

(S E R V E D)
(May 10, 1991)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR PART 550

[PETITION NO. P4-90, DOCKET NO. 91-21]

APPLICATION OF TROPICAL SHIPPING & CONSTRUCTION CO., LTD.
UNDER SECTION 35 OF THE SHIPPING ACT, 1916

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission amends its regulations governing the publishing, filing and posting of tariffs in domestic offshore commerce pursuant to the Shipping Act, 1916. This amendment of Part 550 adds a new exemption for carriers providing port-to-port service in the U.S. Virgin Islands domestic offshore trade. Such carriers now are permitted to publish on one day's notice reductions in existing individual commodity rates, and rates on new tariff items.

DATE: This action is effective upon publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

On October 29, 1990, Tropical Shipping & Construction Co., Ltd. ("Tropical") filed an Application for Exemption ("Application") under section 35 of the Shipping Act, 1916 ("1916

The March Order emphasized that Tropical had yet to file a tariff in the FMC-regulated Florida-U.S. Virgin Islands Trade and further noted it was unclear whether Tropical was going to file such a tariff. The Commission observed that if Tropical did enter the FMC-regulated Florida-U.S. Virgin Islands Trade, the question remained whether Tropical would be competing with carriers regulated by the Interstate Commerce Commission ("ICC") for the sort of cargo that lends itself to port-to-port carriage. The March Order further stated that even if Tropical competed with ICC-regulated carriers for such cargo it was not apparent that it would be disadvantaged by the thirty-day notice requirement of the 1933 Act. The Commission refused to grant the Application on the mere supposition that it met the requirements of section 35. The March Order also noted that it would have been particularly inappropriate to grant the application given CSA's allegation that a similar exemption in the U.S.-Puerto Rico Trade had created difficulties for shippers.

Tropical has now filed a Petition for Reconsideration ("Petition"). TMT and CSA each filed a Reply thereto.

THE PETITION FOR RECONSIDERATION

Tropical's Petition states that on February 28, 1991, one day before the March Order was served, Tropical filed a tariff with the FMC covering port-to-port transportation in the Florida-U.S. Virgin Islands Trade. The filing of a tariff, Tropical argues, removes

submits that CSA's comments regarding the U.S.-Puerto Rico Trade should therefore play no role in the Commission's decision. Id.

Tropical also addresses the contention in CSA's previous comments that a carrier may abuse the exemption in the Puerto Rico Trade by maintaining a high "Cargo N.O.S." rate in its FMC tariff so that any commodity rate may be filed on one day's notice as a reduction from the "Cargo N.O.S." rate, even though the commodity rate may represent an increase over the corresponding ICC rate. Tropical points out that its FMC tariff has no "Cargo N.O.S." rate. Petition at 5.

Finally, Tropical attacks CSA's failure to identify its membership. Tropical believes that CSA may only represent one shipper in the U.S. Virgin Islands. Under the circumstances, Tropical believes that CSA's comments are entitled to little or no weight. Petition at 6.

REPLIES TO THE PETITION FOR RECONSIDERATION

A. TMT

In support of Tropical's Petition for Reconsideration, TMT points out that it has filed an extensive FMC-regulated tariff in the U.S. - U.S. Virgin Islands Trade which will become effective May 1, 1991. TMT Reply at 2. This, it is alleged, is a change in material fact which further supports the need for the exemption. Id. TMT urges the Commission to grant the exemption and confirm that it embraces the trade between Puerto Rico and the U.S. Virgin Islands. Id. It is also requested that the Commission extend the

CSA also believes that the rates in Tropical's new FMC-regulated tariff represent a de facto rate increase. CSA Reply at 6-7. The rates are alleged to be the same as those previously filed with the ICC. Id. at 7. However, the FMC-regulated rates, unlike the ICC-regulated rates, do not include any inland transportation. Id. Thus, it is argued, the shipper is paying the same rate but is receiving less service. Id.

In sum, CSA argues that the Petition should be denied because it is "seriously flawed and misleading". CSA Reply at 7. CSA submits that Tropical cannot be harmed by denial of the Petition because it can control "when, where and under what circumstances it chooses to offer what type of rates/services". Id. Any problems which Tropical envisions are said to be hypothetical.

DISCUSSION

Rule 261 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.261, governing petitions for reconsideration, limits the grounds for such petitions. That Rule provides in relevant part that:

A petition will be subject to summary rejection unless it:

(1) Specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order;

(2) Identifies a substantive error in material fact contained in the decision or order;

(3) Addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party. Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received.

CSA also may be correct in arguing that the rates in Tropical's new FMC-regulated tariff represent a de facto increase over the rates previously filed in its ICC-regulated tariff. The level of rates is the same in both tariffs but the FMC-regulated rates, unlike the ICC-regulated joint through rates, do not include inland transportation. Thus, the shipper may be receiving less service for the same price. However, even if CSA's argument is correct, it does not necessarily require the denial of the Application. The rates were filed on thirty days' notice and were not protested by CSA or any other shipper. More importantly, CSA has not shown how the requested one day's notice would prevent shippers from protesting such rates.

As Tropical correctly points out, the U.S. - U.S. Virgin Islands Trade is open to foreign flag competition. Clearly, the Trade represents a contestable market. Carriers can enter and exit the Trade with relative ease, free from governmental interference. Thus, competition, both actual and potential, may be expected to curtail the sort of problems CSA envisions.

We are now satisfied that the exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory or detrimental to commerce. Indeed, Tropical is now in much the same position as the carriers that have been granted similar exemptions in other trades. See Matson Exemption and Sea-Land Exemption. Accordingly, the Commission will reconsider its March Order and grant Tropical's Application for Exemption.

1. The authority citation for Part 550 continues to read as follows:

AUTHORITY: 5 U.S.C. 553, 46 U.S.C. app. 812, 814, 815, 817, 820, 833a, 841a, 843, 844, 845, 845a, 845b, and 847.

2. In section 550.1, a new paragraph (d) is added reading as follows:

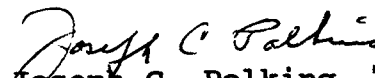
550.1 Exemptions

* * * * *

(d) Carriers providing port-to-port transportation between the United States, including Puerto Rico, and the U.S. Virgin Islands may publish new individual commodity rates, or reductions in existing individual rates, on one day's notice, and to that extent are exempted from the notice requirements of the Act and the rules of this part.

* * * * *

By the Commission.


Joseph C. Polking
Secretary