(S E R V E D)
(August 22, 1990)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR PART 580

[DOCKET NO. 88-19]

RULE ON EFFECTIVE DATE OF TARIFF CHANGES

AGENCY: Federal Maritime Commission.

ACTION: Petition for Reconsideration Denied; Lifting of Stay.

SUMMARY: The Federal Maritime Commission denies a Petition for Reconsideration of a Final Rule that requires common carriers to publish in their tariffs a rule specifying that the rates, rules and charges applicable to a given shipment must be those published and in effect on the date the cargo is received by the carrier or its agent, including a connecting carrier in the case of an intermodal through movement.

Additionally, the Final Rule in Docket No. 88-19 was stayed by notice appearing in the Federal Register on July 11, 1989 (54 FR 29036). With the denial of reconsideration, the stay in Docket No. 88-19 is being lifted.

DATE: Effective 60 days after publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

This proceeding finds its genesis in a Petition for Rulemaking filed by the Transpacific Westbound Rate Agreement ("TWRA") on December 17, 1987. TWRA requested that the Federal Maritime Commission ("Commission" or "FMC") initiate a rulemaking proceeding for the purpose of adopting a rule that would preclude the application of any tariff rate, charge or rule to cargo physically received by the ocean carrier prior to the effective date of the tariff provision. By Notice published December 30, 1987, the Commission requested comments on the Petition for Rulemaking. 52 FR 49205.

After consideration of industry comments, Notice was published on August 30, 1988, of a Commission proposal ("Proposed Rule") to amend its foreign tariff filing regulations at 46 C.F.R. Part 580, to require common carriers to publish in their tariffs a rule on the effective date of rate and other tariff changes. 53 FR 33153. The Commission subsequently extended the deadline for receiving public comments on the Proposed Rule to November 1, 1988. 53 FR 38969.

Twenty-six comments were received by the Commission from all segments of the shipping community. These comments reflected a diversity of positions. Thereafter, the Commission adopted the Proposed Rule as a Final Rule, with no changes. The Final Rule, published May 10, 1989, amended 46 C.F.R. §580.5(d)(3) to read as follows:

> (3) Effective date rule. All tariffs shall provide that the tariff rates, rules and charges applicable

> to a given shipment must be those published and in effect when the cargo is received by the ocean carrier or its agent (including originating carriers in the case of rates for through transportation).

54 FR 20127. By its own terms, the Final Rule was to become effective sixty days after publication in the Federal Register.

In response to carrier inquiries, a press release was issued by the FMC Bureau of Domestic Regulation on May 24, 1989, clarifying the deadlines for carrier implementation of the Final Rule in their respective tariffs. The deadline for publication of the new rule in all tariffs was set as July 10, 1989, with August 9, 1989 established as the final date for all carriers to apply the tariff rule to their shipments.

PETITION FOR RECONSIDERATION

On June 5, 1989, the Chemical Manufacturers Association filed a Petition for Reconsideration or Modification of Final Rule ("Petition for Reconsideration" or "Petition"). CMA seeks reconsideration pursuant to Rule 261, or alternatively, the institution of a new rulemaking for the purpose of modifying the regulation at issue.

CMA asserts that the FMC decision contains a "fundamental error" in its conclusion that the pre-existing rule was subject to shipper discrimination. Petition for Reconsideration at 3, 4-7. CMA asserts that the existing practice "by definition" is not discriminatory since it ensures that similarly situated shippers are charged the same rate. According to CMA, the practice neither results in harm nor unfair discrimination since every shipper of

the same commodity will in fact receive the same rate once it has been filed in the carrier's tariff.

CMA asserts further that the purpose of the discrimination prohibition of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. §§1701 et seq, is to ensure that carriers charge published rates on the same basis to all shippers. CMA alleges that the Final Rule would have the unintended and untenable effect of requiring a carrier to charge like shippers different rates for the same service, based solely on a difference in delivery dates on which the shippers tendered the cargo.

REPLIES TO PETITION

In response to the Petition for Reconsideration, thirteen replies were filed on behalf of shipper organizations, the non-vessel operating common carrier ("NVOCC") industry, ocean common carriers and carrier conferences.[1] Entities filing replies are identified in Appendix A.

The replies support the Petition for Reconsideration. While largely repeating positions espoused in earlier comments,[2] the replies variously assert that there is "no demonstrated need for

[1]By order dated June 19, 1989, the Commission granted an extension of time to permit the filing of replies to the Petition for Reconsideration through June 30, 1989. One of the thirteen commenters, ABC Containerline N.V., filed its reply together with a motion for leave to file after June 30, 1989. No party opposed this filing. ABC Containerline's motion will be granted.

