FEDERAL MARITIME COMMISSION

46 CFR PART 502

[DOCKET NO. 90-29]

AMENDMENT TO RULES OF PRACTICE AND PROCEDURE;
INTEREST IN REPARATION PROCEEDINGS

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission is adopting a Final Rule that amends Rule 253 of its Rules of Practice and Procedure, 46 CFR § 502.253, Interest in reparation proceedings, specifically to provide a uniform rate of interest on all reparation awards granted under the Shipping Act of 1984 and the Shipping Act, 1916 and to specify the average monthly secondary market rate on six-month U.S. Treasury bills as the applicable interest rate. Under the Intercoastal Shipping Act, 1933, interest on refunds and reparation awards will continue to be computed on the average of the prime rate charged by major banks as published by the Board of Governors of the Federal Reserve System.

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

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

The Commission initiated this proceeding by publishing a notice in the Federal Register, 55 FR 43,386 (October 29, 1990), that it was proposing to amend Rule 253 of its Rules of Practice and Procedure, 46 CFR § 502.253, Interest in Reparation Proceedings. Under the Proposed Rule, interest on awards of reparation for all violations of both the Shipping Act of 1984, 46 U.S.C. app. § 1701 et seq. ("1984 Act") and the Shipping Act, 1916, 46 U.S.C. app. § 801 et seq. ("1916 Act") was to be based on the average monthly rate on six-month U.S. Treasury bills ("T-bill rate"). The Commission noted that this standard was the one that currently applies only to misrating cases because of a technical quirk in adopting final rules to implement the 1984 Act. The Commission further stated that this standard appears appropriate for all 1984 Act and 1916 Act cases for the same reasons as when it was first adopted, i.e., persons to whom reparation has been awarded would have the additional funds to use or invest and should therefore be compensated according to investment rates in money and capital markets. However, because of specific statutory directives, the Commission proposed that interest on refunds and reparation under sections 3 and 4 of the Intercoastal Shipping Act, 1933, 46 U.S.C. §§ 845, 845a ("1933 Act") be computed on the basis of the average of the prime rate charged by major banks.

Four comments were received on the Proposed Rule. Because two of these raised matters which, although significant, were arguably outside the scope of the Proposed Rule, the Commission provided for and received additional comments.

INITIAL COMMENTS

Initial comments on the Proposed Rule were submitted by: Sea-Land Service, Inc. ("Sea-Land"); P&O Containers Limited ("P&O"); a group of five conferences[1] ("Conferences"); and the International Association of NVOCCs ("IANVO").

Sea-Land supports the Proposed Rule but suggests that the final rule specify the "secondary market rate" as the exact T-bill rate which will be applied. Sea-Land contends that this rate is that which the general public can earn on T-bill investments and is, therefore, the most reasonable measure of the investment opportunity lost by a complainant.

The Conferences likewise endorse the Proposed Rule. They believe that by specifying the rate of interest for all reparation proceedings, the Commission will eliminate a potential collateral issue from such proceedings. They also note that the proposed rate of interest is consistent with that currently used for misrating cases under the 1984 Act and is the rate used in civil actions in United States district courts. The Conferences further point out

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[1] The Conferences are the Asia North America Eastbound Rate Agreement, Israel Eastbound Conference, Israel Westbound Conference, United States Atlantic and Gulf Ports/Eastern Mediterranean and North Africa Freight Conference, and U.S. Atlantic & Gulf/Western Mediterranean Rate Agreement.

that the Proposed Rule establishes a uniform rate for all Commission proceedings under the 1984 Act. Lastly, the Conferences contend that the shipping community will be better served by a procedural rule established in advance, rather than one applied on a case-by-case basis.

P&O also supports the Proposed Rule, but questions whether a rulemaking is necessary to achieve this result. It notes that in June 1984, the Commission adopted a revision of Rule 253, after notice and comment rulemaking, that applied the T-bill rate to all reparation proceedings. P&O points out that this rule was never amended or withdrawn by the Commission and argues, therefore, that it must be the version considered as remaining in effect. It submits that the limitation presently appearing in Rule 253 (i.e., only misrating cases) was never adopted pursuant to a rulemaking proceeding, as would have been required for such a substantive change to a rule. P&O suggests, therefore, that the Commission could simply correct Rule 253 by publishing the version announced in June 1984.

