

(S E R V E D)
(May 13, 1991)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR Part 586

[PETITION NO. P5-90]

PETITION OF TOTAL OCEAN MARINE SERVICES, INC.
FOR RELIEF FROM CONDITIONS UNFAVORABLE TO
SHIPPING IN THE UNITED STATES/VENEZUELA TRADE

[DOCKET NO. 91-22]

ACTIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE
TO SHIPPING IN THE UNITED STATES/VENEZUELA TRADE

AGENCY: Federal Maritime Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Maritime Commission, in response to a petition alleging the existence of conditions unfavorable to shipping in the foreign oceanborne trade between the United States and Venezuela, hereby initiates a proceeding pursuant to section 19 of the Merchant Marine Act, 1920. It appears from the petition, and comments on the petition, that the laws, policies and practices of the Government of Venezuela reserve a substantial portion of general export and import cargo to carriage by national-flag lines to the exclusion of third-flag operators. In addition, it appears that agencies of the Government of Venezuela have withheld from the petitioner authorization to undertake operation as a common carrier by chartering third-flag vessels. The Proposed Rule would adjust or meet the apparent unfavorable conditions by imposing a per voyage fee in the amount of \$100,000 upon certain named Venezuelan-flag carriers. Failure to

pay the fee will result in suspension of that carrier's tariffs, or denial of access to or clearance from U.S. ports. The effect of the Proposed Rule would be to meet unfavorable shipping conditions by imposing burdens upon Venezuelan carriers which approximate those imposed upon the petitioner, a potential operator of third-flag vessels, by Venezuelan law, regulation, policy and practice.

DATE: Comments (original and 15 copies) due on or before [insert date 45 days after date of publication in the Federal Register].

ADDRESS: Send comments to:

Joseph C. Polking, Secretary
Federal Maritime Commission
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(202) 523-5725

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SUPPLEMENTARY INFORMATION:

I. INTRODUCTION

Section 19 of the Merchant Marine Act, 1920, 46 U.S.C. app. 876, as amended by Pub. L. No. 101-595, 104 Stat. 2979 ("Section 19"), authorizes the Federal Maritime Commission ("Commission" or "FMC") to take regulatory action to correct unfavorable shipping conditions in U.S. foreign oceanborne commerce. Specifically, paragraph (1)(b) of Section 19 directs the Commission -

[t]o make rules and regulations affecting shipping in the foreign trade not in conflict with law in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally, . . . and which arise out of or result from foreign laws, rules, or regulations or from competitive methods or practices employed by owners, operators, agents or masters of vessels of a foreign country.

46 U.S.C. app. 876(1)(b).

Section 19 further provides that the Commission may initiate a rule on its own motion or pursuant to a petition for Section 19 relief. Paragraph (5) states:

(5) The Commission may initiate a rule or regulation under paragraph (1)(b) of this section either on its own motion or pursuant to a petition. Any person, including a common carrier, tramp operator, bulk operator, shipper, shippers' association, ocean freight forwarder, marine terminal operator, or any component of the Government of the United States, may file a petition for relief under paragraph (1)(b) of this section.

46 U.S.C. app. 876(5).

The Commission's rules governing Section 19 proceedings are set forth at 46 CFR Part 585 - Regulations To Adjust or Meet Conditions Unfavorable to Shipping in the Foreign Commerce of the United States ("Section 19 Regulations"). The Section 19 Regulations describe who may file petitions, 46 CFR 585.4, how such petitions are filed, 46 CFR 585.5, the contents of petitions, 46 CFR 585.6, and how petitions may be amended or dismissed, 46 CFR 585.7.

The Section 19 Regulations also set forth the types of conditions which the Commission generally presumes to be unfavorable to shipping. These include those which: impose upon

vessels in the foreign trade of the United States fees, charges, requirements or restrictions different from those imposed on other vessels competing in the trade; preclude or tend to preclude vessels in the foreign trade of the United States from competing in the trade on the same basis as any other vessel; reserve substantial cargoes to the national-flag or other vessels and fail to provide, on reasonable terms, for effective and equal access to such cargo by vessels in U.S. foreign trades; are discriminatory or unfair as between carriers, shippers, exporters, importers, or ports or between exporters from the United States and their foreign competitors; and are otherwise unfavorable to shipping in the foreign trade of the United States. 46 CFR 585.3(a), (b), (c), (d).

