

( S E R V E D )  
( October 8, 1991 )  
( FEDERAL MARITIME COMMISSION )

FEDERAL MARITIME COMMISSION

46 CFR PARTS 580, 581 AND 583

[DOCKET NO. 91-1]

BONDING OF NON-VESSEL-OPERATING  
COMMON CARRIERS

AGENCY: Federal Maritime Commission

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission is adopting a Final Rule to implement the Non-Vessel-Operating Common Carrier Amendments of 1990, which govern the bonding of non-vessel-operating common carriers ("NVOCCs") in the foreign oceanborne commerce of the United States. This Final Rule sets forth the procedures for the filing of bonds by NVOCCs, prescribes the form and amount of bonds to be filed, establishes procedures for the designation of resident agents for NVOCCs not domiciled in the United States, and requires NVOCCs to state in their tariffs relevant information concerning their bonds. In addition, the Final Rule requires common carriers to determine whether an NVOCC has complied with its tariff and bonding responsibilities before transporting cargo for the account of an NVOCC. The Commission will periodically provide a list of complying NVOCCs to assist common carriers in meeting this requirement.

DATE: Effective 30 days after publication in the Federal Register.

FOR FURTHER INFORMATION, CONTACT:

Robert D. Bourgoïn, General Counsel  
Federal Maritime Commission  
1100 L Street, N.W., Suite 12225  
Washington, D.C. 20573  
(202) 523-5740

Bryant L. VanBrakle, Director  
Bureau of Tariffs, Certification and Licensing  
1100 L Street, N.W., Suite 10220  
Washington, D.C. 20573  
(202) 523-5796

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

On January 15, 1991 the Federal Maritime Commission ("Commission" or "FMC") published an Interim Rule to implement the Non-Vessel-Operating Common Carrier Amendments of 1990 ("1990 Amendments") (56 FR 1493).<sup>1</sup> This Interim Rule, which also served as a Proposed Rule, was originally scheduled to go into effect on February 14, 1991. However, in response to numerous comments, the Commission, pursuant to section 16 of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. § 1715, granted a 60-day temporary exemption from all the requirements of the 1990 Amendments and deferred the effective date of the Interim Rule from February 14, 1991 to April 15, 1991. Subsequently, on April 3, 1991, the Commission published a clarification of the Interim Rule and stayed one provision of the Rule (section 580.5(d)(25) (i)) until a final rule was issued ("Clarification Order").

The 1990 Amendments modify provisions of the 1984 Act by establishing certain requirements applicable to the activities of

---

<sup>1</sup> Section 710 of Pub. L. No. 101-595.

NVOCCs in the oceanborne foreign commerce of the United States. New section 23 of the 1984 Act requires NVOCCs to obtain a bond to ensure their financial responsibility for damages, reparations or penalties; requires designation of a resident agent if the NVOCC is domiciled abroad; and permits suspension or cancellation of NVOCC tariffs for failure to maintain a bond or designate a resident agent. New section 10(b)(14) of the 1984 Act makes it a prohibited act for a common carrier knowingly and willfully to accept cargo from or transport cargo for the account of an unbonded or untariffed NVOCC. New section 10(b)(15) of the 1984 Act makes it a prohibited act for an ocean common carrier knowingly and willfully to enter into a service contract with an unbonded or untariffed NVOCC.

The Interim/Proposed Rule adds a new Part 583 to Title 46 of the Code of Federal Regulations, and amends two existing Parts - 580 and 581. New Part 583 establishes various requirements applicable solely to NVOCCs. It requires that all NVOCCs operating in the foreign commerce of the United States, except those engaged exclusively in transporting used military household goods and personal effects, obtain a surety bond of \$50,000. In addition, NVOCCs not domiciled in the United States must designate a resident agent for service of process. If that resident agent cannot be served, the Interim/Proposed Rule provides alternative service on the Secretary of the FMC. The Rule further provides procedures for the suspension or cancellation of an NVOCC's tariff for failure to

maintain a bond or resident agent. Appendix A to Part 583 contains Form FMC-48, the new bond form for NVOCCs.

Part 580 of the Commission's rules covers the publishing and filing of tariffs by common carriers in the foreign commerce of the United States. The Interim/Proposed Rule amendments to this Part apply to both NVOCCs and common carriers. NVOCCs are required to state in their tariffs that they have filed a bond with the Commission, and to identify the bond number and the surety issuing the bond. NVOCCs not domiciled in the United States must also state the name and address of their resident agent. Common carriers are required to ascertain the identity and status of a shipper tendering cargo and to state same on their bills of lading or other records of carriage.<sup>2</sup> If a shipper is identified as an NVOCC, a common carrier must obtain documentation indicating that the NVOCC has complied with its tariff and bonding requirements. The documentation to satisfy this requirement is left to the discretion of the carrier, although a copy of an NVOCC's tariff rule 24 is one acceptable means.

Part 581 contains the FMC rules relating to service contracts. The Interim/Proposed Rule amendments prohibit an ocean common carrier or conference from entering into a service contract with an NVOCC, unless that NVOCC is tariffed and bonded. Further, it requires a shipper party to a service contract to certify its status and, if it is an NVOCC, to provide proof of compliance with

---

<sup>2</sup> This latter provision was stayed by the Commission in its Clarification Order.

the tariff and bond provisions. Again, a copy of the NVOCC's tariff rule 24 is deemed acceptable.

## II. COMMENTS AND DISCUSSION

The Commission has received 65 comments on the Interim/Proposed Rule. The commenters, which are listed in Attachment A, raise concerns with almost all provisions of the Rule. Rather than address each comment separately, we will instead discuss certain general areas of concern, mentioning specific commenters only where appropriate. Any comment not specifically addressed has nevertheless been considered and deemed to be irrelevant, inconsequential or otherwise without merit.

### A. Alleged Effects of 1990 Amendments on Shippers' Associations

Streamline urges the Commission to adopt a new interpretation and statement of policy concerning the effects of the 1990 Amendments on shippers' associations. This proposed interpretation would state that: (1) shippers' associations are not common carriers as defined by section 3(6) of the 1984 Act and can use tariff rates and enter into service contracts; and (2) shippers' associations are not required to file tariffs with the Commission and are not subject to the bonding or resident agent requirements of the 1990 Amendments. Streamline contends that such a policy statement is needed to address concerns raised by overseas offices of some steamship companies and merely clarifies the new law and codifies prior statements of the Commission.

Streamline further suggests that the final rule contain language reflecting the Commission's Clarification Order. This would include a statement that shippers' associations need only disclose their NVOCC members when executing a certification for a service contract, and that NVOCC members that join a shippers' association after a service contract is executed can ship under the contract but must certify their status at the time of the first shipment.<sup>3</sup> Streamline would also clarify in the rule that the periodic resubmission of an NVOCC's legal status be every six months. In addition, Streamline would amend proposed section 583.3(a) to reflect that only common carriers are subject to the statute's prohibition against accepting cargo from NVOCCs not in compliance with the 1990 Amendments.

We are not adopting the statement of policy advanced by Streamline. The alleged basis for the statement, concerns of some overseas offices of ocean carriers, is not convincing. Moreover, a statement that a shippers' association is not an NVOCC merely begs the question. As the Commission has pointed out previously in this proceeding, it is not what an entity calls itself that determines whether it is or is not an NVOCC, but rather the way it conducts its activities. In this regard, we note that the Commission does not certify or otherwise pass, in advance, on the bona fides of a shippers' association.

