

FEDERAL MARITIME COMMISSION

46 CFR PARTS 580 AND 581

[DOCKET NO. 89-20]

DEFINITION OF SHIPPER AND AVAILABILITY
OF MIXED COMMODITY RATES

AGENCY: Federal Maritime Commission.

ACTION: Discontinuance of proceeding.

SUMMARY: The Federal Maritime Commission ("Commission" or "FMC") is discontinuing this rulemaking proceeding, which would have amended the definition of "shipper" and required that mixed commodity rates be made available only to shippers and shippers' associations, as defined. The Proposed Rule would also have imposed certain requirements on those shippers, particularly non-vessel-operating common carriers ("NVOCCs"), which utilized mixed commodity rates. The Proposed Rule has proved, on the basis of the record before the Commission, to be irreparably flawed in its attempt to define who is and is not a shipper. Moreover, one of the objectives of the Proposed Rule -- to preclude untariffed NVOCC operations and to ensure that persons acting as shippers pursuant to the Shipping Act of 1984 ("1984 Act") qualify to do so -- is similar to that of recent legislation, i.e., the Non-Vessel-Operating Common Carrier Amendments of 1990.

FOR FURTHER INFORMATION CONTACT:

Joseph C. Polking, Secretary
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573
(202) 523-5725

SUPPLEMENTARY INFORMATION:

The Commission initiated this proceeding by publishing in the Federal Register (54 FR 40891) a proposed rule ("Proposed Rule") to amend its tariff and service contract rules in 46 CFR Parts 580 and 581. The stated objective of the proposal was

to limit the scope of those that can act as "shippers" vis-a-vis the ocean common carrier, preclude untariffed NVOCC operations and otherwise ensure that the statutory scheme contemplated by the Shipping Act of 1984 is preserved.

The Proposed Rule was intended to accomplish this objective first by amending the definition of shipper to mean "the person who is legally responsible to pay the ocean common carrier for the transportation." Under the Proposed Rule, the term could include the owner of the cargo, a consignor, a consignee, or a tariffed NVOCC, but not a shipper's agent, an ocean freight forwarder, a broker, or an untariffed NVOCC. The revised definition was essentially a device to effectuate certain substantive restrictions; the Proposed Rule would require that mixed commodity rates be made available only to a "shipper" as newly defined, or a shippers' association as presently defined in the Commission's rules. It would also impose various requirements on shippers seeking mixed commodity rates: they would have to indicate their claimed status as a shipper on the bill of lading, state their

NVOCC tariff number, if applicable, and provide other specified information.

Over fifty comments on the Proposed Rule were received. Only a few submissions, primarily from vessel operating common carriers and conferences thereof, expressed support or partial support for the proposal. Most of these emphasized their concurrence with the objective of the Proposed Rule rather than the rule itself, and nearly all offered suggested amendments to the proposal.

The majority of the comments urged either abandonment or major modifications to the Proposed Rule. Many shippers and/or NVOCCs took the position that the narrowed definition is unnecessary, and will cause serious problems and major uncertainties about presently accepted relationships. The remainder of the submissions raised a multitude of difficulties with the proposed shipper definition and the concomitant proposed restriction on access to mixed commodity rates.

The "legally responsible to pay" standard of the Proposed Rule drew most of the commenters' criticism. Many contended that this standard was itself ambiguous and noted that a carrier may not have the means of determining whether a particular entity is the one legally responsible to pay transportation charges. It was also argued that often more than one party may be responsible to pay, and that an entity's interest in a shipment, such as ownership, rather than responsibility to pay is the more appropriate criterion for defining a shipper.

Many commenters challenged the proposed categorical exclusion of certain entities from the definition, arguing that this too fundamentally alters the legislative definition. They variously argued that forwarders, brokers, agents, and shippers' associations (to the extent they act as "agents" for shippers) would be barred from shipper designation, improperly so under certain circumstances. Shippers' associations contended that they should be expressly included in the proposed shipper definition, apparently interpreting the Proposed Rule's failure to do so as an attempt to restrict shippers' associations' rights under the 1984 Act. Some parties objected to the Commission's linking NVOCC tariff filing requirements to a shipper definition, stating that these requirements should be enforced as part of a regimen not affecting entities other than the NVOCCs themselves.

The basic criticism of the "mixed commodity rates" part of the Proposed Rule was that it is just as common for NVOCCs to ship single commodity loads as mixed loads. The proposed provision requiring a shipper to provide a carrier with certain information as proof of its shipper status engendered not so much a consensus of criticism as widespread confusion. Many found the Proposed Rule ambiguous as to the discretion permitted an NVOCC in producing the documentation of its choice. Several parties challenged the reasonableness of requiring an NVOCC to furnish a carrier with such information, arguing that there is a competitive relationship between the two such that disclosing names and client information would be "commercial suicide." Carrier interests took opposing

positions on whether such documentation requirements should be restricted to NVOCCs versus other shippers, although most contended that cargo misdescription was committed more frequently by NVOCCs and that the requirements could appropriately be limited to NVOCCs.

