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FEDERAL MARITIME COMMISSION

DOCKET NO. 92-20

SERVICE CONTRACTS IN FOREIGN-TO-FOREIGN TRADES

ORDER DISCONTINUING PROCEEDING

On May 1, 1992, the Federal Maritime Commission ("FMC" or "Commission") published in the Federal Register (57 Fed. Reg. 18,855) an Advance Notice of Proposed Rulemaking ("ANPR") concerning service contracts that include, within their geographic scope, foreign-to-foreign ocean transportation as well as U.S.-foreign transportation. Such contracts are generally referred to as "mixed" or "global" service contracts. The ANPR solicited comments on the feasibility and desirability of a proposed rule that would allow such contracts to be filed with the Commission on a voluntary basis. Comments were received from parties representing various segments of the ocean transportation industry and from a U.S. government agency.

BACKGROUND

The ANPR reviewed the requirements of the Shipping Act of 1984 governing service contracts filed with the Commission.[1] It noted

[1] A service contract is defined by section 3(21) of the 1984 Act as . . .

> . . . a contract between a shipper and an ocean common carrier or conference in which the shipper makes a

(continued...)

that FMC regulations currently limit the scope of service contracts that may be filed as follows:

> Service contracts shall apply only to transportation of cargo moving from, to or through a United States port in the foreign commerce of the United States.

46 C.F.R. § 581.2. That regulation was promulgated in Docket No. 86-6, Service Contracts, ___ F.M.C. ___, 24 S.R.R. 277 (1987), where the Commission, in rejecting the argument that it should assert jurisdiction over service contracts that include foreign-to-foreign traffic because shippers and carriers sometimes negotiate

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[1](...continued)
commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level - such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party.

46 U.S.C. app. § 1702(21). Section 8(c) requires that . . .

> . . . each [service] contract * * * shall be filed confidentially with the Commission, and at the same time, a concise statement of its essential terms shall be filed with the Commission and made available to the general public in tariff format, and those essential terms shall be available to all shippers similarly situated. The essential terms shall include -
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> (1) the origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements;
> (2) the commodity or commodities involved;
> (3) the minimum volume;
> (4) the line-haul rate;
> (5) the duration;
> (6) service commitments; and
> (7) the liquidated damages for nonperformance, if any.

Id. § 1707(c).

a single contract covering U.S.-foreign and foreign-to-foreign cargo movements, stated:

> In arguing that the scope of service contracts should be broad enough to include foreign-to-foreign cargo, the commenting parties appear to be treating the issue as purely one of policy which is within the Commission's discretion to decide. The Commission, however, cannot expand by its own regulations the power given to it by Congress.

Id. at 284. The ANPR also pointed to Austasia Intermodal Lines, Ltd. v. FMC, 580 F.2d 642 (D.C. Cir. 1978), Puerto Rico Ports Authority v. FMC, 919 F.2d 799 (1st Cir. 1990), and Foreign-to-Foreign Agreements -- Exemption, 24 S.R.R. 1448 (1988), reconsideration denied, 25 S.R.R. 455 (1989), aff'd sub nom. Transpacific Westbound Rate Agreement v. FMC, 951 F.2d 950 (9th Cir. 1991), as authority for the proposition that the Commission could not assert jurisdiction over the foreign-to-foreign provisions of mixed service contracts even if such contracts were permitted to be filed.

The ANPR then noted that the prohibition against filing mixed service contracts requires in effect that the U.S.-foreign provisions of such contracts be treated as a separate contract. The ANPR suggested that, while it is clear that the FMC has and seeks no jurisdiction to require the foreign-to-foreign provisions to be filed, it might be possible for the Commission to allow by regulation the voluntary filing of complete mixed contracts as a matter of information to the public or convenience to the contract parties. The ANPR stated that, while in Foreign-to-Foreign Agreements -- Exemption, the FMC rejected arguments that carriers

should be able to file foreign-to-foreign agreements voluntarily, that holding was based in part on antitrust immunity considerations which may not arise in connection with service contracts.