---

<sup>3</sup> LEP, an NVOCC, also raised concerns about whether all members of a shippers' association must be revealed to an ocean carrier.

Several of Steamline's proposed clarifications are rendered moot by our treatment of other sections of the Proposed Rule. However, consistent with one of Steamline's other suggestions, we have modified section 581.11 by adding a new paragraph (c). This provides that an NVOCC joining a shippers' association during the term of a service contract and entitled to receive service under the contract must first provide an ocean common carrier or conference with proof that it is tariffed and bonded.

B. Challenges by Foreign Forwarders/NVOCCs to Tariff Filing and Bonding Requirements

Generally identical comments received from a large number of foreign-based forwarders, assert that filing tariffs and obtaining a bond will be very costly for them and that these costs ultimately will be passed on to their shipper customers. They also contend that the 1990 Amendments are unclear as to who is covered. These commenters further allege that using carriers as an enforcement arm may damage the relationship between carrier and forwarder. Lastly, these forwarders threaten to divert their cargoes through Canadian ports if the 1990 Amendments are not repealed.

Whatever the merits of the commenters' objections to tariff filing and bonding, the Commission cannot amend or repeal the requirements of the 1990 Amendments. Threats to divert cargoes through Canada do not alter this fact. Moreover, as indicated below we do not believe that the coverage under these Amendments is in any way vague or unclear. The 1984 Act contains a definition of both "common carrier" and "NVOCC." The Commission has further indicated in this proceeding the kinds of activities an NVOCC

conducts. Anyone operating as an NVOCC should be able to determine its status with a reasonable degree of certainty.<sup>4</sup>

C. Suggested Exemption From NVOCC Tariff Filing Requirements

DOT urges the Commission to proceed to exempt NVOCCs from any tariff filing requirement as soon as practicable. DOT alleges that tariff systems are costly to initiate and maintain and that tariff filing can impede competition. Effective regulation by the FMC allegedly will not be impaired because ocean common carriers will still have to file their tariffs and shippers will therefore be able to determine whether NVOCC rates are too high. DOT also claims that tariff filing affects small NVOCCs more heavily and that such firms make up a large proportion of the NVOCC community. It suggests that NVOCC tariff filing may impair U.S. commerce by forcing shippers to use less efficient routes (e.g., Canada or Mexico) or boycott complying NVOCCs.

Several NVOCCs have also suggested that the Commission exempt NVOCCs from tariff filing.<sup>5</sup> Another NVOCC, Distribution Services, Ltd., suggests that the Commission vigorously enforce the tariff filing requirement or alternatively omit tariff filing for all common carriers.<sup>6</sup>

---

<sup>4</sup> See also, our discussion *infra* at pp. 16-18.

<sup>5</sup> Orion Marine Corporation, LEP, Medallion Shipping Lines, and West Forwarding Services, Inc.

<sup>6</sup> Nine letters were received by the Commission after the comment period had expired. Eight supported DOT's position and one opposed it. These letters have been placed in the correspondence file of this docket.



The proposed exemption of NVOCCs from tariff filing is beyond the scope of this rulemaking. Moreover, the proper method of seeking the relief requested by DOT would be a petition for exemption pursuant to section 16 of the 1984 Act, 46 U.S.C. app. § 1715, and not proposed as a comment in a rulemaking proceeding. Section 16 expressly provides that "[n]o order or rule of exemption . . . may be issued unless opportunity for hearing has been afforded interested persons and departments and agencies of the United States." It is important to note that an exemption can only be granted if the Commission affirmatively finds ". . . that the exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, result in a substantial reduction in competition, or be detrimental to commerce."

The Commission has since received a Petition for Exemption from the NVOCC Tariff Filing Requirements Under the Shipping Act of 1984 submitted by the International Federation of Freight Forwarders Associations and several individual NVOCCs. The Commission has determined to publish Notice of this petition in the Federal Register and will solicit comment thereon.

D. Exemption for NVOCCs of Used Military Household Goods

Section 583.3(c) of the Interim/Proposed Rule exempts any person which exclusively transports used military household goods and personal effects from the bonding requirement of the 1990 Amendments. As the Commission noted in its Clarification Order, Congress intended that such NVOCCs be exempted from the

requirements of the 1990 Amendments. See H.R. Rep. No. 785, 101st Cong., 2d Sess. 4 (1990). The Commission further stated, however, that anyone believing that a reexamination of the exemption was warranted could submit comments during the course of this proceeding. Clarification Order at 23, 24.

TAAFLO, an organization of U.S.-flag vessel operators, fully supports a continued exemption. It states that the Commission has properly implemented Congress' intent. On the other hand, ACT, an agent for household goods forwarders, suggests that all NVOCCs should be subject to the same requirements. It alludes to certain problems with a DOD shipping program caused by the financial failure of several unscrupulous and insolvent forwarders. ACT appears to be particularly concerned about the effect of such failures on the agents for household goods forwarders, many of whom have been damaged by the demise of primary forwarders. ACT also believes that regulation of all household goods forwarders by the FMC would remove the Military Traffic Management Command ("MTMC") from a conflict of interest position.

DOD states that MTMC is its agent for personal property movements. It advises that MTMC's International Through Government Bill of Lading Program requires household goods forwarders/NVOCCs to submit performance bonds, in favor of DOD, in the amount of either \$100,000 or 2.5 percent of the carrier's prior year's revenue from DOD shipments. DOD points out, however, that this performance bond is only intended to protect its interests and does not cover agents of the forwarder/NVOCC or any other underlying

parties with whom the forwarder/NVOCC may have contracted to provide services. It states that recently, MTMC-approved forwarders/NVOCCs failed to deliver thousands of shipments leaving the agents for these forwarders/NVOCCs unprotected against loss.

DOD, therefore, suggests several changes to the Proposed Rule. First, it urges that the phrase "used military household goods and personal effects" in section 583.3(c) be changed to read "used household goods and personal effects for the account of the Department of Defense." It believes that use of the term "military" could be interpreted as limiting the scope of the provision to only shipments for military members of the Army, Navy, Air Force, and Marine Corps. DOD explains that MTMC, on behalf of the uniformed services, also ships household goods and personal effects for DOD civilians employed overseas and that these shipments are presently covered by the MTMC performance bond.

DOD also requests that the Commission clarify in any final rule that DOD would not be prohibited from requiring bonds from persons who exclusively transport used household goods and personal effects for the account of DOD. DOD believes that the current wording of section 583.3(c) could lead to the interpretation that DOD itself cannot require performance bonds. DOD states that Congress expected that it would continue to require NVOCC bonding for the NVOCCs carrying its household goods shipments. Lastly, DOD urges that the FMC seek legislative relief so that agents and others providing services on behalf of MTMC-approved NVOCCs are protected by an FMC-required bond.

