

(S E R V E D)
(November 25, 1991)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR PART 550

[PETITION NO. P4-91; Docket No. 91-55]

PUGET SOUND TUG & BARGE CO. --
APPLICATION FOR SECTION 35 EXEMPTION:
HAWAII AND ALASKA TRADES

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, as amended by the Intercoastal Shipping Act, 1933. This amendment of Part 550 adds a new exemption for carriers providing port-to-port service in the Hawaii and Alaska domestic offshore trades. Such carriers may now file on one day's notice any new individual commodity rate, any reductions in existing individual rates, and any new or amendatory tariff regulation, rule or note that does not increase the shipper's cost of transportation. Provisions of the Shipping Act and the Commission's regulations that pertain to any "general decrease in rates" are not affected by this amendment and carriers must continue to comply with those provisions.

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

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Puget Sound Tug & Barge Co. ("Puget") has filed an application seeking two exemptions under section 35 of the Shipping Act, 1916 ("1916 Act"), 46 U.S.C. app. 833a, from the thirty-day tariff notice requirement of section 2 of the Intercoastal Shipping Act, 1933 ("1933 Act"), *id.* 844. One exemption would apply to the domestic offshore trade between the mainland United States (including Alaska) and Hawaii ("Hawaii Trade"). It would permit effectiveness on one day's notice of:

(1) all new tariff rules, regulations or notes which would reduce the shipper's cost of transportation or result in no change in the shipper's cost; and

(2) all changes in existing tariff rules, regulations or notes which would reduce the shipper's cost of transportation or result in no change in the shipper's cost.

The other exemption would apply to the trade between Alaska and the "lower 48" United States ("Alaska Trade"). It would permit effectiveness on one day's notice of:

(1) new individual commodity rates or reductions in existing commodity rates;

- (2) all new tariff rules, regulations or notes which would reduce the shipper's cost of transportation or result in no change in the shipper's cost; and
- (3) all changes in existing tariff rules, regulations or notes which would reduce the shipper's cost of transportation or result in no change in the shipper's cost.

A notice of the filing of Puget's Application appeared in the Federal Register. 56 FR 40,330. Comments in support of the Application were filed by Totem Ocean Trailer Express, Inc. ("TOTE"), and Matson Navigation Company, Inc. ("Matson"). Comments in opposition were filed by the Caribbean Shippers Association, Inc. ("CSA").

THE APPLICATION

Puget states that, doing business as Hawaiian Marine Lines, it provides direct, all-water service between mainland United States ports and Hawaii.¹ It also offers joint through service between interior mainland points and Hawaii under motor/water and rail/water tariffs filed at the Interstate Commerce Commission ("ICC"). Puget estimates that about thirty percent of its Hawaiian traffic moves under its FMC tariff.

Puget asserts that all its competitors in the Hawaii Trade carry substantial amounts of cargo under ICC tariffs, with the exception of Percy Marine, Inc., a small tug-and-barge operator, and that it competes under its FMC tariff for many of the commodities carried by the other carriers under their ICC tariffs. It points out that ICC regulations permit reductions on one day's

¹ Tariff No. 8, FMC-F No. 7.

notice in any "charge, rule or other provision" as well as in any "rate." "Thus," Puget states, "all carrier-imposed transportation costs may be reduced on one day's notice when filed in an ICC tariff, irrespective of whether the charge or cost appears as a commodity rate, a tariff note or in the tariff's rules section." Application at 5. Under the Commission's existing Hawaii exemption, 46 CFR 550.1(b), Puget may reduce commodity rates in its FMC tariff on one day's notice, but reductions in ancillary charges or rate-affecting tariff rules and notes remain subject to thirty days' notice. Puget contends that the present difference in notice periods for tariff rules, notes and ancillary charges places it at a competitive disadvantage.

With respect to the Alaska Trade, Puget similarly states that, doing business as Pacific Alaska Line, it provides direct, all-water service between Pacific Northwest ports and Alaska.² It also offers joint through service between interior "lower 48" points and Alaska under two motor/water tariffs filed at the ICC. Puget estimates that about ten percent of its Alaskan traffic moves under its FMC tariff.

Puget states that its major competitors in the Alaska Trade operate exclusively under ICC tariffs except for Western Pioneer, Inc., a small carrier that provides only port-to-port service. It asserts that it competes under its FMC tariff for many of the same commodities carried by the other carriers under their ICC tariffs, including cement, iron and steel items and vehicles. In addition,

² Tariff No. 1, FMC-F No. 4.