Paragraph (9) of Section 19 provides for specific remedial actions which the Commission may take upon a finding that unreasonable shipping conditions exist. These include: limitations upon sailings to and from United States ports or of the amount or type of cargo carried; suspension, in whole or in part, of any or all tariffs filed with the Commission for carriage to or from United States ports; suspension in whole or in part of an ocean common carrier's right to operate under an agreement filed with the Commission; imposition of fees up to \$1,000,000 per voyage; or any other action the Commission finds necessary and appropriate to correct unfavorable shipping conditions in the U.S. foreign trade. 46 U.S.C. app. 876(9)(a)-(e). See also 46 CFR 585.9.

Paragraph (10)(a) of Section 19 provides that upon request by the Commission the collector of customs at the port or place of destination in the United States shall refuse to clear a vessel of a country that is named in a Section 19 regulation and shall collect any per voyage fees imposed by the Commission. Paragraph (10)(b) of Section 19 provides that upon request by the Commission the Secretary of the Department in which the Coast Guard is operating shall deny entry to or detain at a U.S. port the vessel of a country that is named in a Section 19 regulation.

II. BACKGROUND

Total Ocean Marine Services, Inc. ("Total Ocean" or "Petitioner") has filed Petition No. P5-90 - Petition of Total Ocean Marine Services, Inc. for Relief From Conditions Unfavorable to Shipping in the United States/Venezuela Trade ("Petition") requesting relief under Section 19 from alleged unfavorable shipping conditions in the United States/Venezuela trade ("Trade") created by the Government of Venezuela ("GOV"). The Commission published a notice of the filing of the Petition in the Federal Register, 55 FR 50588 (December 7, 1990), and invited interested persons to comment on the Petition by January 7, 1991. Pursuant to a request for an extension of time, the Commission, by a subsequent notice, 56 FR 1015 (January 10, 1991), extended the time for comment to January 22, 1991.

Replies supporting the Petition were received from the Council of European and Japanese National Shipowners Associations

("CENSA"); Shippers for Competitive Ocean Transportation ("SCOT"); Continental Materials, Inc. ("Continental"); Valls Shipping Company ("Valls"); and Alan L. Grant Rubber Division of Imperial Commodities Corp. ("Grant"). The Commission also received a letter from the U.S. Department of State ("DOS") which supports the effort of Total Ocean to enter the Trade.

Replies opposing the Petition were received from Venezuelan Container Line, C.A. ("VCL"); Naviera Pacifico C.A. ("Naviera Pacifico"); Compania Anonima Venezolana de Navigacion ("CAVN"); Maritima Aragua, S.A. ("Maragua Line"); King Ocean Service de Venezuela, S.A. ("King Ocean"); and American Transport Lines, Inc. ("Am Trans"), a subsidiary of Crowley Maritime Corporation.

Total Ocean made an additional submission dated January 19, 1991, and received by the Commission on January 22, 1991, which it requested the Commission to accept and consider. Total Ocean submitted further additional information in a letter to the FMC Secretary dated January 29, 1991 which it also requested the Commission to accept.

Separate motions to strike the submissions of Total Ocean dated January 19, 1991 and January 29, 1991 were submitted by King Ocean on February 11, 1991, CAVN on February 13, 1991 and Maragua Line on February 20, 1991.

A. The Petition

Total Ocean identifies itself as a Florida corporation organized for the purpose of operating a common carrier service in

the trade between the United States and Venezuela. Petitioner states that it has a tariff on file with the Commission but acknowledges that it is not currently engaged in common carrier operations in any U.S. trade. Total Ocean seeks to enter the Trade by operating chartered vessels of third-flag registry.

Petitioner indicates that on April 25, 1990, it applied to the Venezuelan Ministry of Transport & Communications ("MTC") for authorization to operate a common carrier service in the Trade. By letter dated July 8, 1990, the MTC informed Total Ocean that the matter of its application was being referred to the MTC's Judiciary Bureau and to the Venezuelan Chamber of Ship Owners for consideration of certain legal issues arising under Venezuelan law. MTC apparently has not formally denied Petitioner's application. Total Ocean reports that it received a letter from MTC dated January 4, 1991 indicating that Total Ocean had not exhausted the administrative procedures available to it under Venezuelan law. However, Total Ocean further reports that on January 17, 1991 it was advised by its Venezuelan counsel that it was "unnecessary to exercise any recourse" under Venezuelan law.

Total Ocean alleges that it has suffered continuing loss of operating revenue, as well as continuing legal, communications and administrative expenses as a result of MTC's delay in making a final determination on its application. Petitioner speculates that shippers may be able to provide evidence showing increased costs, inferior service or other harm resulting from the exclusion of Total Ocean from the Trade.