IANVO, asserting that the issue before the Commission is the interpretation of the term "commercial rates" as used in section 11(g) of the 1984 Act, 46 U.S.C. app. § 1710(g), argues that use of a six-month T-bill rate, as proposed, contravenes this section, because T-bill rates, by definition, are not "commercial" rates. IANVO submits that companies injured by Shipping Act violations are not investment companies and that the interest portion of their actual injury should be based on the fact that they had to increase

their borrowing rather than decrease their investment activities. It therefore suggests that the Commission adopt the "Bank Prime Loan" rate as published by the Federal Reserve, increased by 1.5 percent. In support of this proposal, IANVO submits a statement by Professor Dennis E. Logue, Associate Dean of the Amos Tuck School of Business Administration at Dartmouth College.

ADDITIONAL COMMENTS

Neither Sea-Land's proposal with respect to specifying the "secondary market rate" for T-bills nor IANVO's proposal that the Commission adopt the Bank Prime Loan rate, plus 1.5 percent, appeared to be within the scope of the Proposed Rule, and no one had been given an opportunity to comment on them. Thus, the Commission published a Request for Additional Comments, 56 FR 15,558 (April 17, 1991), to provide such opportunity. Additional comments were filed by the National Industrial Transportation League ("League") and a group of conferences similar but not identical to the group filing the initial comments ("Conferences 2").[2]

The League supports the position of IANVO that interest on all reparation orders for violations of the 1984 Act and the 1916 Act be set at the Bank Prime Loan rate plus 1.5 percent. Noting that section 11(g) of the 1984 Act requires that complainants be granted

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[2] The additional comments were filed on behalf of Asia North America Eastbound Rate Agreement, Israel Eastbound Conference, The "8900" Lines Agreement, United States Atlantic & Gulf/Western Mediterranean Rate Agreement, and United States Atlantic & Gulf Ports/Eastern Mediterranean and North African Freight Conference.

interest to compensate them for "actual injury," the League maintains that using T-bill rates requires acceptance of the unjustified premise that injured parties are by nature entities who lost investment opportunities by paying unlawful rates. Shippers are, however, the League argues, fundamentally manufacturers or other similar business entities whose operating and capital costs, and thus their borrowing costs, were increased by the unlawful action, and thus should be compensated at their borrowing rates, not the lending rates. Using the Bank Prime Loan rate plus 1.5 percent is reasonable, it asserts, because it approximates what a firm's likely capital costs would be.

Conferences 2 oppose IANVO's position and support Sea-Land's position. They maintain that an award of interest at commercial borrowing rates was not intended by the 1984 Act. They highlight the fact that section 11(g) speaks of the "actual injury" to be compensated as "includ[ing] loss of interest at commercial rates compounded from the date of injury . . . ." (Emphasis supplied.) The use of the emphasized words is said to be consistent with the theory of compensating for lost investment opportunities, but not for the cost of borrowing funds, which is IANVO's theory. Had Congress intended to adopt such an approach, Conferences 2 contend, it would have so indicated, as it did in the 1933 Act, which requires interest on reparation to be "computed on the basis of the average of the prime rate charged by major banks, as published by the Board of Governors of the Federal Reserve System . . . ." See 46 U.S.C. app. § 845a. Conferences 2 point out that the Commission

has consistently awarded interest on reparation for all types of violations of the 1984 Act at the six-month T-bill rate. Lastly, they maintain that Sea-Land's position is appropriate because it would merely allow an injured party to receive a rate of interest available to the general public. Sea-Land's proposal allegedly does not modify the Rule as proposed by the Commission, but only clarifies the exact rate of interest to apply.[3]