DOD's two suggested amendments to the Proposed Rule have merit and will be accommodated in the Final Rule. Section 583.3(c) has been amended so that household goods and personal effects of civilian DOD employees are clearly included within the exemption. This section has been further amended to specifically state that DOD can continue to require a bond for its shipments. DOD's other suggestion, that the law be amended to include agents of MTMC approved NVOCCs within the scope of the 1990 Amendments' bonding requirement may have merit. However, any such action is outside the scope of this rulemaking proceeding and, moreover, may be more appropriately advanced by others more directly affected by the perceived problem.

F. Tariff Rule No. 25

Section 580.5(d)(25) of the Interim/Proposed Rule contains certain provisions concerning a common carrier's acceptance of cargo from an NVOCC, including a requirement that such carriers publish a rule (Rule No. 25) in their tariffs concerning this subject. Two commenters have raised concerns with this requirement.

BCL et al. contend that section 580.5(d)(25) does not state what must be contained in the new Rule No. 25 carriers would be required to include in their tariffs. They point out that all the preceding paragraphs in this section specifically indicate what the

corresponding tariff rule must contain.<sup>7</sup> NEC also contends that it is unclear whether VOCCs must publish a tariff rule and, if so, what its contents must be. NEC believes that there is no valid regulatory purpose to be served by such a requirement, nor is it necessitated by the 1990 Amendments. NEC notes that the FMC's Clarification Order stated that VOCCs are free to accept other means to satisfy themselves that a known NVOCC is in compliance with the statutory requirements. NEC questions what a tariff rule would state under such circumstances.

NEC argues that the purpose of tariffs is to describe the services offered and the rates and charges applicable to those services. It does not believe that tariffs should recite provisions of the Shipping Act or Commission rules, or describe services not offered. Lastly, NEC contends that there is no need for an NVOCC tariff rule because of the new prohibited acts added as a result of the 1990 Amendments. If the Commission rejects NEC's position, NEC proposes an optional tariff rule.

Part of the confusion surrounding section 580.5(d)(25) may be due to a combination of its subject matter and its placement. Proposed paragraph (d)(25) did impose several substantive

---

<sup>7</sup> Section 580.5(d) provides:

Specific tariff rules shall be published to govern each of the following subjects and shall be designated in all tariffs by the numbers and headings specified below. In the event that a specified rule does not apply to the service offered, the rule number and heading shall be published with a statement that the rule is not applicable. For example: Rule No. 15. Open Rates. Not Applicable.

requirements on common carriers. As discussed below, the requirements that remain have been moved to Part 583, which now contains all general rules pertaining to the 1990 Amendments. However, we believe that a carrier tariff rule devoted to acceptance of NVOCC cargo may still be warranted. Specifically, if a common carrier is going to adopt a procedure for ascertaining NVOCC compliance other than the two specified in new sections 583.7(b)(1) or (2), then that procedure must be set forth in the carrier's Rule 25.

G. Co-loading by NVOCCs

In our Clarification Order, we addressed the issue of co-loading by NVOCCs as follows:

In a legitimate co-loading situation otherwise governed by the Commission's tariff rules, 46 C.F.R. § 580.5(c)(14), the only status that must be declared to the ocean common carrier and the only compliance that must be verified is that of the master co-loader who appears as "shipper" on the ocean carrier's bill of lading. Ocean carriers would not need to verify compliance of other NVOCCs whose cargo may be included in the master co-loader's shipment. However, the master co-loader, as a common carrier, would have its own obligation to verify the compliance of subordinate co-loading NVOCCs who tender their own cargo pursuant to the master's tariff. See section 580.5(d)(25) of the Interim Rule.

Clarification Order at 21. NCBFAA generally agrees with this discussion. However, it suggests that, to the extent VOCCs are relieved from any shipper identification responsibilities, NVOCCs serving as master co-loaders should be accorded identical treatment. NCBFAA contends that master co-loading NVOCCs should have the same verification responsibilities as do VOCCs.

Streamline, on the other hand, believes that the Commission should require "self-certification" to VOCCs from all NVOCCs participating in a co-loaded shipment. Streamline contends that the Commission's Clarification Order has created a major loophole in the new law. Streamline posits the scenario of one NVOCC complying with the law and several other non-complying NVOCCs co-loading through its facilities. Under such an arrangement, any judgment against the one complying NVOCC allegedly could easily exceed the \$50,000 bond. Streamline recommends, therefore, that with respect to service contracts, at the time of signing, an NVOCC shipper should identify and provide certifications for all other NVOCCs with whom it has co-loading agreements. In addition, Streamline suggests that for both tariff and service contract movements, NVOCCs should be required to state whether a shipment is co-loaded with other NVOCCs and, if so, to provide compliance certifications with respect to those other NVOCCs.

NCBFAA's concerns are unwarranted. The fact is that NVOCCs and VOCCs are presently treated equally under section 580.5(d)(25). This is because this paragraph relates to "common carriers" and not solely vessel operating common carriers. This continues to be the case with new section 583.7; it also applies to all common carriers. As a common carrier, therefore, an NVOCC will have to comply with all the requirements applicable to common carriers that are adopted in the Final Rule.

We see no compelling reason to expand the carrier certification requirement beyond a master co-loader to its

subordinate NVOCCs. If the hypothetical scenario presented by Streamline becomes a reality and frustrates the intent of the 1990 Amendments, we will address it at that time. However, we would like to reemphasize that our co-loading rules apply only to "the combining of cargo" by two or more NVOCCs, in a single shipment.<sup>8</sup> Moreover, these rules do not in any way give one NVOCC a license to use another NVOCC's service contract for its shipments. See California Shipping Line Inc. v. Yangming Marine Transport Corp., 25 S.R.R. 1213 (1990).

#### H. Definition of NVOCC

Many of the European NVOCCs filing similar comments contend that the concept of an NVOCC is foreign to them and that the statutory and regulatory definitions of NVOCC do not provide them sufficient guidance. TWRA likewise claims that the statutory definition of NVOCC is vague and difficult to apply. DOT has also requested that the Commission clarify more precisely the functions or services that distinguish NVOCCs from other intermediaries. DOT expresses concern about the examples of NVOCC activity contained in the Supplementary Information to the Interim/Proposed Rule, contending that many of these functions can also be performed by non-NVOCCs, and thus their value is diluted.

IANVOCC, on the other hand, submits that the 1990 Amendments are clear as to which companies are affected and that a "working definition" of "NVOCC" is not needed. IANVOCC states that, at

---

<sup>8</sup> See 46 C.F.R. § 580.5(c)(14).



least since 1952, the Commission has clearly indicated what an NVOCC does, citing Bernhard Ulmann Co. v. Porto Rican Express Co., 3 F.M.B. 771 (1952), and Common Carriers by Water, 6 F.M.C. 245 (1961). It explains that NVOCCs provide transportation for hire by water and assume responsibility or have liability imposed by law for the safe transportation of cargo shipments.

The North Europe Conferences suggest that there is a readily available litmus test by which to determine whether someone is acting as an NVOCC:

A person purchasing transportation service from a VOCC and offering such service for resale to other persons is an NVOCC.

NEC claims that its test covers VOCC services under tariffs, service contracts, and excepted commodities. NEC states that the test covers resale by NVOCCs to other NVOCCs, shippers' associations, other middlemen and shippers. NEC contends that its test can be easily understood by any business person in the world.

