

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: Reconsideration of Final Rule.

SUMMARY: On October 8, 1991, the Federal Maritime Commission adopted a Final Rule implementing the Non-Vessel-Operating Common Carrier Amendments of 1990. Subsequently, the Commission received a Petition for Stay and Reconsideration or Clarification of the Final Rule from a conference of ocean common carriers and three individual vessel-operating common carriers. Upon reconsideration, the Commission has clarified its procedures for issuance of its list of NVOCCs in compliance with the 1990 Amendments and further clarified that common carriers can rely on an NVOCC's Tariff Rule No. 24 for a period of six months.

EFFECTIVE DATE: Upon publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

On October 8, 1991, the Commission adopted a Final Rule to implement the Non-Vessel-Operating Common Carrier ("NVOCC") Amendments of 1990 ("1990 Amendments"), 56 FR 51987. The Rule became effective 30 days after publication in the Federal Register, i.e., on November 18, 1991. The Commission now has before it a Petition for Stay and Reconsideration or Clarification of the Final Rule ("Petition") filed by the Inter-American Freight Conference, Bermuda Container Line Ltd., Great White Fleet Ltd., and Transportacion Maritima Mexicana, S.A. de C.V. ("Petitioners"). A reply to the Petition was received from the Pacific Merchant Shipping Association ("PMSA").

THE PETITION

Petitioners raise concerns with two parallel provisions of the Final Rule - sections 583.7(b) and 581.11(b). First, they note that the Supplementary Information to the Final Rule indicates that section 583.7(b)(1) permits carriers to consult and rely on a list of tariffed and bonded NVOCCs provided by the Commission and that such a list will be updated "periodically." Petitioners are concerned that there may be delays in the distribution and receipt of the lists and, therefore, suggest that a period of effectiveness be designated on each list. They also urge that new lists be issued sufficiently in advance of the expiration date of the current list so that there would be no hiatus between the effectiveness of each list and its successor. Reconsideration is

said to be appropriate here because the provision relating to such lists appeared for the first time in the Final Rule.

Second, Petitioners state that, under section 583.7(b)(2) of the Final Rule, carriers would be required to review the Commission's tariff files at the time of every shipment in order to determine whether an NVOCC has a tariff on file with an appropriate Rule No. 24. They believe that neither the Final Rule nor the Supplementary Information indicates that a carrier may rely on a copy of Rule No. 24 provided by an NVOCC. Petitioners believe that because the Commission previously permitted a six-month period of reliance on NVOCC tariff rules, and given the lack of any clear statement on the subject in the Final Rule, that no such period of reliance is permitted under the Final Rule.

Petitioners further argue that reconsideration is the more appropriate remedy because it could result in changes to the text of the Final Rule. A less preferable, but seemingly acceptable, remedy would, in their opinion, be an order of clarification. Lastly, in order to permit comment on their Petition, Petitioners suggest that the Final Rule be stayed.

#### REPLY TO PETITION

Only one reply was received in response to the Petition. The Pacific Merchant Shipping Association, representing 45 ocean carriers on the West Coast, supports the Petition. PMSA likewise contends that an expiration date on the Commission's list of complying NVOCCs is necessary to eliminate confusion and that

carriers should be permitted to consult a copy of an NVOCC's Tariff Rule No. 24. PMSA claims that, if carriers must verify every shipment of a particular NVOCC, they will be subject to an unreasonable burden.

#### DISCUSSION

As an initial matter, Petitioners' request for a stay of the Final Rule has been mooted. Petitioners filed their Petition on November 12, 1991, six days before the Final Rule was to become effective. Given the time period for replies to petitions, the Commission was not in a position to address the merits of the stay request until after the Final Rule had actually gone into effect. See 46 C.F.R. § 502.262. In any event, we do not believe that a stay would have been appropriate under the circumstances.

Petitioners' concern about their perceived inability to consult a copy of an NVOCC's Tariff Rule No. 24 is unwarranted. There is nothing in the language of the Final Rule that requires a common carrier seeking to confirm an NVOCC's compliance to review that NVOCC's tariff on file with the Commission. To the contrary, section 583.7(b)(1) specifically states that a carrier can obtain proof of compliance by ". . . reviewing a copy of the tariff rule published by the NVOCC . . . ." (Emphasis supplied). A common carrier is not required to consult the original NVOCC tariff on file with the Commission, but rather can rely upon any type of copy provided by the NVOCC. A carrier relying on such a copy of an NVOCC's Rule No. 24 will, therefore, be protected from any

liability under section 10(b)(14) of the Shipping Act of 1984, 46 U.S.C. app. § 1709(b)(14).

Petitioners' other concerns about the Commission's list of complying NVOCCs, its period of effectiveness, and the lack of advance notice of its effectiveness, will be alleviated by the procedure recently adopted by the Bureau of Tariffs, Certification and Licensing ("BTCL") to implement the Final Rule. On November 18, 1991, BTCL published its initial list of NVOCCs in "substantial compliance." This list was made retroactive to November 4, 1991, and contains the words "effective until superseded" on its cover. The Commission provided 103 copies of the list to requestors. In addition, BTCL published an Information Bulletin to apprise the industry of the availability of the list. In the future, the Commission intends to publish advance notice of the availability of superseding lists of complying NVOCCs. Such notice will be published in the Federal Register, and the list itself will not become effective until five days after this notice. In an effort to apprise everyone in the ocean transportation industry of new lists of complying NVOCCs, the Commission will also publish an information bulletin that will be available to the trade press.

The Commission recognizes that under the Interim Rule, ocean common carriers or conferences were required to obtain documentation that a known NVOCC was tariffed and bonded. The Supplementary Information to the Interim Rule merely indicated that carriers could require "periodic resubmissions" of such

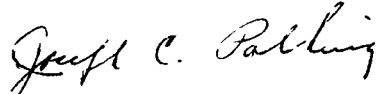
documentation and the Commission, by order of clarification, later interpreted "periodic resubmission" to mean every six months. The Final Rule now requires common carriers to obtain proof of a known NVOCC's compliance. However, the Final Rule and Supplementary Information did not expressly indicate how often a carrier must obtain proof of compliance for a particular NVOCC. It was our intention to continue the six-month policy. Therefore, if a carrier is relying on an NVOCC's Tariff Rule No. 24, it will be able to do so for a period of six months. This will avoid an excessive duplication of effort and is consistent with our prior practice under the Interim Rule. However, if a carrier is relying on the Commission's list of complying NVOCCs, it can do so only until such time as that list is superseded pursuant to the procedure described above.

The Commission does not believe that any modifications to the Final Rule are necessary based on the above discussion. The changes in Commission procedure, together with our clarification of the amount of time within which a carrier can rely on an NVOCC's Rule No. 24, should alleviate any problems carriers are actually experiencing with the Final Rule.

THEREFORE, IT IS ORDERED, That the "Petition for Stay and Reconsideration or Clarification" submitted by the Inter-American Freight Conference, Bermuda Container Line Ltd., Great White Fleet

Ltd., and Transportacion Maritima Mexicana, S.A. de C.V. is granted to the extent indicated above.

By the Commission.

  
Joseph C. Polking  
Secretary