(S E R V E D)
(January 23, 1990)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR PART 550

[PETITION NO. P5-89, DOCKET NO. 90-03]

APPLICATION OF SEA-LAND SERVICE, INC. FOR EXEMPTION UNDER SECTION 35 OF THE SHIPPING ACT, 1916

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission ("FMC") amends its regulations governing the publishing, filing and posting of tariffs in domestic offshore commerce pursuant to the Shipping Act, 1916. This amendment of Part 550 adds a new exemption for carriers providing port-to-port service in the Puerto Rico domestic offshore trade. Such carriers now are permitted to publish on one day's notice reductions in existing individual commodity rates, and rates on new tariff items.

DATE: This action is effective upon publication in the Federal Register.

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SUPPLEMENTARY INFORMATION:

Sea-Land Service, Inc. ("Sea-Land") has filed an Application for Exemption ("Application") under section 35 of the Shipping Act, 1916, 46 U.S.C. app. 833a ("1916 Act"), that seeks an exemption from the 30-day tariff filing requirement of section 2 of the

Intercoastal Shipping Act, 1933, 46 U.S.C. app. 844 ("1933 Act"). The exemption would permit carriers in the FMC-regulated United States/Puerto Rico trade to publish new individual commodity rates, or reductions in existing individual rates, on one day's notice.

A notice of the filing of the Application was published in the Federal Register (54 FR 40189, September 29, 1989) and comments supporting the Application were submitted by Trailer Marine Transport Corporation ("TMT"), Puerto Rico Maritime Shipping Authority ("PRMSA"), and Gulf Atlantic Transport Corporation ("GATCO"). Comments opposing the Application were submitted by Pueblo International, Inc. ("Pueblo").

THE APPLICATION

Sea-Land alleges that FMC-regulated carriers in the U.S./Puerto Rico trade are at a competitive disadvantage vis-a-vis carriers filing tariffs with the Interstate Commerce Commission ("ICC"). The primary cause for this disadvantage, Sea-Land alleges, is the differing notice periods applicable to rate reductions at the two agencies. Section 2 of the 1933 Act requires carriers to provide 30 days' notice of any tariff change, including rate reductions and new rates. However, the ICC has adopted regulations that permit new or reduced intermodal rates to go into effect on one day's notice (49 CFR 1312.39(h)(1)). Sea-Land alleges that this hampers FMC-regulated carriers in meeting the needs of their customers. Sea-Land Application at 2-3.

Sea-Land points out that the FMC granted a similar petition

in Matson Navigation Co., Inc. - Application for Section 35 Exemption, No. P5-88, 24 S.R.R. 1518 (1989). Sea-Land alleges that the conditions that led to approval of that petition exist in the Puerto Rico trade. Sea-Land Application at 3-4.

COMMENTS

A. GATCO.

GATCO is an FMC-regulated common carrier by water operating between U.S. Atlantic and Gulf Coast ports and ports in Puerto Rico. It states that it is in competition with other carriers operating under tariffs filed with the ICC. GATCO alleges that it is at a competitive disadvantage with respect to these ICC-regulated carriers by reason of the one-day notice period allowed by the ICC. GATCO urges the FMC to eliminate this competitive disadvantage by granting Sea-Land's application. GATCO notes that a similar exemption was granted to Matson in the Hawaii trade.

B. PRMSA.

PRMSA is a common carrier by water providing service between the U.S. and Puerto Rico primarily under joint through tariffs filed with the ICC. In addition, it publishes an FMC tariff naming rates for commodities requiring controlled temperature. PRMSA alleges that FMC-regulated carriers are at a competitive disadvantage vis-a-vis ICC-regulated carriers because the ICC permits filings of new or reduced rates on one day's notice. PRMSA also points out that the FMC granted a similar exemption for Matson in the Hawaii trade. It notes that the ICC, in establishing a one-

day notice period, found that the one-day notice period would permit carriers to respond quickly to the needs of the shipping public.

C. TMT.

Until recently, TMT served the U.S./Puerto Rico trade exclusively under an ICC-regulated tariff. On December 1, 1989, it began offering service pursuant to a tariff filed at the FMC. It continues to operate under its ICC tariff as well. TMT alleges that it requires the subject exemption to make its new FMC service competitive with the ICC-regulated service of other carriers.