In addition to the issue of the Commission's authority to accept mixed service contracts on a voluntary basis, the ANPR solicited comments on other concerns. Perhaps most important, the Commission asked whether it is a matter of fundamental business importance or convenience that it allow the filing of service contracts that include foreign-to-foreign transportation. The ANPR also raised a number of issues related to such filing, e.g., whether the foreign-to-foreign part of a mixed contract would fall under the public "essential terms" requirement, whether similarly situated shippers would be able to demand as a matter of right the same essential terms for foreign-to-foreign transportation, whether the foreign-to-foreign provisions of a mixed contract might operate to bar certain shippers from exercising their "me-too" rights as similarly situated shippers, and whether the Commission would have legal power to enforce section 8(c)'s requirements against the foreign-to-foreign provisions of a voluntarily filed contract.

SUMMARY OF COMMENTS

The comments filed in response to the ANPR are overwhelmingly opposed to proceeding any further toward a proposed rule. Comments in full or partial support of liberalized filing for mixed service contracts were submitted by only four shippers, one carrier (Orient Overseas Container Line, Ltd. ("OOCL")), and the U.S. Department of

Transportation ("DOT"). Opposing comments were filed by three individual carriers,[2] twenty-three carrier conferences and associations,[3] two individual shippers,[4] four shipper groups[5] and the National Customs Brokers and Forwarders Association of America.

A. Supporting Comments

The supporting comments, being few in number, can be summarized in some detail.

ConAgra, Inc., describes itself as "a diversified agribusiness enterprise operating across the entire food chain." Comments at 2. It argues that shippers ought to be able to file mixed service contracts voluntarily, saying that at present it "must separate its

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[2] Crowley Maritime Corporation ("Crowley"), Hanjin Shipping Co., Ltd., and Sea-Land Service, Inc.

[3] Council of European & Japanese National Shipowners' Associations; North Europe-USA Rate Agreement and USA-North Europe Rate Agreement ("North Europe Conferences"); Venezuelan American Maritime Association, Atlantic and Gulf/West Coast South America Conference, United States/Central America Liner Association, Central America Discussion Agreement, United States Atlantic and 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, and Caribbean and Central American Discussion Agreement; Asia North America Eastbound Rate Agreement, The "8900" Lines, South Europe/United States of America Freight Conference, and Israel Trade Conference ("ANERA et al."); Trans-Pacific Freight Conference of Japan and Japan-Atlantic and Gulf Freight Conference ("Japan Conferences"); and Transpacific Westbound Rate Agreement.

[4] Minnesota Mining and Manufacturing Company ("3M") and Weyerhauser Paper Company.

[5] Agriculture Ocean Transportation Coalition, American Import Shippers Association, American Paper Institute, Inc., and National Industrial Transportation League.

traffic for contracting purpose on the basis of regulatory jurisdiction rather than on the basis of business considerations." Id. at 5. According to ConAgra, voluntary filing should make section 8(c)'s "essential terms" publication requirement applicable to contract terms covering foreign-to-foreign traffic only if those terms affect the terms applicable to U.S.-foreign traffic. ConAgra further argues that parties to a mixed contract should not be required to separate cargo and service commitments for U.S.-foreign and foreign-to-foreign shipments, saying that if the foreign-to-foreign shipments are a factor in determining the rates applicable to FMC-regulated traffic, the Commission would thereby be empowered "to audit the carrier's records to the extent necessary to confirm that such volume commitment has been satisfied." Id. at 7.

Hiram Walker & Sons, Inc., states that "it is a matter of convenience to combine all business opportunities and trade lanes into one global package, regardless of origin and destination, and regardless of commodities involved." Comments at 1. It asserts that the current regulation causes unnecessary paperwork "with split filings and subsequent tracking of commitments." Id. In contrast to ConAgra, Hiram Walker urges that the "essential terms" of a voluntarily filed mixed contract should be broken out between U.S.-foreign and foreign-to-foreign, with similarly situated shippers being able to access only the U.S.-foreign terms. Hiram Walker does not address what approach should be taken to a contract where the U.S.-foreign commitments are affected by the foreign-to-foreign commitments, or vice versa.