[2]Six of the thirteen replies are limited to registering support for CMA's Petition, or to repeating views submitted previously in filed comments.

change"[3] and that there is "nothing in the current carrier practices which discriminates against shippers".[4]

TWRA supports the Final Rule and opposes reconsideration. TWRA notes that CMA's Petition does not meet the requirements for reconsideration under Rule 261, and emphasizes CMA's acknowledgement of such deficiency. TWRA Reply at 3, citing CMA Petition for Reconsideration at 2, n.3. See Discussion, infra.

TWRA rebuts the commenters' assertions of discriminatory effect found in the Final Rule. It urges that the "test" for discrimination proposed by CMA (of two shippers on the same vessel paying different rates) finds no supporting authority in FMC precedent interpreting discriminatory practices rendered unlawful by the 1984 Act.

TWRA states that the statutory purpose of tariff filing is to provide maximum notice of rate actions to shippers and carriers. It asserts that such purpose is not met where a shipper is denied advance notice of secret "pocket rates", nor are the discriminatory effects of such practices eliminated simply because that shipper receives the same freight rate through the happenstance of shipping on the same vessel. TWRA contends that a shipper denied opportunity to learn of a favorable rate offered by one carrier and made available to a competing shipper before the former tenders its cargo, and a carrier unable to learn of or verify another carrier's

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[3]Reply of Inter-American Freight Conference, at 2.

[4]Reply of Tropical Shipping & Construction Co., Ltd., at 1.

rate when asked for a rate quotation by a shipper, are both deprived of informed choice in the marketplace.

The North Europe - U.S. Atlantic Conference and the North Europe - U.S. Gulf Freight Association filed a joint reply in support of the Petition for Reconsideration. These conferences request that the Commission specifically address the impact of the Final Rule upon the rating of "split" shipments, i.e., wherein discrete cargo loads or containers are received by the carrier on different days for movement under a single, comprehensive bill of lading.[5] In addition, the North Europe conferences request both stay of the Final Rule and oral argument upon the Petition.

A stay of the Final Rule was granted by order published July 11, 1989 (54 FR 29036); oral argument was denied by order served September 11, 1989.

DISCUSSION

Rule 261 of the FMC's Rules of Practice and Procedure establishes the standards for the filing of petitions for reconsideration. Rule 261 provides inter alia:

> A petition will be subject to summary rejection unless it:
>
> (1) Specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order;
>
> (2) Identifies a substantive error in material fact contained in the decision or order; or

[5]This suggests neither a legal nor substantive error in the Final Rule, but rather a possible interpretation which could only arise upon implementation of the Final Rule. This issue can be addressed at that time based on a more detailed factual presentation.

> (3) Addresses a finding, conclusion or other matter upon which the party has not previously had the opportunity to comment or which was not addressed in the briefs or arguments of any party. Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received.

46 C.F.R. §502.261(a). Requests for reconsideration based on mistakes of fact must demonstrate that the error is material to the result reached in the decision complained of, i.e. the decisionmaker likely would not have reached the substantive result but for the influence of the erroneous factual material. CMA acknowledges that its arguments for reconsideration essentially raise legal issues not within the confines of Rule 261. Petition for Reconsideration at 2, n.3.[6]

On further consideration of the Final Rule, the Petition for Reconsideration and the replies thereto, the Commission has determined to deny the Petition for Reconsideration and re-instate the Final Rule.[7]

The basis for the Final Rule springs from the statutory jurisdiction of the Commission, which attaches to all transportation between U.S. and foreign ports and between points on any through rate which is established. See section 8(a) of the 1984 Act. The FMC's jurisdictional authority over the provision

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[6]Likewise, replies to the Petition for Reconsideration which basically restate positions advanced at the rulemaking stage do not merit reconsideration. Six of the 13 replies do no more than iterate positions previously stated, without additional substantive comment.

