, Maritime carriers, Trade practices

Therefore, pursuant to section 19(1)(b) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(1)(b); Section 10002 of the Foreign Shipping Practices Act of 1988, 46 U.S.C. app. 1710a; Reorganization Plan No. 7 of 1961, 26 FR 7315 (August 12, 1961); and 46 CFR Part 585; Part 586 of Title 46 of the Code of Federal Regulations is revised to read as follows:

Part 586 - Actions to Adjust or Meet Conditions Unfavorable to Shipping in the U.S. Foreign Trade.

AUTHORITY: 46 U.S.C. app. 876(1)(b); 46 U.S.C. app. 1710a; 46 CFR Part 585; Reorganization Plan No. 7 of 1961, 26 FR 7315 (August 12, 1961).

§ 586.1 Actions to Adjust or Meet Conditions Unfavorable to Shipping in Specific Trades.

Whenever the Commission determines that conditions unfavorable to shipping exist in the United States foreign trade with any nation and issues rules to adjust or meet such conditions, pursuant to section 19(1)(b) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(1)(b) and 46 CFR Part 585, such rules shall be published in the Federal Register and added to this Part.

§ 586.2 Conditions unfavorable to shipping in the United States/Peru Trade.

(a) <u>Conditions Unfavorable to Shipping in the Trade</u>.

(1) The Federal Maritime Commission has determined that the Government of Peru ("GOP") has created conditions unfavorable to shipping in the foreign trade of the United States by enacting, implementing and enforcing laws and regulations which unreasonably restrict non-Peruvian-flag carriers from competing in the Trade on the same basis as Peruvian-flag carriers, and additionally deny to non-Peruvian-flag carriers effective and equal access to cargoes in the Trade. Moreover, the laws and regulations at issue unilaterally allocate and reserve export liner cargoes from the United States for carriage by Peruvian-flag carriers.

(2) GOP law provides that non-Peruvian-flag carriers must become associate carriers or obtain cargo from shippers who have secured waivers for individual shipments or certification of cargo shipped, to operate in the Trade. The enforcement of this system discriminates against U.S. shippers and exporters, restricts their opportunities to select a carrier of their own choice, and hampers their ability to compete in international markets.

(b) <u>Peruvian-flag carriers - assessment of fees</u>.

(1) "Voyage" means an inbound or outbound movement between a foreign country and the United States by a vessel engaged in the United States trade. Each inbound or outbound movement constitutes a separate voyage. For purposes of this part, the transportation of cargo by water aboard a single vessel inbound or outbound between ports in Peru and ports in the United States under one or more bills of lading issued by or on behalf of the

Peruvian-flag carriers named in paragraph (b)(2) of this section, whether on board vessels owned or operated by the named carriers or in space chartered by the named carriers on vessels owned or operated by others, or carried for the account of the named carriers pursuant to Agreements on file with the Federal Maritime Commission, under any of the tariffs enumerated in paragraph (b)(4) of this section, shall be deemed to constitute a voyage.

(2) For each voyage completed after the effective date of this section, the following carriers shall pay to the Federal Maritime Commission a fee in the amount of $50,000:

Compania Peruana de Vapores ("CPV");

Empresa Naviera Santa, S.A. ("Santa");

Naviera Neptuno, S.A. ("Neptuno"); and

Naviera Universal, S.A. ("Uniline").

The fee for each voyage shall be paid by certified or cashiers check made payable to the Federal Maritime Commission within 7 calendar days of the completion of the voyage for which it is assessed.

(3) Each Peruvian-flag carrier named in paragraph (b)(2) of this section shall file with the Federal Maritime Commission a report setting forth the date of each voyage completed, amount of cargo carried, and amount of fees assessed pursuant to paragraph (b)(2) of this section during the preceding calendar quarter. Each such report shall include a certification that all applicable fees assessed pursuant to paragraph (b)(2) of this section have been paid, and shall be executed by the Chief Executive Officer under

oath. Such reports shall be filed within 15 days of the end of each calendar quarter.

(4) If any Peruvian-flag carrier shall fail to pay any fee assessed by paragraph (b)(2) of this section within the prescribed time for payment, or fail to file any quarterly report required by paragraph (b)(3) of this section within the prescribed period for filing, the tariffs identified below, as applicable to such carrier, shall be suspended effective 30 calendar days after the expiration of the calendar quarter in which such fees or report were due:

(i)(A) Compania Peruana de Vapores (CPV)

FMC No. 14 - Applicable BETWEEN United States Atlantic and Gulf Ports AND Ports in South America, Trinidad, and the Leeward and Windward Islands.

FMC No. 15 - Applicable FROM United States West Coast Ports and Hawaii TO Ports in Chile, Peru, Mexico, Panama and the West Coast of Central America.

FMC No. 16 - Applicable FROM Ports in Chile, Peru, Mexico, Panama and the West Coast of Central America TO United States West Coast Ports and Hawaii.

(B) Empresa Naviera Santa, S.A.

FMC No. 3 - Applicable FROM Rail Container Terminals at United States Pacific Coast Ports TO Ports in South America.

FMC No. 5 - Applicable FROM Rail Terminals at United States Interior Ports and Points TO Peru and Chile.

FMC No. 7 - Applicable BETWEEN United States Atlantic and Gulf Ports and Ports in Peru.

(C) Naviera Neptuno, S.A.

FMC No. 5 - Applicable BETWEEN United States Pacific Ports AND Peru and Pacific Coast Ports in Chile, Colombia and Ecuador.