TMT notes, however, that the Application does not apply to the Virgin Islands trade, although Sea-Land's FMC tariff applies to both the Virgin Islands and Puerto Rico trades. TMT explains that the rate for the Virgin Islands is constructed by adding an arbitrary to the Puerto Rico rate; thus any change to the Puerto Rico rate will automatically affect the Virgin Islands rate. TMT suggests that the exemption be extended to the Virgin Islands trade.

D. Pueblo.

Pueblo operates a chain of grocery stores and retail food outlets in Puerto Rico and the Virgin Islands. Pueblo argues that the Application for exemption should be supported by "clear and convincing evidence" because of Sea-Land's share of the market and because it "requests a very substantial withdrawal of agency regulation." Pueblo Comments at 2.

Pueblo argues that the real issue here concerns the level of

rates filed at the ICC. It believes that carriers will attempt to "forum shop" in order to avoid regulation of their rates. Pueblo believes that the application will assist the carriers in their "forum shopping". Pueblo Comments at 4.

Pueblo alleges that Sea-Land moves most of its cargo pursuant to joint-through rates filed with the ICC. It states that Sea-Land cannot point to a single case in which it lost cargo due to the thirty-day notice requirement of the FMC. Sea-land is allegedly unlike Matson which did suffer harm. Pueblo Comments at 3.

Pueblo claims that it operates in a very competitive environment and that it is essential for it to know what its competitors are paying for transportation. If a competitor of Pueblo obtains a cost advantage through a lower transportation rate, Pueblo states that the results to Pueblo can be severe. Pueblo states that it must book freight days or weeks in advance of the shipment. If the application is granted, Pueblo believes that it will be unable to plan in advance. Pueblo Comments at 6.

Finally, Pueblo argues that the Sea-Land proposal is the first step toward eventual deregulation of the domestic offshore trades. Pueblo Comments at 7.

DISCUSSION

Section 35 of the 1916 Act provides in pertinent part:

> The Federal Maritime Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this Act or any specified activity of such persons

> from any requirement of the Shipping Act, 1916, or Intercoastal Shipping Act, 1933, where it finds that such exemption will not substantially impair effective regulation by the Federal Maritime Commission, be unjustly discriminatory, or be detrimental to commerce.

This Commission has granted carriers exemptions from tariff filing requirements in a limited number of cases. For example, in Puget Sound Tug & Barge Co. -- Exemption, No. 88-22, 24 S.R.R. 1146 (1988), the FMC granted Puget Sound Tug & Barge Co. an exemption from tariff filing for transportation from Seattle, Washington, to the vicinity of Kivalina, Alaska during 1988 and 1989. In Petition For Exemption From Tariff Filing Requirements Previously Granted By Commission Order and Cross Petition For Revocation Of Exemption, No. 83-54, 22 S.R.R. 1040 (1984), the FMC granted an exemption from tariff filing for all common carrier service to the area of Western Alaska surrounding the Kuskokwim River. Most recently, in Matson Navigation Co. -- Application For Section 35 Exemption, and Tariff Filing Notice Periods -- Exemption, No. 89-03, 24 S.R.R. 1604 (1989), we granted an exemption to Matson, and later all carriers in the Hawaii trade, to permit individual rates to be filed on one day's notice if the filing is a new or reduced rate.[1] GRIs and GRDs were not included within the exemption and still must be filed on sixty days' notice. The Sea-Land Application seeks the same exemption for the Puerto Rico trade.

Although Pueblo does not go so far as to argue that the Application is beyond the scope of section 35, it argues that the Application should be held to a higher standard of proof because

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[1] 46 CFR 550.1(b).

it appears to be a "very substantial withdrawal of agency regulation." Pueblo Comments at 2. There is little, if any, support for Pueblo's position.

The Application applies only to individual new or reduced rates. As so limited, it should not impair effective rate of return regulation which seems to be Pueblo's greatest concern.[2] Nor would it appear to have any effect on the regulation of individual rates. New or reduced individual rates are rarely challenged. Suspension of such rates is even more rare. If there is a challenge to a reduction of an individual rate, typically it is on the grounds of discrimination, not on cost grounds. Discrimination is generally shown by evidence of the reduced rate's adverse impact on the complaining party's business. Such evidence of adverse impact is already in the hands of the complaining party. Unlike the case of GRIs and GRDs, there is no supporting financial information that must be evaluated prior to the rate becoming effective.