Cargill, Inc., states that it and its subsidiaries ship significant quantities of cargo in foreign-to-foreign trades. It has studied the feasibility of global contracts, and believes that such contracts will allow it to negotiate effectively with carriers "in order to achieve the highest quality services at the most economical rates." Comments at 2. Cargill states it would be "preferable" if such contracts were unified documents rather than divided between the U.S.-foreign and foreign-to-foreign aspects. Id. at 3. It argues that there is no legal bar to permitting voluntary filing of such contracts, and that to do so would not create Commission jurisdiction over the contracts but merely recognize "the business realities of international trade." Id. at 4. Cargill argues that it is premature to attempt to write regulations governing equal access to mixed or global contracts, which it suggests may not prove to have much practical significance. It declines to express an opinion on whether the Commission's reporting requirements would apply to the entirety of a voluntarily filed mixed contract.

E. I. du Pont de Nemours and Company ("Du Pont") submits brief comments acknowledging that the "me-too" provisions of section 8(c) would pose problems for global service contracts, particularly if a shipper accesses rates in U.S.-foreign service that are based on global cargo commitments, but the shipper lacks the foreign-to-foreign cargo volume. Du Pont states:

> One possible solution to this problem would be to permit the carrier to voluntarily include in the required essential terms publication the total volume covered by the global contract. All other information and contract

> terms affecting the foreign-to-foreign cargo moves would either not be filed or held in confidence by the FMC.

Comments at 2. Du Pont "strongly opposes" any other application of the Shipping Act or the Commission's regulations to the foreign-to-foreign provisions of mixed or global contracts. Id.

DOT characterizes the current regulation permitting only the U.S.-foreign provisions of a mixed contract to be filed as a "regulatory intrusion into the marketplace," Comments at 2, which serves no "legitimate legal or regulatory need," id. It argues that there is no legal bar to permitting mixed contracts to be filed on a voluntary basis, so long as the Commission does not attempt to apply its substantive jurisdiction over the foreign-to-foreign provisions of such contracts. With respect to the various practical and administrative difficulties which the ANPR listed and sought advice on, DOT states only that carriers should be permitted to decide for themselves how to structure their contracts for filing purposes, choosing whether or not to state the foreign-to-foreign aspects separately from the U.S.-foreign provisions, and whether or not to make the foreign-to-foreign terms available to similarly situated shippers. "The Commission's regulatory concern," DOT says, "should be basically limited to the minimal question of whether the filing option elected by the parties makes the terms of the contract available to similarly situated shippers in a reasonable manner." Id. at 12.

OOCL's brief comment supports in general terms "any regulatory change which enhances the treatment of service contracts as normal legal contracts." Comments at 2. Without addressing any of the

specific issues listed in the ANPR, the carrier states simply that parties to a service contract ought to be able to count "freight which passes between two non-U.S. points" as volume under the contract, if they wish to.

B. Opposing Comments

The opposing comments assert that a change in the current regulation as described by the ANPR would be flawed legally and as a matter of policy. The North Europe Conferences point out that the filing of service contracts is a tariff-filing practice and that, under current law, no tariffs covering foreign-to-foreign ocean transportation are filed. The Conferences ask, "[W]hat conceivable useful purpose could it serve to provide for the voluntary filing of [service contracts] covering 'foreign-to-foreign' commerce when the tariffs on which they are based remain unfiled?" Comments at 6. The Japan Conferences assert that antitrust considerations do arise in connection with voluntary filing of mixed service contracts, since entering into any service contract by a conference "necessarily requires collective ratemaking by members." Comments at 5. Other commenters reject the suggestion that a voluntary filing could give shippers a right to access the foreign-to-foreign provisions of mixed contracts, or that the FMC would have any authority to enforce such a right. Comments of ANERA et al. at 10-11. It is also alleged that:

> The filing of worldwide contracts would also make it exceedingly difficult to enforce the Commission's regulations applicable to the U.S. trades. There would be endless confusion as to what requirements applied, what the Commission could enquire into, what documents could be sought, and what foreign contract actions could

> be attributed to enforcement of U.S. requirements (e.g., discrimination, rebating, etc.). It would make requirements that today are reasonably predictable into a regime of requirements that are ambiguous and uncertain in scope.