The Commission has already, within the context of this proceeding, given the shipping public more than adequate guidance as to what constitutes an NVOCC. In the Supplementary Information to the Interim Rule, we advised that:

As common carriers, NVOCCs hold themselves out to the public to provide transportation by water between the United States and foreign countries, utilizing vessels operating on the high seas. NVOCCs normally enter into affreightment agreements with their underlying shippers, issue bills of lading or equivalent documents, and assume full responsibility for the shipments they handle, from point of origin to point of destination.

We additionally stated that an intermediary's conduct,

and not what it labels itself, will be determinative of its status. Subsequently, in our Order Denying Request for Stay we stated that:

The concept of an NVOCC is not new. It has been part of FMC regulatory law for some forty years. As far back as 1952 the Federal Maritime Board found a non-vessel operator to be a common carrier by water. Bernhard Ulmann Co., Inc. v. Porto Rican Express Co., 3 F.M.B. 771 (1952). The 1984 Act's definition of NVOCC merely codified that term as it had been interpreted by case law and was understood in the ocean transportation industry. We therefore find it difficult to believe that anyone serious about complying with our laws and regulations will have difficulty doing so.

We will not, therefore, adopt a definition of NVOCC different from that contained in section 581(d) of the Rule and section 3(17) of the 1984 Act. In this regard, however, we do note that the litmus test proffered by NEC does appear to encompass someone who is acting as an NVOCC and would appear to be subsumed in the statutory definition. The focus of this test is on someone who purchases and resells transportation services. It is not intended to include someone acting solely as a broker or consolidator.

#### I. Bond Form

Appendix A to Part 583 contains Form FMC-48, the bond form required of all NVOCCs subject to the 1984 Act. This form was prescribed pursuant to authority in the 1990 Amendments. Several commenters have suggested amendments to this bond form. Intercargo contends that, because the bond establishes "near-absolute liability" for the surety, it is only fair that a surety receive notice of any potential claims at the earliest possible date. Allegedly, only then will a surety be able to protect its interests

by limiting additional liability (through termination) or pursuing possible subrogation against the NVOCC. Intercargo suggests, therefore, that the Commission or a complainant/plaintiff provide notice to a surety of the initiation of an action against an NVOCC.

IANVOCC would amend the bond form so that it can only be invoked against NVOCC transportation-related activities that remain unresolved after a judgment in a court of law where the NVOCC had the right to be represented by an attorney. ITT would limit such amendment to judgments where the NVOCC had the opportunity to be represented by an attorney. In support of this position, ITT raises the specter of abuses in small claims courts distant from an NVOCC's place of business.

ITT also suggests that the bond form be amended by adding the words "directly involving cargo moving on the Bill of Lading of the involved NVOCC" after "arising from its transportation-related activities." Such a narrowing is said to be necessary to avoid unlimited liability. Transeas would further limit coverage of the bond to judgments obtained in the United States and to "ocean transportation-related activities" rather than simply "transportation-related activities." It states that, like many other NVOCCs, it is part of a larger company which conducts other transportation-related activities - e.g., customs brokerage and air freight.

The language in the bond form limiting the bond to an NVOCC's "transportation-related activities" tracks the express language of the 1990 Amendments. There does not appear to be any sound basis

or reason for otherwise narrowing the scope of the bond. The bond covers the transportation-related activities of an NVOCC when acting as an NVOCC. As Congress has indicated, the bond is intended to " . . . be available to pay any judgment for damages arising out of an NVOCC's activities as an ocean common carrier providing ocean transportation services." H.R. Rep. No. 785, 101st Cong., 2d Sess. 3 (1990) (emphasis supplied). To the extent that someone who operates as an NVOCC also provides non-NVOCC services, those services would not be covered by the bond. Likewise, if a corporate affiliate conducts some other non-NVOCC activities, those services would not be covered under the bond. Nor do we believe that we can limit the bond to only judgments obtained in the United States. The bond is available to "pay any judgment for damages" against an NVOCC, and is not limited to only conduct by an NVOCC in this country. See section 23(c) of the 1984 Act.

There is no need to limit the bond to judgments where an NVOCC had an opportunity or right to representation. Generally, no judgment will be issued in any court of law, whatever its level, unless the NVOCC is first properly served with notice of the action against it. Similarly, we see no need to modify the bond form so that the surety must be notified of all complaints or penalty proceedings. If a surety desires notice of such actions against an NVOCC, it could probably require such notice in a separate agreement outside the standard bond form.

J. NVOCC Bond Amount

Section 23(a) of the 1984 Act permits the Commission to determine an amount for an NVOCC bond satisfactory to insure the financial responsibility of that carrier, but in any event not less than \$50,000. As a result, section 583.4 of the Interim/Proposed Rule requires every NVOCC to file a valid surety bond in the amount of \$50,000. Several commenters question the equity of requiring a single bond amount for all NVOCCs regardless of their size or the amount of business they engage in. One suggests that the amount of the bond should be proportionate to the business generated by an NVOCC, while another recommends that the amount of the bond should be commensurate with the size of an NVOCC's potential obligations to shippers and carriers. NEC would set the bond level at ten percent of the annual gross revenues earned by an NVOCC for services it provides pursuant to a tariff on file with the Commission, subject to a minimum of \$50,000 and a maximum of \$2,000,000.

One ocean freight forwarder urges that licensed and bonded forwarders not be required to obtain an additional bond if they also conduct NVOCC operations. PCC suggests instead that NVOCCs and ocean freight forwarders should be permitted to combine the face amounts of their respective bonds into a single bond. NCBFAA also requests that the Commission clarify that NVOCCs operating from multiple offices need only have one bond.

The surety bond requirement contained in section 583.4(a) is directed only toward an NVOCC. The number of offices an NVOCC may have is irrelevant to this requirement and, therefore, only one

bond is required, provided that the offices are not separately incorporated. As for permitting ocean freight forwarders to operate as NVOCCs without an additional NVOCC bond, the Commission previously addressed this issue in its Clarification Order, stating:

The Commission cannot at this juncture permit the combining of ocean freight forwarder and NVOCC bonds. Each bond is intended to cover separate activities of what are generally separate entities . . . . The users of these services are also in two distinct classes. Besides being contrary to the clear language of the statute, inasmuch as both the freight forwarder provision and the NVOCC provision require separate bonds for separate activities, any attempt to allow one bond to cover both activities could seriously undermine the protection such bonds afford.

We see no reason to alter this position now. Nor do we believe that it would be advisable to permit the combining of an NVOCC bond and an ocean freight forwarder bond into a single, cumulative bond. Such a course of action would create significant monitoring and enforcement problems for the Commission without creating any particular benefits for the industry.

While NVOCCs may differ in size, net worth, extent and quality of service, experience, etc; any attempt to arrive at a different method for determining a bond amount, at this time, may create more problems than it solves. For example, exactly how will an NVOCC's potential liability be measured? The annual gross revenues of an NVOCC for one year may bear no relationship to revenues earned in a future year. In addition, one could argue that as an NVOCC grows, its ability to be responsible for its financial obligations also increases. At this juncture, we believe that it is best to

obtain experience under the existing bond amount before considering any changes to it. We will then be in a better position to judge whether any other method of determining a bond amount is desirable or practicable.