Total Ocean cites Chapter II, Article 14 (requiring prior authorization to operate) and Chapter IV, Article 20, Section (E) (imposing fines for violations of Chapter II) of the Venezuelan "Law For the Protection and Development of the National Merchant Marine" ("Cargo Reservation Law"), enacted on July 18, 1973, as the operative law applicable to its application.

Total Ocean requests Commission action under Section 19. Total Ocean suggests that sanctions similar to those recently invoked by the Commission in the U.S./Peru trade be applied against the following Venezuelan carriers: CAVN, King Ocean, Naviera Pacifico, Maragua Line, VCL, C.A. Maritima Oceanica Granelera ("Camogra"), and Inagua Line-Naviprobo ("Inagua"), as well as any other Venezuelan carriers operating in the Trade.

B. Replies Supporting the Petition

CENSA states that the Petitioner has shown that it has been excluded from operating third-flag vessels in the Trade. CENSA notes that the Commission has used Section 19 to protect operators of third-flag vessels in U.S. trades, most recently in Ecuador and Peru. CENSA calls attention to a statement in a Memorandum of Consultations dated September 9, 1983 in which the Venezuelan authorities invoke the United Nations Code of Conduct for Liner Conferences ("U.N. Liner Code"). CENSA contends that the U.N. Liner Code is inapplicable in the Trade and that any reliance on U.N. Liner Code guidelines is inappropriate. CENSA urges the Commission to protect all carriers from GOV restrictions.

SCOT asserts that the Trade is not competitive and that consequently rates are high and service is not satisfactory. SCOT contends that there is a lack of effective third-flag competition. SCOT provides various data on the Trade and concludes that the exclusion of Total Ocean does constitute a condition unfavorable to shipping.

Further support for Petitioner was received from several individual shippers. Continental claims that the lack of competition in the Trade has led to a 40 percent increase in freight costs over the past year. Valls asserts that there is not enough service in the Trade. Grant alleges that the Trade is becoming increasingly uncompetitive.

The Department of State commented on the Petition in a letter to the Commission Secretary. DOS advises that embassy officials have raised the issue of Total Ocean's application with GOV authorities on numerous occasions. DOS further indicates that while Total Ocean's application has not been rejected, Total Ocean nevertheless has not been granted access to the Trade. DOS concludes that GOV authorities have in effect denied Total Ocean an opportunity to serve the Trade. DOS views approval of Total Ocean's application as consistent with certain governmental understandings reached in 1983, and notes that in these documents "both sides acknowledged as desirable the continued active presence of third-flag carriers in the U.S.-Venezuelan trade". DOS states that it will continue to seek a diplomatic solution.

C. Replies Opposing the Petition

VCL contends that the treatment of Total Ocean's application by MTC reflects the Ministry's legitimate regulatory concerns and does not constitute a condition unfavorable to shipping. VCL argues that Total Ocean has not presented any evidence of harm to shipping. Moreover, VCL contends that under Venezuelan law, U.S.-flag, as well as third-flag carriers are permitted to compete for authorization to trade reserved cargo. VCL contends it would be inappropriate for the Commission to use Section 19 to "pressure" the administrative process of GOV's maritime agencies.

CAVN argues that Total Ocean is not a U.S.-flag carrier and therefore is not entitled to participate in cargo reserved to U.S.-flag carriers whether the cargo originates in the United States or Venezuela. CAVN claims that as a potential third-flag carrier, Total Ocean may enter the Trade without any governmental approvals and compete for the 50 percent of Venezuela's cargo that is not reserved for national-flag carriers. The reply filed by Maragua Line is substantially the same as that filed by CAVN.

King Ocean contends that the Petition is premature because the GOV is still considering Total Ocean's application and there has been no denial. It also argues that this is an isolated case that does not rise to the level of a trade condition unfavorable to shipping. Finally, King Ocean contends that the Petition is defective under the FMC's regulations.

Naviera Pacifico claims that Total Ocean has made "only the sketchiest allegations of harm to oceanborne commerce." It states

that the facts would show that the Trade is adequately served, that no shippers are being harmed and that the Trade would be disrupted by the action which Total Ocean is seeking.

Am Trans asserts that the Trade is open to third-flag carriers to compete for non-reserved cargo without having to obtain government approval. Am Trans contends that certain government agreements concluded in 1983 are working well and these executive agreements ". . . should be looked to to guide the trade today, rather than a Section 19 proceeding."