[7]Although the Commission could reject the Petition for failure to meet the procedural requirements of Rule 261, the Petition has been considered on its substantive merits.

of through transportation commences at the port or point of receipt, whether the cargo is tendered to the ocean carrier or to another carrier under arrangement for through transportation to destination. See, Hammer v. Dagenhart, 247 U.S. 251 (1918), overruled on other grounds, United States v. Darby, 312 U.S. 100 (1941); United States v. Freeman, 239 U.S. 117 (1915); Southern Railroad Co. v. Reid, 222 U.S. 424 (1912). See also, Transcontinental Freight Co. v. Director General, 62 I.C.C. 127, 128 (1921) (legal rate is rate in effect on date shipment accepted). The date of delivery thus provides the benchmark date by which to measure the carrier's compliance with the mandate of section 8 of the 1984 Act, 46 U.S.C. app §1707, that the carrier show in its tariffs "all" its rates, charges and practices applicable to cargo tendered thereunder.

The Commission is not empowered to permit retroactive rate filings. As the Commission explained in Mueller v. Peralta Shipping Corp. 8 F.M.C. 361 (1965):

> We are aware that our decision in these two cases will result in some hardship, but we adopt the position that strict adherence to filed tariffs is mandatory. Moreover, we believe that strict construction of the statute will result in more careful tariff administration and management by carriers and conferences, and the obviation of possible undue or unfair preferences or advantages and discriminations.

8 F.M.C. at 364 (footnote omitted).[8] This accords with recent Supreme Court precedent requiring strict adherence to the tariff rates then filed, despite any harsh effects that might result. Maislin Industries U.S., Inc. v. Primary Steel Inc. No. 89-624, (S. Ct., June 21, 1990). See also, Louisville & Nashville R. Co. v Maxwell 237 U.S. 94, 97 (1915) ("This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.") (emphasis supplied).

Only two of the commenters take issue with the FMC's legal analysis concerning the retroactive aspects of pocket rate practices, as set forth in the Supplementary Information to the Final Rule. CMA suggests that a change in tariff rates after cargo receipt can be considered retroactive "only if cargo receipt a priori is the date for determining rate applicability," Petition for Reconsideration at 7, n. 5. CMA, however, does not attempt to rebut the FMC's analysis of the governing law on rate jurisdiction or its analysis of applicable provisions of the 1984 Act.

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[8]Subsequent to, and as a result of this decision, the Commission sought legislative authority to permit carriers to "waive the collection of a portion of their freight charges for good cause such as bona fide mistakes." H. R. REP. No. 920 (90th Cong., 1st Sess., 1967), Statement of Purpose and Need for the Bill to Amend Provision of the Shipping Act, 1916, to Authorize the Federal Maritime Commission to Permit a Carrier to Refund a Portion of the Freight Charges, p. 3-4. Statutory authority was granted under Public Law 90-298, which added four provisos to section 18(b)(3) of the Shipping Act, 1916.

Forest Lines Inc. ("Forest Lines") similarly challenges the determination that rates filed after the fact of the commencement of transportation constitute retroactive ratemaking. It suggests that such effect is "precisely what Congress intended" in authorizing rate reductions to be immediately effective. Reply of Forest Lines, at 5, n.4. The legislative history, however indicates the contrary. See Final Rule at 12-14. See also Hearings on H.R. 4299 Before the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine and Fisheries, 87th Cong., 1st Sess. (1961), at 187 (rate reductions are intended to be prospective from date of filing).

Those supporting reconsideration also argue that the Commission lacks evidence of discriminatory effect or harm in the current practice, and that the Final Rule would occasion discriminatory rate practices in its own right. CMA suggests that the pre-existing rule cannot be deemed discriminatory because "every shipper shipping that commodity with that carrier will receive the same rate upon the same terms from that carrier..." Petition for Reconsideration, at 5 (emphasis in original). Thus, it is CMA's position that all shippers have equal access to the negotiated rate once filed.

CMA may be correct that a shipper which commits its cargo at the current published rate will ordinarily receive the benefit of any negotiated rate for that commodity on that sailing, and thus would not be damaged. A shipper deprived of reasonable means to inform and avail itself of unpublished rates by one carrier,

however, may opt to tender its cargo under another commodity description otherwise applicable to the goods, or tender to another carrier in deference to the latter's published rate. This shipper does not receive "like" treatment, because it receives no benefit from any subsequent event of publication of the tariff rate negotiated between the former carrier and the negotiating shipper. The Commission earlier considered CMA's concerns and concluded:

> Any such discrimination would be no less real for the fact that the second shipper remains unaware of the rate arrangement, and thus cannot complain.

Final Rule at 17.