Puget submits it serves some small and remote Alaskan ports only once or twice a year, that decisions to call at these locations are often made on short notice, and that it therefore is important to be able to file tariff reductions applicable to these ports on one day's notice.

COMMENTS

A. Matson and TOTE

The brief comments filed by Matson and TOTE support Puget's Application without reservation. It may be noted that, although Puget did not list TOTE as a competitor in the Alaskan Trade, TOTE states that it provides both all-water, FMC-regulated service and intermodal, ICC-regulated service to Alaska and argues that granting Puget's Application will eliminate "unnecessary and cumbersome differences" between its tariffs and "unnecessary discrimination against shippers preferring all-water service." Comment at 2.

B. CSA

CSA opposes Puget's Application for essentially the same reasons it has advanced in previous section 35 exemption proceedings. It argues that the result of allowing rate actions to go into effect on one day's notice "is to improperly shift the burden of proof as to the reasonableness of a given filing from the carrier to the complaining shipper," Comments at 3, and that the carriers' request that exemptions be broadened to include rate-reducing changes in tariff notes and rules is an indication that

"carriers are improperly using rules, surcharges and the like, to alter their basic rate structure." Id. at 4. It also contends that what appears to be a reduced rate may actually involve an increase in total costs to shippers when the formerly applicable rate is a low Cargo NOS rate.

DISCUSSION

Section 35 empowers the Commission to exempt "any specified activity * * * from any requirement of the Shipping Act, 1916, or Intercoastal Shipping Act, 1933, where it finds that such exemption will not substantially impair effective regulation . . . , be unjustly discriminatory, or be detrimental to commerce." 46 U.S.C. app. 833a. The purpose of Puget's Application is to eliminate a claimed competitive disadvantage Puget faces because of the thirty-day notice requirement on FMC tariff reductions. Over the last three years, the Commission has granted a series of exemptions to remove similar disadvantages. Application of Trailer Marine Transport Corporation Under Section 35 of the Shipping Act, 1916, ___ F.M.C. ___, 25 S.R.R. 1660, 1663 (1991); Tropical Shipping & Construction Co., Ltd. -- Application for Section 35 Exemption, _ F.M.C. ___, 25 S.R.R. 1471, 1475 (1991); Application of Sea-Land Service, Inc. for Exemption Under Section 35 of the Shipping Act, 1916, ___ F.M.C. ___, 25 S.R.R. 660, 662 (1990); Tariff Filing Notice Periods -- Exemption, ___ F.M.C. ___, 24 S.R.R. 1604, 1605 (1989); Matson Navigation Co., Inc. -- Application for Section 35

Exemption, ___ F.M.C. ___, 24 S.R.R. 1518, 1522 (1989). We have observed that if such exemptions are approved,

. . . FMC-regulated carriers will be able to compete on an equal footing with ICC-regulated carriers with respect to rate reductions. This should be of substantial benefit to the shipping public. FMC-regulated carriers and shippers will be able to negotiate lower rates as the need arises and the shipping public will be able to take advantage of these rates immediately, not thirty days later when it may be too late.

Application of Sea-Land Service, Inc., 25 S.R.R. at 662.

Puget's Application meets the showing required in the previous cases. It has demonstrated that its FMC-regulated services are competitive with carriers offering ICC rates and that the thirty-day notice requirement has operated or will operate to its detriment in the Hawaii and Alaska Trades. CSA's lone comments in opposition are identical to its submission in Application of Trailer Marine Transport Corporation, which the Commission rejected, stating:

Although CSA appears correct when it states that most carriers have both ICC and FMC-regulated tariffs, it does not necessarily follow that carriers can suffer no harm as a result of the 30-day notice requirement of the 1933 Act. The carrier's ability to shift cargo from one tariff to another may be limited by the needs and desires of the shippers served by the carrier. For example, the shipper may prefer to move its cargo under a port-to-port rate rather than a joint-through intermodal rate. In sum, there is no clear indication that carriers are misusing the exemptions that have been previously granted by the Commission and will misuse the exemption requested here.