III. DISCUSSION

Opponents of the Petition raise a number of procedural and substantive objections. These include arguments that certain filings by Total Ocean should be stricken, that the Petition is premature and technically deficient, that Total Ocean lacks the wherewithal to provide a service, that third-flag carriers are not excluded from the Trade, that the Petition fails to show the existence of any condition unfavorable to shipping, and that certain government agreements should not be disturbed. The Commission has considered the Petition and the comments thereon, including the arguments in opposition to the Petition, and has determined to grant Total Ocean's Petition and initiate a proceeding.

A. Motions to Strike

King Ocean, CAVN and Maragua Line have filed motions to strike the submissions by Total Ocean dated January 19, 1991 and

January 29, 1991. They filed their motions pursuant to Rule 73 of the Commission's Rules of Practice and Procedure, 46 CFR 502.73, arguing that these submissions are not permitted under the Commission's rules.

They also argue that the January 19 submission is not authorized under the Commission's Section 19 Regulations, and that the January 29 submission constitutes a reply to a reply which is prohibited under Rule 74, 46 CFR 502.74. They argue that these submissions are prejudicial in that they have not had an opportunity to respond. King Ocean requests alternatively that if the January submissions are not stricken that interested parties be given the opportunity to reply to these submissions.

Total Ocean has not submitted a response to the motions to strike.

Initially, it should be noted that the Commission's Rules of Practice and Procedure contained in Part 502 are not applicable to petitions filed pursuant to Section 19 unless the Commission expressly determines that all or some part of those rules shall govern in a particular matter or proceeding. That determination has not been made here. Therefore, Rule 73, 46 CFR 502.73, which concerns motions in other formal proceedings cannot technically be invoked in connection with this Petition. Nor can Rule 74 which concerns replies to pleadings and motions. However, the fact that these rules of practice and procedure cannot be utilized in this instance is not necessarily dispositive of the merits of the relief requested in these motions inasmuch as they also contend that under

the Section 19 Regulations there is no express authorization for a petitioner to supplement its petition and that the Commission has not solicited such a submission.

The Commission's Section 19 Regulations allow a petitioner to amend its petition. Section 585.7 states:

Upon failure of a petitioner to comply with the provisions of this part, the petitioner will be notified by the Secretary and afforded reasonable opportunity to amend its petition. Failure to timely amend the petition will result in its dismissal. For good cause shown additional time for amendment may be granted.

46 CFR 585.7.

The point of the motions to strike appears to be that the Commission has not notified Total Ocean of any deficiency in its Petition and that the January submissions are therefore not authorized. It should be noted, however, that section 585.7 does not expressly prohibit supplemental submissions to a Petition. Moreover, the Section 19 Regulations clearly contemplate that a petitioner will be notified of any deficiency and given an opportunity to amend a petition prior to its dismissal. Thus, even if the Commission were to refuse to consider the January submissions it would nevertheless allow an opportunity to amend the Petition pursuant to its rules.

The Commission therefore has determined to accept the January submissions of Total Ocean and to treat them as amendments to its Petition. While the Commission certainly does not favor piecemeal submissions of Section 19 petitions, there would appear to be no purpose served in requiring Total Ocean to resubmit these filings. Contrary to the assertions of King Ocean, CAVN, and Maragua Line,

acceptance of these filings would not deprive these carriers of an opportunity to be heard. They will certainly have the opportunity to respond fully to these submissions in this rulemaking proceeding. Accordingly, the motions to strike are denied and Total Ocean's January filings are accepted.

B. Sufficiency of the Petition

King Ocean asserts that the Petition fails to fulfill the requirements of the Commission's Section 19 Regulations in several respects: (1) the Petition does not provide a copy of the relevant law which is a "certified" copy, the English translation is not "certified," and the translation is of poor quality; (2) the Petition fails to give a clear description of harm inasmuch as the alleged cargo loss is not supported by evidence that Total Ocean could have carried cargo; (3) the statistics provided by Total Ocean are not representative, are not adequately explained and there is no explanation as to why more recent statistics are not provided; and (4) the Petition fails to submit a recommended regulation that will meet the alleged unfavorable condition. King Ocean concludes that the Petition must therefore be amended or dismissed.

The Section 19 Regulations state that a certified copy of any law and translation should be provided. Section 585.6(b) states that a petition shall set forth:

(b) A certified copy of any law, rule, regulation or other document involved and, if not English, a certified English translation thereof.