DISCUSSION

At the outset, we note that there may be merit to the position advanced by P&O - i.e., that the present limitation on the granting of interest to misrating cases is ineffective because the Commission's June 1984 Final Rule on interest in reparation proceedings was never amended or modified pursuant to notice and comment rulemaking. Prior to enactment of the 1984 Act, Rule 253, as applied to the 1916 Act, was limited to cargo misrating cases. See Interest in Reparation Proceedings, 20 S.R.R. 1511 (1981). However, in proposing a new Rule 253 to implement the 1984 Act, the Commission expressly expanded the scope of the Rule to all reparation proceedings. Docket No. 84-17, Notice of Proposed Rulemaking, 49 FR 17044 (April 23, 1984). When the Commission issued its final Rule 253, it was likewise made applicable to all

[3] The Commission rejected, as untimely and as an unauthorized reply, a letter from Corporate Counsel of P&O in support of Sea-Land's comments mailed after the time for additional comments had expired.

reparation proceedings. See Interest in Reparation Proceedings, 22 S.R.R. 1069 (1984), 49 FR 26054 (June 26, 1984).

Subsequently, on November 5, 1984, the Commission adopted Final Rules relating to Subchapter A of its Rules, the General and Administrative Provisions. The Commission explained that it was making substantive changes to only Part 500 (standards of conduct) and § 502.32 (restrictions on former employees), but that it also made "technical changes" in other provisions in Subchapter A based on its further review of these regulations since the passage of the 1984 Act. See Final Rules in Subchapter A, General and Administrative Provisions, 22 S.R.R. 1298, 1299 (1984). The Commission specifically stated that it was making "no changes in substance" and was, therefore, promulgating these rules as final without the need for comment. Id. Unfortunately, during the course of this process the present limitation was apparently inadvertently included in Rule 253. As a result, it no longer read as applying to all reparation proceedings, but rather only to cargo misrating cases. Such a change could be viewed as "substantive," which could only have been accomplished after notice and comment rulemaking as required by the Administrative Procedure Act, 5 U.S.C. § 553.[4] It, therefore, might be possible for us to revert

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[4] The Administrative Procedure Act contains an exception to the notice and comment requirement for "rules of agency organization, procedure, or practice" (5 U.S.C. § 553), but this exception does not appear to be applicable here. See, e.g., Air Transport Ass'n of America v. DOT, 900 F.2d 369 (D.C. Cir. 1990), vacated on other grounds, 111 S.Ct. 944(1991); National Motor Freight Traffic Ass'n v. United States, 268 F.Supp. 90, 96-97 (D.D.C. 1967), aff'd mem., 393 U.S. 18(1968); Batterton v. Marshall, 648 F.2d 694, 707-08 (D.C. Cir. 1980).

to the June 1984 version of Rule 253, explaining that in doing so we merely rectify the above-described inadvertent error.[5]

Simply to say now that Rule 253 always applied to all reparation proceedings fails, however, to address the basic issue which has emerged in this proceeding - whether interest should be based on an "investment" or a "loan" theory. Although the loan theory advanced by IANVO and the League is not without some support in logic, we conclude that the investment theory is more in keeping with Congress' action with respect to interest under the 1916 and 1984 Acts.

Although the 1916 Act contains no specific language on the payment of interest, the Commission has historically awarded interest as a part of its authority to grant "full reparation" for statutory violations. See, 46 U.S.C. app. § 821.[6] It, moreover, explicitly rejected the "forced loan" theory of the calculation of interest under the 1916 Act in 1981 when it promulgated Rule 253 for the payment of interest at a T-bill rate. See Interest in Reparation Proceeding, 20 S.R.R. at 1513-14.

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[5] The T-bill rate has in fact been treated as applicable in interest computations in proceeding of all types under the 1984 Act since its passage. See e.g., California Shipping Line, Inc. v. Yangming Marine Transp. Corp., 25 S.R.R. 400, 432 (1989), reversed on other grounds, 25 S.R.R. 1212 (1989); Secretary of the Army v. Port of Seattle, 24 S.R.R. 17,32 (1987), aff'd in part, 24 S.R.R. 595 (1987). See also International Association of NVOCCs v. Atlantic Container Line, 25 S.R.R. 675,700-03 (ALJ Kline 1990)

[6] See, e.g., Oakland Motor Car Co. v. Great Lakes Transit Corp., 1 U.S.S.B.B. 308, 312 (1934); United States Borax & Chemical Corporation v. Pacific Coast European Conference et al., 11 F.M.C. 451, 470 (1968), citing L.& N.R.R. v. Sloss-Sheffield Co., 269 U.S. 217, 239 (1925), where the Court recognized the loss of interest on charges unlawfully collected as an element of damages.