The delay in tariff publication of negotiated rates may act to deprive a shipper of informed choice and result in unjust and unlawful discrimination between affected shippers. It also undermines the integrity of the tariff filing scheme created by Congress. As the Supreme Court pointed out in Armour Packing Co. v. United States 209 U.S. 56, 81 (1908):

> If the rates are subject to secret alteration by special agreement then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart....Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.

It is also suggested that the Final Rule will occasion the same discriminatory rate practices which prompted revision of the pre-existing rule. A rule based on date of delivery allegedly will create rate distinctions between shippers of the same commodity on the same vessel and voyage. These distinctions are said to be

without justification in the circumstances of the transportation itself, and thus would constitute a form of discrimination indefensible under 1984 Act standards.

Whenever there is a change in rates, two shippers of the same commodity inevitably will pay different rates if their shipments fall on different sides of that rate change. Were the parties' analysis correct on this point, all rate changes would be unlawfully discriminatory. However, not every difference in rates is prohibited - only those which are unjust in their purpose and effect. North Atlantic Mediterranean Freight Conference - Rates on Household Goods, 12 F.M.C. 202 (1967), reversed sub nom. American Export Isbrandtsen Lines v. FMC, 409 F.2d 1258 (2d Cir., 1969).

Thus, the legal standard employed in adjudging rate discrimination from the face of a tariff alone is not the same as that employed in determining the lawfulness of uneven application or administration of the carrier's tariff as between competing shippers. The latter standard involves factual considerations outside the four corners of the tariff pages, while the former is concerned only with the language of the tariff itself. This distinction appears rooted in the basic purpose of tariff publication intended by Congress, that filed rates "afford equal opportunity to all shippers to avail themselves of such rates and full opportunity to competing carriers to meet such rates." H.R. REP. No. 98-53, 98th Cong., 1st Sess. 19 (1983), citing Section 19 Investigation, 1935, 1 U.S.S.B.B. at 498 (1935). See also Arizona

Grocery Co. v. Atchison, T. & S.F.R. Co., 284 U.S. 370, 384 (1932) ("In order to render rates definite and certain, and to prevent discrimination and other abuses, the statute require[s] the filing and publishing of tariffs specifying the rates adopted by the carrier, and ma[kes] these the *legal* rates, that is, those which must be charged to all shippers alike.") The Final Rule seeks to give meaning to this statutory objective by curbing carrier rate practices which employ secret and unpublished rate arrangements.

The Petition for Reconsideration is therefore found to be without merit and, accordingly, denied. With this denial, the Commission is also lifting the stay previously placed upon the Final Rule, effective 60 days from the date of publication in the Federal Register. All carriers and conferences must publish tariff rules in accordance with the Final Rule no later than the effective date of the Final Rule. These tariff rules, in turn, must be made applicable to all cargo shipments no later than 30 days after tariff publication.

WHEREFORE, IT IS ORDERED that the Petition for Reconsideration filed by the Chemical Manufacturers Association is denied;

FURTHER, IT IS ORDERED that the Motion for Leave to file a reply by ABC Containerline N.V. is granted; and

FURTHER, IT IS ORDERED that the stay of the Final Rule published in Docket No. 88-19, appearing in the Federal Register on July 11, 1989 (54 FR 29036), is lifted.

By the Commission.[9]

Joseph C. Polking
Secretary

[9]Commissioner Donald R. Quartel, Jr. dissents. Commissioner Ming Hsu did not participate because the Commission's consideration of this matter occurred before she took office.

APPENDIX A

1. Pacific Coast/Australia - N.Z. Tariff Bureau

2. International Association of NVOCCs

3. Inter-American Freight Conference

4. United States/South and East Africa Conference; and
   South and East Africa/U.S.A. Conference

5. National Industrial Transportation League

6. Carolina Freight Carriers Corporation

7. Waterman Steamship Corp.

8. North Europe - U.S. Atlantic Conference; and
   North Europe - U.S. Gulf Freight Association

9. Forest Lines Inc.

10. Israel Eastbound Conference;
    U.S. Atlantic & Gulf/Western Mediterranean Rate Agreement;
    U.S. Atlantic and Gulf Ports/Eastern Mediterranean and North African Freight Conference;
    Australia/Eastern U.S.A. Shipping Conference;
    Australia - Pacific Coast Rate Agreement; New Zealand/
    U.S. Atlantic and Gulf Shipping Lines Rate Agreement;
    and New Zealand/Pacific Coast North America Shipping Lines Rate Agreement

11. Tropical Shipping & Construction Co. Ltd

12. ABC Containerline N.V.

13. Transpacific Westbound Rate Agreement