Pueblo's concerns seem largely speculative and are not shared by other shippers or carriers that may have occasion to challenge a rate reduction. No other shipper has filed comments in regard

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[2] We have declined to exempt carriers in the Puerto Rico/Virgin Islands trade from the sixty-day notice requirement for general rate increases ("GRI") or general rate decreases ("GRD") in Amendment Of Certain Regulations Governing Common Carriers By Water In The Domestic Offshore Commerce Of The United States, No. 82-2, 22 S.R.R. 1195 (1984). The Commission observed that abandonment of the sixty-day notice requirement would make it economically and practically impossible for the Commission and interested third parties to review and respond to such a GRI/GRD prior to its becoming effective.

to Sea-Land's Application. Nor have carriers expressed any concern that the reduced notice period will prevent them from protesting a rate of a competing carrier they believe is unreasonable or discriminatory.

Pueblo's additional concern that it will not know what its competitors are paying for ocean transportation until after the fact may be correct but it does not provide a valid reason for denying the Application. If the Application is approved, FMC-regulated carriers will be able to compete on an equal footing with ICC-regulated carriers with respect to rate reductions. This should be of substantial benefit to the shipping public. FMC-regulated carriers and shippers will be able to negotiate lower rates as the need arises and the shipping public will able to take advantage of those rates immediately, not thirty days later when it may be too late. Of course, any time that there is increased competition there is greater uncertainty, but this standing alone is no reason to deny the Application.[3]

Pueblo misses the point in contending that Sea-Land and the other carriers supporting the application have suffered no harm as a result of the 30-day filing requirement of the 1933 Act because virtually all of their cargo moves under ICC tariffs. Section 35 does not require a showing of present harm. Pueblo does not deny

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[3] Presumably, Pueblo is presently unable to determine in advance what its competitors are paying for transportation of cargo moving in an ICC-regulated service. Given that most cargo in the U.S./Puerto Rico trade presently moves pursuant to tariffs filed with the ICC rather than the FMC, approval of the subject Application would not appear to represent a significant change in the status quo.

that a carrier moving cargo subject to the 30-day filing requirement of the 1933 Act is at a competitive disadvantage vis-a-vis ICC-regulated carriers. We are under no obligation to withhold remedial action until FMC-regulated carriers have actually suffered substantial injury.

TMT seeks an extension of the exemption to cover the U.S. Virgin Islands on the grounds that Sea-Land constructs its Virgin Islands rates by adding an arbitrary to its Puerto Rico rates. Because the Virgin Islands were not included in the Application or notice of its filing in the Federal Register, TMT's request is beyond the scope of this proceeding. However, TMT is correct that any change in the Puerto Rico rates would necessarily effect Sea-Land's Virgin Islands rates. In order to avoid affecting rates in the U.S. Virgin Islands trade, it will be necessary for carriers utilizing the exemption to publish their United States/Puerto Rico rates separately from any rates applicable to the U.S. Virgin Islands trade.

Contrary to Pueblo's suggestion, we believe that the present record is sufficient for a thorough consideration of the Application. Section 35's requirement that "[n]o order or rule of exemption . . . shall be issued unless opportunity for hearing has been afforded interested persons," 46 U.S.C. app. 833A, does not mandate a formal evidentiary hearing. The legislative history of section 35 makes it clear that "a reasonable opportunity to be heard" is all that is required. Exemptions from Shipping Act, 1916, H.R. Rep. No. 2248, 89th Cong., 2d Sess. 4 (1966).

Interested parties have had the opportunity to comment and no party has identified what additional evidence it would produce at a formal evidentiary hearing.

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, innovations, or on the ability of United States-based enterpises to compete with foreign-based enterprises in domestic or export markets.

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the Federal Maritime Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small government jurisdictions.

List of Subjects in 46 CFR Part 550:

Maritime carriers; reporting and recordkeeping requirements.

Therfore, pursuant to 5 U.S.C. 553, sections 18, 35 and 43 of the Shipping Act, 1916, 46 U.S.C. app. 817, 833a and 841a, and section 2 of the Intercoastal Shipping Act, 1933, 46 U.S.C. app. 844, Part 550 of Title 46, Code of Federal Regulations, is amended as follows:

In section 550.1, a new paragraph (c) is added reading as follows:

550.1 Exemptions

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(c) Carriers providing port-to-port transportation between the United States and Puerto Rico may publish new individual commodity rates, or reductions in existing individual rates, on one day's notice, and to that extent are exempted from the notice requirements of the Act and the rules of this part.

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By the Commission.

Joseph C. Polking
Secretary