K. Shipper Status Declaration

Section 580.5(d)(25)(i) of the Interim/Proposed Rule states:

(25) *Certification of shipper status and rules applicable to acceptance of cargo for the account of non-vessel-operating common carriers (NVOCC).*

(i) Every common carrier accepting or transporting cargo for the account of a shipper or shippers' association shall ascertain the identity and status of the shipper tendering the cargo, *e.g.*, owner of the cargo, shippers' association, non-vessel-operating common carrier or specified other designation. The common carrier shall state the shipper's status in a clear and legible manner in the shipper identification box on its bill of lading, waybill, or other substitute record of carriage.

A somewhat similar requirement applies to service contracts, although that provision (section 581.11(a)) requires the shipper contract party to certify its status on the signature page of the service contract. In response to several emergency comments, the Commission stayed the effectiveness of section 580.5(d)(25)(i) until a final rule is adopted in this proceeding.

Many of the commenters perceive section 580.5(d)(25)(i) as imposing enforcement obligations on ocean common carriers not contemplated or required by the 1990 Amendments. They argue that the 1990 Amendments are directed at the conduct of NVOCCs only, and that carriers are simply prohibited from transporting cargo for non-complying NVOCCs. One commenter maintains that the Commission

would need specific statutory authority before it could alter or regulate the contents of a carrier's bill of lading. Others raise the possibility that requiring a shipper status declaration on a bill of lading could have unforeseen consequences on other commercial documents and transactions. Votainer contends that shipper status determinations are made even more difficult because the ownership of cargo can change during the course of a shipment. Some commenters note that there are hundreds of thousands of bills of lading issued in any given year, and that recording a status declaration on each would be extremely costly, duplicative, and otherwise burdensome. It is argued that in many instances, carriers and shippers do not engage in direct negotiations, but rather, relevant shipping documents, including bills of lading, are prepared by third parties.

Several commenters question the regulatory purpose or need for the shipper status declaration. They also question the effectiveness of the system inasmuch as it relies on the voluntary admission of persons most likely to prevaricate, i.e., non-complying NVOCCs. TWRA contends that it is pointless to have false status declarations on bills of lading. At the most, many argue that all that should be required is a statement that the shipper is or is not an NVOCC. Other status designations of shippers are allegedly immaterial to the purposes of the 1990 Amendments. If a shipper status declaration is deemed important, TWRA suggests that carriers simply maintain a record of such declarations periodically updated.



DOT also contends that the procedure set up by section 580.5(d)(25)(i) could potentially result in harm or abuse. It suggests that ocean common carriers may be tempted to curtail their dealings with NVOCCs as a class and that NVOCCs may themselves seek to avoid problems by using Canadian or Mexican ports.

We have determined to delete the shipper status declarations requirement originally proposed in section 580.5(d)(25)(i) of the Interim Rule. Upon further consideration, having each shipper state its status on every bill of lading appears to be of questionable regulatory utility. Moreover, removing such a requirement should significantly decrease the burdens of these regulations, without decreasing their overall effectiveness.

However, we continue to believe that a shipper certification requirement for service contracts will produce regulatory benefits including aiding the Commission's enforcement efforts without being unnecessarily burdensome. Unlike bills of lading, which number in the hundreds of thousands per year and are located all over the world, service contracts are required by statute to be filed with the Commission and number approximately 6,500 per year. The Commission, therefore, has the opportunity to closely monitor all service contracts to ensure that they are not improperly used by NVOCCs not in compliance with the Act. The Final Rule will therefore require a service contract shipper to state whether it is: (1) a beneficial owner of cargo; (2) a shippers' association; (3) an NVOCC; or (4) some other designation.

L. Proof of NVOCC Compliance with Statutory Requirements

If a shipper tendering cargo is known by the common carrier to be an NVOCC, then section 580.5(d)(25)(ii) of the Interim/Proposed Rule requires that carrier to ". . . obtain documentation that the NVOCC has a tariff and a bond as required by sections 8 and 23 of the Act before the common carrier accepts or transports cargo for the account of the NVOCC." This provision further states that "[a] copy of the tariff rule published by the NVOCC and in effect under § 580.5(d)(24) may be accepted by the common carrier as documenting the NVOCC's compliance with the tariff and bonding requirements of the Act." Carriers that comply with this procedure are absolved from liability under section 10(b)(14) of the 1984 Act, unless a carrier ". . . had reason to know such certification or documentation of NVOCC tariff and bonding was false."

Several commenters have suggested that the Commission should establish a standard practice with respect to common carrier scrutiny of NVOCC compliance. This would provide useful guidance as to what the Commission considers adequate and at the same time would avoid ad hoc, arbitrary procedures. On the other hand, certain carrier interests have proposed that the Final Rule should make clear that carriers can avoid liability by other means and that the obtaining documentation requirement is merely illustrative of such other means. The Japan Conferences would have the Commission expressly broaden the "safe harbor" protection provided by section 580.5(d)(25)(iii) to other methods of assuring NVOCC compliance. If the "documentation" requirement is retained, TWRA contends there is a conflict as to whether a carrier need simply

"review" a copy of the NVOCC's tariff rule or must obtain actual documentation that the NVOCC is tariffed and bonded. If a carrier has reason to suspect that a shipper is an NVOCC, IANVOCC would require that it obtain a copy of the bond and the title page of the NVOCC's tariff in addition to a copy of Rule 24.

Several alternatives to the documentation requirement have also been advanced. ANERA et al. suggest that NVOCCs could certify that they are tariffed and bonded on a separate document, provided semi-annually to carriers. Alternatively, these conferences propose that such a certification be included as a stamp on bills of lading. Others have suggested that the Commission assign a five-digit reference number to each NVOCC that files a tariff and bond. This allegedly would be consistent with the Commission's present treatment of ocean freight forwarders. One commenter urges the Commission to establish a 24-hour telephone line, accessible through a modem, that would contain tariff and bond data.

The most widely endorsed alternative to the documentation requirement is a Commission published list of NVOCCs who are tariffed and bonded or a list prepared by a commercial service. A variant to this proposal is a Commission list of non-complying NVOCCs. The South/Central American Conferences note that the Commission has the responsibility for ensuring compliance with the 1990 Amendments and contend that the Commission should consequently be responsible for informing the public. They submit that a Commission list would be consistent with one of the goals of the Merchant Marine and Fisheries Committee - protecting the users of

NVOCC services. Streamline also notes that shippers, and not just carriers, have a substantial interest in identifying NVOCCs who are in compliance with the Act. NEC submits that if the Commission publishes a list, the work will be performed once. On the other hand, NEC believes that if the Commission leaves a vacuum in this area, multiple persons will provide fragmented and perhaps duplicative services.

We believe that the simplest and easiest method of obtaining proof of NVOCC compliance is through a Commission list of all NVOCCs that are tariffed and bonded. The FMC's Bureau of Tariffs, Certification and Licensing now has the ability to provide such information from its database. The Commission will, therefore, provide an accurate list of complying NVOCCs on a periodic basis. Private vendors will be free to disseminate the information on the list to those requesting it. Carriers are not required to consult the list. They may review a copy of an NVOCC's tariff Rule 24. If a common carrier uses either method, it will be deemed to have met its statutory obligations. Carriers remain free to require some other method of proving that an NVOCC is in compliance. However, if they do so, they must specify in their tariffs the procedures they will apply, and then apply them on a uniform, nondiscriminatory basis.