46 CFR 585.6(b). Total Ocean states in its original Petition that:

Exhibit "G" is a telecopier transmitted copy of the original Spanish version of the Venezuelan Law For the Protection and Development of the National Merchant Marine together with a certified English translation thereof.

Petition at 2. No certification appears at the conclusion of the Spanish text. In addition, the date of enactment shown at the conclusion of the English translation appears to be incomplete. See Petition at Exhibit G. However, there is a signature of a translator and the signature of a public notary in Florida with the date November 15, 1990 following the text of the English translation.

When the Commission issued its original Section 19 Regulations, it stated the purpose of the certification requirement as follows:

Because of possible disputes concerning the accuracy of translations, certified copies in the original language are required in addition to a certified English translation.

See Docket No. 72-62, Regulations To Adjust or Meet Conditions Unfavorable to Shipping in the Foreign Trade of the United States, 14 S.R.R. 1138, 1141 (1974). King Ocean objects to the quality of the translation and the lack of certification but does not point out any specific issues that would call into question the basic text of the law. Rather, any differences in the comments are those of interpretation of the law or its application.

King Ocean also objects that Total Ocean has not provided a clear description of the loss it has, or expects to suffer, and that the statistics which are furnished are deficient. Section

585.6(d) of Section 19 Regulations states that petitions shall set forth:

(d) A clear description, in detail, of the harm already caused or which may reasonably be expected to be caused petitioner, including:

(1) Statistics for the representative period showing a present or prospective cargo loss if harm is alleged on that basis. Such statistics shall include figures for the total cargo carried or projected in the Trade for the period;

(2) Statistics or other evidence for the representative period showing increased costs, inferior services or other harm to cargo interest if injury is claimed on that basis; and

(3) A statement as to why the period is representative.

46 CFR 585.6(d).

Total Ocean does address the above-referenced requirements. Petition at 2-3. Total Ocean provides Journal of Commerce PIERS data for cargo in the Trade shipped between February 1988 and January 1989. See Petition at Exhibit I. Moreover, it is not clear what more Total Ocean could present in the way of injury since Total Ocean's claim is that of a potential competitor in the Trade. In this regard, Total Ocean in its January 29 submission, represented that it has the "wherewithal" to operate in the Trade.

Finally, there is the issue of the Petition's alleged failure to submit a recommended regulation. Section 585.6(e) states that a petition shall set forth

(e) A recommended regulation, the promulgation of which will, in the view of the petitioner, adjust or meet the alleged conditions unfavorable to shipping in the foreign trade of the United States.

46 CFR 585.6(e). In its Petition, Total Ocean requests the Commission's assistance in obtaining

prompt confirmation from the MTC of their [Total Ocean's] authorization to operate third flag vessels in a common carrier service in the Trade

Petition at 3. However, in its January 19 submission, Total Ocean supplements its request for relief as follows:

. . . Petitioner recommends consideration be given to the imposition of actions in form and scope similar to those detailed [in the case of Peru], affecting the following named Venezuelan carriers participating in the Trade: [CAVN, Camogra, King Ocean, Maragua, Inagua, Naviera, VCL and any other Venezuelan carriers operating in the Trade].

Total Ocean's January 19 submission cures any deficiency in this regard and brings the Petition into conformity with the Commission's rules.

Thus while there may be some technical imperfections in the Petition, it does substantively comply with the requirements for relief under the Section 19 Regulations.

C. Ripeness of the Petition

Opponents of the Petition object that Total Ocean's application to serve the Trade has not been denied and that it is therefore premature to consider Total Ocean's request for relief. In short, they contend that Total Ocean's claim is not "ripe." They claim that Total Ocean's application to serve the Trade through chartered third-flag vessels raises novel legal questions and that the regulatory process in Venezuela should not be interfered with.

Total Ocean states in its Petition that it filed its application with the Ministry of Transport and Communications on April 25, 1990, and has retained local counsel in Venezuela to assist in and expedite its application. Total Ocean also advises that it subsequently had frequent contact with GOV authorities and has sought the assistance of the U.S. Department of State.

In its January 19, 1991 submission, Total Ocean addresses the question of whether its Petition is premature. It includes an MTC letter to the U.S. Embassy dated January 4, 1991, stating that not all procedures under Venezuelan law had been exhausted. However, a letter from Total Ocean's Venezuelan counsel dated January 17, 1991 states that it is unnecessary to exercise recourse under the Venezuelan administrative procedures act.