Under the 1984 Act, Congress explicitly provided for the award of interest as a part of reparation awards. Section 11(g) of the 1984 Act provides that the "actual injury" for which reparations are to be paid "includes the loss of interest at commercial rates . . . . " (Emphasis supplied.) In determining legislative intent, the Commission must give meaning to all of the language of the statutes it administers. See Volkswagenwerk v. FMC, 390 U.S 261, 275 (1968). Congress could have simply stated that "actual injury includes interest at commercial rates." But the use of the construct "loss of interest" seems to indicate a Congressional intent to treat an interest award as a lost investment opportunity on the part of the injured party. This is the position the Commission took in adopting a new Rule 253 after enactment of the 1984 Act. The notice of proposed rulemaking issued then explained why the Commission was considering the T-bill standard for section 11(g) as follows:

> The term "commercial rates" is interpreted to mean the rates of interest on marketable securities which are widely available to commercial entities. A rate of interest is assessed on reparation awards in order to make the complainant whole. This is intended to compensate the claimant for the loss of monies during the injury period. In theory, the injured party is entitled to compensation for the monies lost plus any interest which might have been received, had those funds been invested during the period.

49 FR at 17044 (April 23, 1984) (Emphasis supplied). The Commission ultimately chose the T-bill rate because it was a benchmark interest rate that established a reasonable level of compensation. 22 S.R.R. at 1072. The Commission further noted that, under Rule 253, the Commission itself would do whatever

calculations were necessary to determine the correct amount of interest, thereby reducing the potential for error. Id. at 1071.

The 1984 Act contains no definition of "commercial rates", nor does the legislative history indicate exactly what was intended by the term. What little discussion of interest exists is consistent with the payment of interest on an "investment theory."[7] The Commission, in establishing its regulations on T-bill rates in 1981, characterized the T-bill rate of interest as "commercial." See 20 S.R.R. at 1513-14; see also 22 S.R.R. at 1072. Although Congress did not specifically discuss this usage, "[t]he longevity of the Commission's stance and congressional inaction suggests the absence of contrary legislative intent . . . ." National Customs Brokers & Forwarders v. United States, 883 F.2d 93, 102, n.11 (D.C. Cir. 1989). Congress advised only that it "expects that the FMC will establish a standard rate of interest and method for compounding that interest." H.R. Rep. No. 53, Part 2, 98th Cong, 1st Sess. 29 (July 1, 1983). Had Congress preferred that the Commission adopt a "loan" theory of interest, it is logical to assume it would have so provided, as it did in the 1933 Act. But Congress showed no such preference with respect to interest under the 1916 and 1984 Acts. Congress has, moreover, generally provided

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[7] See Statement of the National Customs Brokers & Forwarders Association of America, Inc., - Hearings on H.R. 1878 before the Subcommittee on Merchant Marine of the Committee on Merchant Marine and Fisheries, House of Representatives, 98th Cong., 1st Sess. 11 (March 22, 1983): "Forwarders obtaining reparations only for actual injury would be out-of-pocket, since they could not recoup for the loss of the use of money, their costs of litigation or attorneys' fees." (Emphasis supplied.)

a T-bill rate for interest awards on money judgments in civil cases in United States district courts. See 28 U.S.C. § 1961(a).

We conclude that the investment theory is the appropriate one to adopt for interest under the 1916 and 1984 Acts as most in keeping with the language and legislative history of the 1984 Act and the practice under the 1916 Act which Congress did not overturn.

There is no challenge to Sea-Land's suggestion that the secondary market rate for T-bills be used in the computation of interest under the 1916 and 1984 Acts.[8] The secondary rate is the most appropriate as it is the one available to the general public. It is, moreover, the one which is presently used by the Commission's Secretary in calculating interest rates.[9] We will therefore codify this practice in our revision of Rule 253.