The Federal Maritime Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291, dated February 17, 1981, 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, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units or small governmental 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 3072-0053. Public reporting burden for this collection of information is estimated to average 113 hours per response, including the 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 or any other aspect of this collection of information, including suggestions for reducing this burden, to Norman W. Littlejohn, Director, Bureau of Administration, Federal Maritime Commission, Washington, D.C. 20573; 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:

46 CFR Part 583

Freight; Maritime carriers; Rates; Reporting and  
record keeping requirements; Surety bonds.

46 CFR Part 580

Cargo; Cargo vessels; Freight; Exports;  
Harbors; Imports; Maritime carriers; Rates;  
Reporting and record keeping requirements;  
Surety bonds; Water carriers; Water  
transportation.

46 CFR Part 581

Freight; Maritime carriers; Rates; Reporting  
and record keeping requirements.

Therefore, pursuant to 5 U.S.C. 553, sections 8, 10, 11, 12,  
13, 17 and 23 of the Shipping Act of 1984, 46 U.S.C. app. 1710,  
1709, 1710, 1711, 1712, 1716 and 1722, the interim rule amending  
Title 46, Code of Federal Regulations, which was published at 56 FR  
1493 on January 15, 1991, is adopted with changes as follows:

1. New Part 583 is revised to read:

PART 583 - BONDING OF NON-VESSEL-OPERATING COMMON CARRIERS

Sec.

583.1 Definitions.

583.2 Scope.

- 583.3 Proof of financial responsibility, when required.
- 583.4 Surety bond requirements.
- 583.5 Resident agent.
- 583.6 Termination of bond or designation of resident agent.
- 583.7 Proof of Compliance.
- 583.91 OMB control numbers.

APPENDIX A - NON-VESSEL-OPERATING COMMON CARRIER (NVOCC) BOND FORM

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702, 1707, 1709, 1710-1712, 1716 and 1722.

§583.1 Definitions.

In this part:

(a) "*Act*" means the Shipping Act of 1984 (46 U.S.C. app. 1701 et seq.).

(b) "*Common carrier*" means a person holding itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from port or point of receipt to the port or point of destination; and

(2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean

transportation by ferry boat, ocean tramp, or chemical parcel-tanker. As used in this paragraph, 'chemical parcel-tanker' means a vessel whose cargo-carrying capability consists of individual cargo tanks for bulk chemicals that are a permanent part of the vessel, that have segregation capability with piping systems to permit simultaneous carriage of several bulk chemical cargoes with minimum risk of cross-contamination and that has a valid certificate of fitness under the International Maritime Organization Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk.

(c) "*Commission*" means the Federal Maritime Commission.

(d) "*Non-vessel-operating common carrier*" or "*NVOCC*" means a common carrier that does not operate the vessels by which the ocean transportation is provided and is a shipper in its relationship with an ocean common carrier.

(e) "*Ocean common carrier*" means a vessel-operating common carrier.

(f) "*Person*" includes individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States or of a foreign country.

§583.2 Scope.



This part implements the Non-Vessel-Operating Common Carrier Amendments of 1990, Pub. L. No. 101-595, section 710.

§583.3 Proof of financial responsibility, when required.

(a) Except as provided in paragraph (c) of this section, no person shall provide transportation as a non-vessel-operating common carrier unless a surety bond covering such NVOCC has been furnished to the Commission.

(b) Where more than one entity operates under a common trade name, a separate bond is required for each corporation or person separately providing transportation as a non-vessel-operating common carrier.

(c) Any person which exclusively transports used household goods and personal effects for the account of the Department of Defense is not subject to the requirements this Part.

§583.4 Surety bond requirements.

(a) Prior to the date it commences common carriage operations, every non-vessel-operating common carrier shall establish its financial responsibility by filing with the Commission, simultaneously with its tariff, a valid surety bond on Form FMC-48, in the amount of \$50,000. Bonds must be issued by a surety company found acceptable by the Secretary of the Treasury.

(b) Surety bonds shall be submitted to the Director, Bureau of Tariffs, Certification and Licensing,

Federal Maritime Commission, Washington, D.C. 20573. Copies of Form FMC-48 may be obtained from the Commission's Bureau of Tariffs, Certification and Licensing at the address listed above, or from any of the Commission's district offices located in New York, NY, New Orleans, LA, San Francisco, CA, Hato Rey, PR, Los Angeles, CA, Miami, FL and Houston, TX.

§583.5 Resident agent.

(a) Every non-vessel-operating common carrier not domiciled in the United States shall designate and maintain a person in the United States as legal agent for the receipt of judicial and administrative process, including subpoenas.

(b) If the designated legal agent cannot be served because of death, disability, or unavailability, the Secretary, Federal Maritime Commission, will be deemed to be the legal agent for service of process. Any person serving the Secretary must also send to the NVOCC by registered mail, return receipt requested, at its address published in its tariff on file with the Commission, a copy of each document served upon the Secretary, and shall attest to that mailing at the time service is made upon the Secretary.

(c) Service of administrative process, other than subpoenas, may be effected upon the legal agent by mailing a copy of the document to be served by certified or

registered mail, return receipt requested. Administrative subpoenas shall be served in accordance with §502.134 of this chapter.

(d) Designations of resident agent under paragraphs (a) and (b) of this section and provisions relating to service of process under paragraph (c) of this section shall be published in the NVOCC's tariff in accordance with §580.5(d)(24) of this chapter.

§583.6 Termination of bond or designation of resident agent.

(a) Upon receipt of notice of termination of a surety bond, the Commission shall notify the NVOCC by certified or registered mail at its address published in its tariff on file with the Commission, that the Commission shall, without hearing or other proceeding, suspend or cancel the tariff or tariffs of the NVOCC as of the termination date of the bond, unless the common carrier submits a valid replacement surety bond before such termination date. Replacement surety bonds must bear an effective date no later than the termination date of the expiring bond.

(b) Upon receipt of notice of termination of a designation of resident agent, or upon receipt of alternative service of process upon the Secretary in accordance with §583.5(b), the Commission shall notify the NVOCC by certified or registered mail, at its address

published in its tariff on file with the Commission, that the Commission shall, without hearing or other proceeding, suspend or cancel the tariff or tariffs of the NVOCC effective thirty days after receipt of such notice of termination or alternative service of process upon the Secretary unless the NVOCC publishes in its tariff a replacement designation of an agent in the United States for the receipt of judicial and administrative process before such effective date of suspension or cancellation.

§ 583.7 Proof of Compliance.

(a) No common carrier may transport cargo for the account of a shipper known by the carrier to be an NVOCC unless the carrier has determined that that NVOCC has a tariff and a bond as required by sections 8 and 23 of the Act.

(b) A common carrier can obtain proof of an NVOCC's compliance with the tariff and bonding requirements by:

(1) consulting a current list provided by the Commission of tariffed and bonded NVOCCs; or

(2) reviewing a copy of the tariff rule published by the NVOCC and in effect under § 580.5(d)(24) of this chapter; or

(3) any other appropriate procedure, provided that such procedure is set forth in the carrier's tariff of general applicability as

required by paragraph (d) (25) of section 580.5 of this chapter.