Finally, carrier and carrier conference commenters objected strongly to the perceived law enforcement duty created by the Proposed Rule on ocean common carriers regarding NVOCC tariff filing. These parties also expressed confusion over the scope of the carrier's duty under the Proposed Rule to verify the existence and accuracy of an NVOCC's FMC tariff number and confirm the shipper's status. Some of these commenters suggested that the Commission was in effect attempting to delegate to the carriers some of its own law enforcement responsibility.

Upon consideration of the comments and intervening events, the Commission has determined to discontinue this proceeding without offering further proposals or requests for comment at this time. It is evident from the comments received that the Proposed Rule as written is faulty for many of the reasons discussed, and cannot be corrected within the present framework of the proposal. It appears that the suggested definition of shipper unrealistically attempted to simplify the complex relationships and activities in the shipping industry. The proposed definition proved, we believe, to be excessively rigid and consequently unintentionally exclusionary in its application to the myriad of entities with interests of various kinds in oceanborne cargo. We also conclude that the proposed mechanisms for employing the definition were premised on

unfounded generalizations and presumptions, and would be unworkable in practice. In short, the Commission is persuaded that the Proposed Rule was likely to create more problems than it would resolve.*

Moreover, since the initiation of this proceeding, Congress has enacted the Non-Vessel-Operating Common Carrier Amendments of 1990 ("NVOCC Act"). The NVOCC Act requires NVOCCs to furnish to the Commission a bond of \$50,000, or higher if required by the Commission, to be issued by a surety company and made available to meet claims for damages. It also requires NVOCCs not domiciled in the United States to designate a resident agent in the U.S. for receipt of service of process. The Act authorizes the Commission to suspend or cancel the tariff of an NVOCC which fails to comply with the bonding or agent designation requirements. Under the NVOCC Act, vessel operating common carriers are prohibited from accepting or transporting cargo from, or entering a service contract with, an NVOCC unless that NVOCC has a tariff and a bond on file.

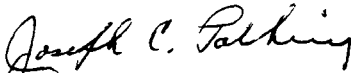
The objectives of the NVOCC Act coincide with some of the Commission's objectives in initiating this rulemaking: to protect

* The Commission is not suggesting that it has adopted all of the arguments -- some of which were mutually contradictory -- contained in the comments to the Proposed Rule. The arguments of several of the shippers' association interests in particular seemed to be based on misreadings and misinterpretations of the Proposed Rule. Generally, however, the Commission is impressed with and appreciative of the considered and detailed comments it received in writing and at oral argument.

the shipping public against irresponsible, unlawful or insolvent NVOCCs. While the statute is a different approach from the Proposed Rule, it addresses some of the same concerns.

The Commission has determined, therefore, in addition to its conclusion that the Proposed Rule was flawed and impractical, that it would be purposeless and precipitate on its part to proceed with this rulemaking when it remains to be seen what the impact of the NVOCC Act will be on the NVOCC industry in general and on the problems targeted in the Proposed Rule in particular. The proceeding will therefore be discontinued without prejudice to any future determination by the Commission that further action is warranted.

By the Commission."


Joseph C. Polking
Secretary

" Concurring opinion of Commissioner Quartel is attached.

Statement of Commissioner Quartel Concurring in
Part With Commission Decision

While I agree with the Commission's decision to discontinue the proceeding in Docket No. 89-20, I disagree in part with the rationale offered for the decision as set forth in the Order of Discontinuance.

I agree with the reasoning set forth in the Order as regards several of the problems created by the proceeding, including: the overwhelmingly negative response from the industry that the Rule was unnecessary and created substantial uncertainties; that the "legally responsible to pay" standard is ambiguous; and that the proposed categorical exclusion of certain entities from the definition would too fundamentally alter the current legislative definition. However, I disagree with the unfounded conclusion in the Order that the "NVOCC Act", recently passed by Congress and currently being implemented by this Commission, addresses the same issues as this proceeding and ameliorates the underlying circumstances which led to the present proposed rulemaking.

The purported linkage between the purposes or effects of the "NVOCC Act" and the target of this proceeding is entirely specious. The fact is, as indicated in part in the Order, the Commission concluded that its knowledge both of the "shipper" issue and of the actual practices of "middlemen" in this industry is limited at best; and to have proceeded with this proposed rulemaking under that disadvantage would have been irresponsible. The "NVOCC Act" is simply not the "white Knight" of this issue; in fact it is really a noncompetitive wolf in sheep's clothing.