Id. at 11. Other potential difficulties are described by the National Customs Brokers and Freight Forwarders Association:

> One can envision service contracts being filed with Commission [sic] which would contain very substantial minimum quantity tonnage requirements, based largely on the foreign-to-foreign component of a multinational shipper. Alternatively, the contracting parties might take the position that foreign-to-foreign tonnage is itself an "essential term" that must be satisfied by any would-be accessing shipper. In either event, the result would be that few shippers would be in a situation to actually "me-too" such a contract. The net effect being that small shippers would be discriminated against in favor of large multinational shippers who could easily meet such terms. This system would unreasonably result in limiting access to service contracts in derogation of the concept of common carriage and small shippers would be forced to pay higher prices.

Comments at 10 (footnote omitted).

On the policy issue of whether it would be a matter of significant business convenience and commercial benefit to permit voluntary filing of mixed service contracts, Crowley asserts that the benefit of such a step would flow only to "a very few large, predominantly foreign (although not exclusively foreign), shippers and carriers." Comments at 4. Sea-Land submits that carriers can enter into multi-lane service contracts under existing law and regulations, and that a proposed rule along the lines discussed in the ANPR would be both unnecessary and counterproductive. The shippers filing opposition comments express concern that their confidential contracts in foreign-to-foreign trades might become public filings at the Commission, that they would incur wasteful

costs and administrative burdens, and that small and medium-sized shippers would face an unfair competitive disadvantage.

DISCUSSION

Upon consideration of the comments, the Commission has determined that this proceeding should be discontinued without advancement toward a proposed rule.

It warrants emphasis that nothing in the 1984 Act prevents ocean carriers and shippers from negotiating mixed or global contracts. Indeed, commenters like Du Pont are currently parties "to a number of global maritime contracts." Du Pont Comments at 1. The requirements of the Act are triggered only if, and only to the extent that, such a contract includes provisions governing U.S.-foreign ocean transportation. If U.S. trades are included as part of the contract, that part must simply be segregated from the remainder of the contract and filed with the Commission.

A number of opposing comments misconstrued the ANPR as an extension of jurisdiction over the foreign-to-foreign component of a mixed contract which it was never the Commission's intent to exercise. Moreover, as a practical matter, acceptance of mixed contracts that would be subject only <u>in part</u> to FMC jurisdiction raises issues regarding compatibility with the requirements imposed by Congress that the essential terms of contracts falling under section 8(c) must be filed, published and made available to "similarly situated" shippers. The ANPR recognized this and posed detailed questions designed to obtain for the Commission as much

information and assistance as possible, so that a solution -- if one existed -- could be reflected in any proposed rule. The few persons filing in support of a proposed rule, however, either have not responded to these concerns to any significant degree or have suggested contradictory approaches. The suggestion that carriers simply be permitted to decide for themselves how to structure and file their service contracts is not consistent with the mandatory terms of section 8(c).

We agree with the comments of Hiram Walker that, if mixed contracts were permitted to be filed, the U.S.-foreign and foreign-to-foreign provisions would have to be stated separately; this would be necessary to ensure that Commission regulation stayed within its proper jurisdictional boundary. The rationale that mixed contracts should be accepted because they represent integrated, unified business arrangements disappears if such contracts are broken out for filing purposes between U.S.-foreign and foreign-to-foreign trade lanes. In short, the existing record indicates that such an approach, while addressing the concerns of opposing comments, would do nothing to facilitate or encourage global or mixed contracts; the segregation would conflict with the commercial rationale behind aggregating world-wide cargo for the purpose of leveraging lower rates in U.S. foreign commerce.

As a final point, the paucity of supporting comments and the wide-ranging opposition -- which includes large and small shippers as well as carriers -- make it impossible to conclude on this

record that voluntary filing of mixed or global service contracts is important to the ocean shipping industry.

THEREFORE, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

Joseph C. Polking
Secretary