25 S.R.R. at 1663.

As a general matter, rate or cost reductions benefit shippers and rarely engender protests or regulatory concerns. It has been

thirteen years since the Commission investigated a rate decrease.³ CSA's allegation that carriers have been improperly using surcharges and tariff rules to disguise changes in their rate structures is nonspecific and unsupported. Its charge that new commodity rates are actual increases if they replace a Cargo NOS rate is similarly not tied to any alleged practice on the part of Puget. Generally, it may be fairly observed that Cargo NOS rates are usually much higher than specific commodity rates; the filing of a new commodity rate (often as a result of a bargain struck by the carrier with a new customer) thus typically represents a decrease in costs, not an increase. The Commission is satisfied that the requested exemptions will not substantially impair effective regulation, be unjustly discriminatory, or be detrimental to commerce.

The Commission concludes that Puget's Application meets the standards of section 35 of the 1916 Act. Accordingly, subject to the limitation described below, the Commission will grant the Application.

Although the exemptions will permit a carrier to make a change to a tariff rule, regulation or note affecting a large number of rate items, a carrier may not use the exemptions to institute a general decrease in rates on one day's notice.⁴ Puget has not

³ Trailer Marine Transport Corporation -- Proposed Reduced and Initial Through Rates and Provisions Between U.S. Atlantic and Gulf Ports in the U.S. Virgin Islands, 21 F.M.C. 997 (1979).

⁴ Section 1 of the 1933 Act, 46 U.S.C. app. 843, defines a "general decrease in rates" as:

(continued...)

requested an exemption from any of the provisions of the 1933 Act and the Commission's regulations that pertain to a general rate decrease. The provisions in the 1933 Act that apply to a general decrease in rates include a requirement that any such decrease be filed on sixty days' notice. Rule 67 of the Commission's Rules of Practice and Procedure requires the carrier to accompany any general decrease in rates with testimony and exhibits of such composition, scope and format that they will serve as the carrier's entire direct case in the event the matter is set down for hearing. These exemptions do not relieve carriers from complying with those provisions.

Although the Commission, as an independent regulatory agency, is not subject to Executive Order 12291, dated February 17, 1981, it has nonetheless reviewed the rule in terms of this Order and has determined that this rule is not a "major rule" as defined in Executive Order 12291 because it will not result in:

- (1) an annual effect on the economy of \$100 million or more;
- (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

⁴(...continued)

. . . any change in rates, fares, or charges which will (A) result in a decrease in not less than 50 per centum of the total rate, fare, or charge items in the tariffs per trade of any common carrier by water in intercoastal commerce; and (B) directly result in a decrease in gross revenue of such carrier for the particular trade of not less than 3 per centum.

(3) significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

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 and small government jurisdictions.

List of Subjects in 46 CFR Part 550:

Maritime carriers; Reporting and recordkeeping requirements.

Therefore, pursuant to 5 U.S.C. 553, sections 18, 35 and 43 of the Shipping Act, 1916, 46 U.S.C. app. 817, 833a and 841a, and section 2 of the Intercoastal Shipping Act, 1933, 46 U.S.C. app. 844, Part 550 of Title 46, Code of Federal Regulations, is amended as follows:

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. Section 550.1 is amended by revising paragraph (b) and by adding paragraph (f) to read as follows:

550.1 Exemptions

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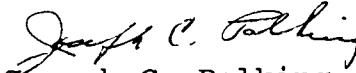
(b) Carriers providing port-to-port transportation between the continental United States (including Alaska and the District of Columbia) and Hawaii may publish new individual commodity rates, or

reductions in existing individual rates, or any new or amendatory tariff regulation, rule or note that does not increase the shipper's cost of transportation, on one day's notice, and to that extent are exempted from the notice requirements of the Act and the rules of this part; provided, however, that such carriers must comply with those provisions of the Act and the Commission's regulations that pertain to any "general decrease in rates."

* * * * *

(f) Carriers providing port-to-port transportation between the continental United States (including the District of Columbia but excluding Alaska) and Alaska may publish new individual commodity rates, or reductions in existing individual rates, or any new or amendatory tariff regulation, rule or note that does not increase the shipper's cost of transportation, on one day's notice, and to that extent are exempted from the notice requirements of the Act and the rules of this part; provided, however, that such carriers must comply with those provisions of the Act and the Commission's regulations that pertain to any "general decrease in rates."

By the Commission.


Joseph C. Polking
Secretary