(c) A common carrier that has employed the procedure prescribed in either paragraph (b) (1) or (2) of this section shall be deemed to have met its obligations under section 10(b) (14) of the Act, unless the common carrier knew that such NVOCC was not in compliance with the tariff and bonding requirements.

§ 583.91 OMB control number assigned pursuant to the Paperwork Reduction Act.

The information collection requirements contained in this part have been approved by the Office of Management and Budget (OMB) in accordance with 44 U.S.C. chapter 35 and have been assigned OMB control number 3072-0053.

FEDERAL MARITIME COMMISSION  
NON-VESSEL OPERATING COMMON CARRIER (NVOCC) BOND  
(SECTION 23, SHIPPING ACT OF 1984)

\_\_\_\_\_, as Principal (hereinafter called Principal), and \_\_\_\_\_, as Surety (hereinafter called Surety) are held and firmly bound unto the United States of America in the sum of \$\_\_\_\_\_ for the payment of which sum we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally.

WHEREAS, Principal operates as an NVOCC in the waterborne foreign commerce of the United States, has an NVOCC tariff on file with the Federal Maritime Commission, and pursuant to section 23 of the Shipping Act of 1984 has elected to file this bond with the Commission;

NOW, THEREFORE, the condition of this obligation is that the penalty amount of this bond shall be available to pay any judgment for damages against the Principal arising from the Principal's transportation related activities or order for reparations issued pursuant to section 11 of the Shipping Act of 1984, 46 U.S.C. app. § 1710, or any penalty assessed against the Principal pursuant to section 13 of the Shipping Act of 1984, 46 U.S.C. app. § 1712.

This bond shall inure to the benefit of any and all persons who have obtained a judgment for damages against the Principal arising from its transportation related activities or order of reparation issued pursuant to section 11 of the Shipping Act of 1984, and to the benefit of the Federal Maritime Commission for any penalty assessed against the Principal pursuant to section 13 of the Shipping Act of 1984. However, this bond shall not apply to shipments of used household goods and personal effects for the account of the Department of Defense.

The liability of the Surety shall not be discharged by any payment or succession of payments hereunder, unless and until such payment or payments shall aggregate the penalty of this bond, and in no event shall the Surety's total obligation hereunder exceed said penalty regardless of the number of claims or claimants.

This bond is effective the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, and shall continue in effect until discharged or terminated as herein provided. The Principal or the Surety may at any time terminate this bond by written notice to the Federal Maritime Commission at its office in Washington, D.C. Such termination shall become effective thirty (30) days after receipt of said notice by the Commission. The Surety shall not be liable for any transportation related activities of the Principal after the expiration of the thirty (30) day period but such termination shall not affect the liability of the Principal and Surety for any event occurring prior to the date when said termination becomes effective.

The underwriting Surety will promptly notify the Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, D.C. 20573, of any claim(s) against this bond.

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

(Please type name of signer under each signature.)

Individual Principal or Partner \_\_\_\_\_ Business Address \_\_\_\_\_

Individual Principal or Partner \_\_\_\_\_ Business Address \_\_\_\_\_

Individual Principal or Partner \_\_\_\_\_ Business Address \_\_\_\_\_

Trade Name, If Any \_\_\_\_\_

Corporate Principal \_\_\_\_\_

State of Incorporation \_\_\_\_\_

Trade Name, If Any \_\_\_\_\_

Business Address \_\_\_\_\_

(Affix Corporate Seal)

By \_\_\_\_\_

Title \_\_\_\_\_

Corporate Surety \_\_\_\_\_

Business Address \_\_\_\_\_

(Affix Corporate Seal)

By \_\_\_\_\_

Title \_\_\_\_\_

PART 580 - [AMENDED]

2. The authority citation for Part 580 continues to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702-1705, 1707, 1709, 1710-1712, 1714-1716, 1718, and 1722.

3. In Section 580.5 new paragraphs (d)(24) and (d)(25) are revised to read:

§580.5 Tariff contents.

\* \* \* \* \*

(d) \* \* \*

(24) *Bonding of non-vessel-operating common carriers and legal agent for service of process.*

(i) Every non-vessel-operating common carrier (NVOCC) shall state in its tariffs on file with the Commission that it has furnished the Commission a bond in the amount required by §583.4 of this chapter to ensure the financial responsibility of the NVOCC for the payment of any judgment for damages arising from its transportation-related activities, order for reparations issued pursuant to section 11 of the Act, or penalty assessed pursuant to section 13 of the Act. The NVOCC shall state its bond number and identify the name and address of the surety company issuing the bond.

(ii) Every NVOCC not domiciled in the United States shall state in its tariffs the name and address of a person in the United States designated under §583.5 of this chapter as its legal agent for the service of judicial and administrative process, including subpoenas.



the designated legal agent cannot be served because of death, disability or unavailability, the Secretary, Federal Maritime Commission will be deemed to be the NVOCC's legal agent for service of process.

(iii) Service of administrative process, other than subpoenas, may be effected upon the legal agent by mailing a copy of the documents to be served by certified or registered mail, return receipt requested.

(25) *Rules applicable to acceptance of cargo for the account of non-vessel-operating common carriers (NVOCCs).*

If a common carrier adopts a procedure, other than those set forth in sections 583.7(b)(1) or (2) of this chapter, for determining whether NVOCCs for whom it wishes to transport cargo have complied with the tariff and bonding requirements of sections 8 and 23 of the Act, that procedure shall be clearly set forth in its tariff.

PART 581 - [AMENDED]

4. The authority citation for Part 581 continues to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702, 1706, 1707, 1709, 1712, 1714-1716, 1718, and 1722.

5. In Section 581.3 new paragraph (e) is adopted without change and reads as follows:

§581.3 Filing and maintenance of service contract materials.

\* \* \* \*

(e) *Service contracts with non-vessel-operating common carriers.* No ocean common carrier or conference shall execute or file any service contract in which a contract party or an

affiliate of such contract party or member of a shippers' association entitled to receive service under the contract is a non-vessel-operating common carrier, unless such non-vessel-operating common carrier has a tariff and a bond as required by sections 8 and 23 of the Act and Commission regulations under Parts 580 and 583 of this chapter.

6. In Section 581.4 new paragraph (a)(3) is adopted without change and reads as follows:

§581.4 Form and manner.

(a) \* \* \* \*

(3) On the signature page of the service contract, a certification of shipper status in accordance with §581.11.

\* \* \* \* \*

7. New Section 581.11 is revised to read:

§581.11 Certification of shipper status.

(a) The shipper contract party shall certify on the signature page of the service contract its shipper status, e.g., owner of the cargo, shippers' association, non-vessel-operating common carrier, or specified other designation, and the status of every affiliate of such contract party or member of a shippers' association entitled to receive service under the contract. The certification shall be signed by the contract party.

(b) If the certification completed by the contract party under paragraph (a) of this section identifies the contract party or an affiliate or member of a shippers'

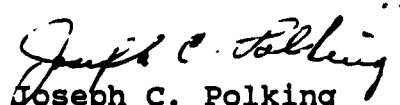
association as a non-vessel-operating common carrier, the ocean common carrier or conference shall obtain proof that such non-vessel-operating common carrier has a tariff and a bond as required under sections 8 and 23 of the Act before signing the service contract. An ocean common carrier or conference can obtain proof of an NVOCC's compliance by consulting a current list provided by the Commission of NVOCCs in compliance with the tariff and bonding requirements or by reviewing a copy of the tariff rule published by the NVOCC and in effect under §580.5 (d)(24) of this chapter.