(D) Naviera Universal, S.A. (Uniline)

FMC No. 2 - Applicable BETWEEN United States Ports and Points AND Ports and Points in Central America, South America, Mexico, and the Caribbean.

(ii) The following conference tariffs, or any other conference tariff covering the Trade, including intermodal tariffs covering service from interior U.S. points:

Atlantic & Gulf/West Coast of South America Conference

FMC No. 2 - Applicable FROM United States Atlantic and Gulf Ports TO West Coast Ports in Peru and Chile via the Panama Canal.

FMC No. 3 - Applicable FROM Points in the United States TO Points and Ports in Chile, Peru, and Bolivia moving through United States Atlantic and Gulf Ports of Interchange.

FMC No. 5 - Applicable FROM Points and Ports in Chile, Peru and Bolivia TO Points and Ports in the United States, moving through United States Atlantic and Gulf Ports of Interchange.

FMC No. 6 - Applicable FROM Chilean and Peruvian Ports of Call via the Panama Canal TO Ports of Call on the Atlantic and Gulf Coasts of the United States.

(iii) Any other tariff which may be filed by or on behalf of the carriers listed in paragraph (b) of this section.

(iv) In the event of suspension of tariffs pursuant to this paragraph, all affected conference or rate agreement tariffs shall be amended to reflect said suspensions. Operation by any carrier under suspended, cancelled or rejected tariffs shall subject said carrier to all applicable remedies and penalties provided by law.

(c) Source of fees. Any fees assessed by paragraph (b)(2) of this section against Peruvian-flag carriers operating pursuant to any Agreement filed with the Federal Maritime Commission providing for revenue pooling, joint service, space-chartering or other joint operations shall be paid by such Peruvian-flag carriers without affecting the revenue shares or amount of revenue earned by non-Peruvian-flag carriers operating pursuant to such Agreements.

(d) <u>Effective Date</u>. Paragraph (a) of this section is effective on March 28, 1989. The date upon which paragraphs (b) and (c) of this section shall become effective shall be determined by further order of the Commission amending this section.

§ 586.3 Conditions Unfavorable to Shipping in the United States/Ecuador Trade.

(a) <u>Conditions unfavorable to shipping</u>.

(1) The Federal Maritime Commission has determined that the Government of Ecuador ("GOE") has created conditions unfavorable to shipping in the foreign trade of the United States by enacting, implementing and enforcing laws, decrees and regulations which unreasonably restrict non-Ecuadorian-flag carriers from competing in the liquid bulk trade from the United States to Ecuador on the same basis as Ecuadorian-flag carriers.

(2) Resolution No. 012/87 unilaterally reserves export liquid bulk cargoes from the United States to Ecuador for carriage by Ecuadorian-flag carriers who utilize Ecuadorian-flag vessels or charter third-flag vessels, or U.S.-flag carriers who utilize U.S.-flag vessels. The enforcement of this system discriminates against U.S. carriers and other maritime companies desirous of participating in this Trade through the charter of third-flag

vessels, and denies to non-Ecuadorian-flag carriers effective and equal access to liquid bulk cargoes in the Trade. It also discriminates against U.S. shippers and exporters whose opportunities to select a carrier of their choice are restricted and whose ability to compete in international markets is hampered.

(b) Ecuadorian-flag carrier - assessment of fees.

(1) "Voyage," for purposes of this section means an outbound movement from the United States to a foreign country by a vessel engaged in the United States trade. Each outbound movement constitutes a separate voyage. The transportation of cargo by water aboard a single outbound vessel between ports in the United States and ports in Ecuador under one or more bills of lading issued by or on behalf of the Ecuadorian-flag carrier Maritima Transligra, S.A. ("Transligra"), whether on board vessels owned or operated by Transligra or in space chartered by Transligra in vessels owned or operated by others shall be deemed to constitute a voyage.

(2) For each voyage completed after the effective date of this section, Transligra shall pay to the Federal Maritime Commission a fee in the amount of $50,000. The fee for each voyage shall be paid by certified or cashiers check made payable to the Federal Maritime Commission within 14 calendar days of the completion of the voyage for which it is assessed.

(c) Report.

Transligra shall file with the Federal Maritime Commission a report setting forth the names of vessels operated by Transligra in the Trade, whether owned or chartered; the names of vessels on which Transligra has chartered space for the carriage of cargo in the Trade, and the names and addresses of the owners of such vessels; the date of each voyage completed in the Trade; the amount of cargo carried; and the amount of fees assessed pursuant to paragraph (b)(2) of this section during the preceding calendar quarter. Each such report shall include a certification that all applicable fees assessed pursuant to paragraph (b)(2) of this section have been paid, and shall be executed by the Chief Executive Officer under oath. Each report shall be filed within 15 days of the end of the applicable calendar quarter.

(d) Refusal of Clearance by the Collector of Customs.

If Transligra shall fail to pay any fee assessed by paragraph (b)(2) of this section, or fail to file any quarterly report required by paragraph (c) of this section within the prescribed period for filing, the Secretary of the Commission shall request the Chief, Carrier Rulings Branch of the U.S. Customs Service to direct the collectors of customs at ports in the U.S. Gulf of Mexico to refuse the clearance required by Section 4197 of the Revised Statutes (46 U.S.C. app. 91) to any vessel owned or operated by Transligra.

By the Commission.

Joseph C. Polking
Secretary