Lastly, we adopt as part of the Final Rule the provision in the Proposed Rule dealing with refunds and reparation proceedings under the 1933 Act. That provision is unopposed and merely restates the interest standard set forth in sections 3 and 4 of the 1933 Act. See 46 U.S.C. app. §§ 845 and 845a.

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[8] Although the League challenged the basic approach advocated by Sea-Land, it did not express a preference for the type of T-bill rate to be used if the Commission chose to adopt an "investment" approach to interest computation.

[9] The notice of proposed rulemaking for the 1984 revision making the T-bill rate applicable to all reparation proceedings explicitly stated that "[i]t is proposed that the secondary market interest rates on six-month U.S. Treasury bills be used as the reparations rate of interest." 49 FR 17044 (April 23, 1984).

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 Paperwork Reduction Act, 44 U.S.C. 3501-3520, does not apply to this rule because the amendments to Part 502 of Title 46, Code of Federal Regulations, do not impose any additional reporting or record keeping requirements or change the information collection requirements which require the approval of the Office of Management and Budget.

List of Subjects in 46 CFR Part 502:

Administrative Practice and Procedure

Therefore, pursuant to 5 U.S.C. 551, 553, and 559, Part 502 of Title 46 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 502 continues to read as follows:

Authority: 5 U.S.C. 504, 551, 552, 553, 559; 12 U.S.C. 1141(a); 18 U.S.C. 207; 26 U.S.C. 501(c)(3); 28 U.S.C. 2112(a); 46 U.S.C. app. 817, 820, 821, 826, 841a, 1114(b), 1705, 1707-1711, 1713-1716; E.O. 11222 of May 8, 1965 (30 FR 6469); and 21 U.S.C. 862.

2. Section 502.523 is revised to read as follows:

§ 502.253 Interest in reparation proceedings.

Except as to applications for refund or waiver of freight charges under section 502.92 and claims which are settled by agreement of the parties, and absent fraud or misconduct of a party, interest granted on awards of reparation in complaint proceedings instituted under the Shipping Act of 1984, the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, will accrue from the date of injury to the date specified in the Commission order awarding reparation. Compounding will be daily from the date of injury to the date specified in the Commission order awarding reparation. Normally, the date specified within which payment must be made will be fifteen (15) days subsequent to the date of service of the Commission order.

(a) On awards of reparation granted under the Shipping Act of 1984, or the Shipping Act, 1916, interest shall be computed on the basis of the average monthly secondary market rate on six-month U.S. Treasury bills commencing with the rate for the month that the injury occurred and concluding with the latest available monthly

U.S. Treasury bill rate at the date of the Commission order awarding reparation. The monthly secondary market rates on six-month U.S. Treasury bills for the reparation period will be summed up and divided by the number of months for which interest rates are available in the reparation period to determine the average interest rate applicable during the period.

(b) On refunds ordered under section 3(c)(2) and awards of reparation granted under section 4 of the Intercoastal Shipping Act, 1933 interest shall be computed on the basis of the average of the prime rate charged by major banks, as published by the Board of Governors of the Federal Reserve System during the period to which the reparation applies. [Rule 253.]

By the Commission.[10]

Joseph C. Polking
Secretary

[10] Commissioner Quartel's dissent is attached.

Commissioner Quartel's Dissent to Docket No. 90-29

The Commission's adoption of an "investment theory" (and thus the T-Bill rate) for reparations for violations of the 1984 Act and the 1916 Act is inconsistent with the explicit language of section 11(g) of the 1984 Act, which requires that complainants be granted interest to compensate them for "actual injury." That the Commission has a history, as described in the majority opinion, of incorrectly applying the standard is no excuse for its continuance.

The proper standard for the Commission to have taken is that proposed by the International Association of NVOCC's and supported by other shippers (eg, the National Industrial Transportation League), that is, at the commercial loan rate of Bank Prime plus 1.5 percent.

The majority opinion reflects both a persistent Commission bias towards carriers and against shippers; and a manifest inability to understand the real world transactions which occur in commercial markets.