(c) If an NVOCC joins a shippers' association during the term of a service contract and is entitled to receive service under the contract, the NVOCC shall provide to the ocean common carrier or conference the proof of compliance required by paragraph (b) of this section prior to any shipments under the contract.

(d) An ocean common carrier or conference executing a service contract shall be deemed to have met its obligations under section 10(b)(15) of the Act upon meeting the requirements of paragraphs (a) and (b) of

this section, unless the ocean common carrier or conference knew that such NVOCC was not in compliance with the tariff and bonding requirements.

By the Commission.\*

  
Joseph C. Polking  
Secretary

---

\* Commissioner Quartel's dissent is attached.

ATTACHMENT A

DOCKET NO. 91-1

Commenters

1. Trans-Pacific Freight Conference of Japan and Japan-Atlantic and Gulf Freight Conference ("Japan Conferences").
2. Backhaus & Co.
3. Orion Marine Corporation.
4. LEP International ("LEP").
5. Philippine International Seafreight Forwarders Ass'n., Inc.
6. Trans-Atlantic American Flag Liner Operators ("TAAFLO").
7. Cargonaut.
8. Intercargo Corporation ("Intercargo").
9. F.A.R. Freight Services, Inc.
10. Harry W. Hamacher.
11. Emil Ipsen.
12. Willis Corroon Maritime Inc.
13. Phoenix International Freight Services, Ltd.
14. West Gulf Maritime Association ("WGMA").
15. Pacific Merchant Shipping Association ("PMSA").
16. Allport Freight Limited.
17. World Transport Agency Ltd.
18. Rotterdam Waterway Shipping Agency BV.
19. Peeters & Van Yperen Shipping Co. Ltd.
20. Ross & Associates.
21. Anpac International Line.
22. Distribution Services Ltd.
23. Fédération Française Des Organismes Commissionnaires De Transport.
24. NAVIS Schiffarts-und Speditionsgesellschaft mbH.

25. Technotrans.
26. A. Helgeler & Co.
27. Ross Freight Company Inc.
28. Votainer Consolidation Services (U.S.A.), Inc. ("Votainer").
29. International Association of NVOCCs ("IANVOCC").
30. United States Atlantic and Gulf/Venezuela Steamship Conference; Atlantic and Gulf/West Coast South America Conference; United States/Colombia Conference; United States Atlantic and Gulf/Ecuador Conference; U.S./Central America Liner Association; Central America Discussion Agreement; United States Atlantic & Gulf/Hispaniola Steamship Freight Association; Hispaniola Discussion Agreement; United States Atlantic 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 ("South/Central American Conferences").
31. Transpacific Westbound Rate Agreement ("TWRA").
32. National Customs Brokers and Forwarders Association of America, Inc. ("NCBFAA").
33. USA-North Europe Rate Agreement and North Europe-USA Rate Agreement ("North Europe Conferences" or "NEC").
34. Streamline Shippers' Association, Inc. ("Streamline").
35. U.S. Department of Defense ("DOD").
36. U.S. Department of Transportation ("DOT").
37. International Trade Tracking ("ITT").
38. Air & Sea International, Inc.
39. Anglia Forwarding Ltd.
40. Asia North America Eastbound Rate Agreement; Australia/Eastern U.S.A. Shipping Conference; Israel Eastbound Conference; Israel Westbound Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; U.S. Atlantic & Gulf Western Mediterranean Rate Agreement; South Europe/U.S.A. Freight Conference; and the "8900" Lines ("ANERA et al.").
41. Carolina Freight Carriers Corporation ("Carolina").
42. CDS Line.
43. COPEX I.G.S. BV.

44. Curry Transfer & Storage Co.
45. Coirsa International, Inc.
46. EM Exmare.
47. International Container Transport, Inc.
48. Hamprecht Transport.
49. Michael J. LoPrimo & Co., Inc.
50. Medallion Shipping Lines.
51. S.E.I. Spedition GMBH.
52. TranSeas Express ("Transeas").
53. West Forwarding Services, Inc.
54. Alaska Coast Transport, Inc. ("ACT").
55. Atlantic Container Line ("ACL").
56. BWI Transworld II, Inc.
57. JLK International.
58. NEDRAC, Inc.
59. Ocean Links International USA, Inc.
60. Rohde & Liesenfeld GmbH & Co.
61. American President Lines, Ltd. ("APL").
62. Bermuda Container Line Ltd., Great White Fleet, Ltd. and Transportation Maritima Mexicana, S.A. de C.V. ("BCL et al.").
63. Inter-American Freight Conference ("IAFC").
64. Pacific Coast Council of Customs Brokers and Freight Forwarders Association, Inc. ("PCC").
65. Wilhelmsen Lines A/S.

COMMISSIONER QUARTEL'S DISSENT TO DOCKET NO. 91-1:  
BONDING OF NON-VESSEL-OPERATING COMMON CARRIERS.

These final rules can, at best, be said to be indifferent to the business and economics of the industry regulated. Majority assertions of clarity and fairness notwithstanding, these final rules are, as evidenced by repeated public comments and appeals, an enigma and a sore to this nation's trading partners, and a model of anti-competitive unfairness to America's own small, legitimate, family-owned NVOCC's. The latter, unfortunately, will bear the brunt of this Commission's decision to, among other things, establish a uniform bond level -- rather than to recognize through proportional bonding (as I believe it is required to do, by both law and economic common sense) -- the issues of equity and competition. While the Commission argues that it needs and can wait for experience with the single level bond, it in fact has a long history of evaluating in other segments of this industry the issues of differing size, net worth, extent and quality of service, etc., as they relate to bonding.

The Commission has made a commendable attempt to relieve the burden placed by the underlying statute on a third party -- the vessel-operating carriers -- which requires their shouldering a portion of the FMC's own enforcement responsibilities. In my opinion, the Commission stretched the law to do so -- and this



Commissioner wishes they had shown the same apparent level of interest and consideration in dealing with the NVOCC's.

I also believe that the staff analysis of the cost of these rules is very seriously flawed, and thus clashes with other rules and laws designed to prevent the implementation of burdensome and unnecessary major rules such as this one. These rules will, in fact, not only have a significant economic impact on a very substantial number of small entities, but will significantly and adversely affect competition, employment, innovation, and the ability of many small US-based enterprises to compete with foreign-based enterprises in export markets.

We know that other institutions of government are not immune to the narrow vested interests of large, well-funded entities which present themselves under the guise of the larger public concern. In implementing this unfair and burdensome law, this independent agency, in my view, had latitude to better ameliorate some of the anti-competitive special interest imbalance created by the statute -- for example, by requiring a proportional bond. Instead, these rules, given the glacial speed at which legislative corrections are likely to take place, more than likely sanctify the law's fundamental flaws. In this instance, the "level playing field" this law and these regulations were said to be intended to bring about is not only not level, but is now strewn with new boulders and impediments blocking the path of America's small businesses and consumers.