DOS' letter dated January 22, 1991 outlines diplomatic efforts made on behalf of Total Ocean. The letter states that

While the Government of Venezuela has not to date rejected TOMS' application, neither has it permitted TOMS' [sic] to operate in the trade.

DOS Letter at 1. The letter further states that:

Based upon these meetings, the Departments of State and Transportation believe that the Government of Venezuela is interpreting its Law for the Protection of National Merchant Marine Shipping as well as a Memorandum of Understanding between the United States Government and the Government of Venezuela in a manner that denies TOMS the opportunity to participate in the bilateral trades using third-country flag chartered vessels.

DOS Letter at 2.

Total Ocean's application has been pending for one year. Moreover, Total Ocean has pressed its request with GOV authorities and the Department of State. Given this background, the treatment

of Total Ocean's application appears to amount to a de facto denial. This view is supported by the evaluation in the DOS letter. The Commission need not wait for a formal rejection of Total Ocean's application by GOV authorities before taking action under Section 19.

D. Ability to Provide Service

Opponents of the Petition object that Total Ocean has not demonstrated any ability to provide a common carrier service in the Trade. They point out that Total Ocean currently provides no service in any trade and questions whether Total Ocean has the experience and "wherewithal" to enter the Trade. From this, they conclude that there is no unfavorable condition to shipping resulting from the exclusion of Total Ocean from the Trade.

Total Ocean addresses the "wherewithal" issue in its January 29, 1991 submission to the Commission. Total Ocean asserts that no other carriers are required to demonstrate wherewithal in order to enter the Trade. Total Ocean represents that it is prepared to demonstrate that it has the financial resources, experience and expertise, access to vessels, and shipper commitments of potential future business.

This objection of the opponents of the Petition does not disqualify the Petition. While it is true that Total Ocean does not presently operate as an ocean common carrier, having in place an existing service is not a prerequisite to Section 19 relief. Moreover, Total Ocean does seem to have demonstrated a serious commitment to enter the Trade by filing a tariff with the

Commission and expending financial resources in pursuing its application. Certainly Section 19 relief is available to protect enterprising companies or individuals who might seek to start up new services and bring greater competition to U.S. trades.

E. Conditions Unfavorable to Shipping

The Venezuelan carriers objecting to the Petition argue that there is no unfavorable shipping condition because third-flag carriers are permitted to, and in fact do, serve the Trade. They contend that Total Ocean would be free to enter the Trade without prior approval by Venezuelan authorities and is not excluded from competing for those cargoes which are not reserved to national-flag carriers.

Access to Venezuelan cargo is subject to Venezuela's Cargo Reservation Law. Article 9 of that law sets aside 50 percent of import and export general cargo for carriage by Venezuelan-flag carriers. Status as a Venezuelan-flag carrier is determined under the criteria set forth in Article 7, the chief requirement being that vessels must be 80 percent owned by Venezuelan nationals. Under Article 8, Venezuelan carriers may operate non-Venezuelan-flag vessels up to 50 percent of their Venezuelan-flag tonnage. Under Article 14, a national-flag carrier of a trading partner may be allowed to participate in the transport of this reserved cargo on the basis of reciprocity. Article 20 provides for the assessment of a fine equivalent to the value of the cargo lost by the national-flag vessel for violations of the cargo reserve system.

Even under a liberal interpretation of the Cargo Reservation Law, third-flag carriers appear to be excluded from competing for at least 50 percent of the general cargoes. This in itself would appear to constitute a condition unfavorable to shipping. Section 585.3(b) states that an unfavorable shipping condition exists where government actions

Reserve substantial cargoes to the national flag or other vessels and fail to provide, on reasonable terms, for effective and equal access to such cargo by vessels in the foreign trade of the United States. (Emphasis added).

46 CFR 585.3(b). There is no indication in the record of any mechanism by which third-flag operators may gain access to the reserved 50 percent.

In Docket No. 87-11, Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Colombia Trade, the Commission indicated that a law which reserved 50 percent of the liquid bulk trade to national-flag carriers would constitute a condition unfavorable to shipping. Moreover, in Docket No. 87-6, Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Peru Trade, one of the matters in issue was a Peruvian decree which reserved 50 percent of the cargo to national-flag lines. Although not addressed directly, the Peru case suggests that a 50 percent reservation of cargo could be seen as a condition unfavorable to shipping.

Nevertheless, opponents of the Petition argue that even if Total Ocean were to have a valid complaint, this is an isolated case that does not rise to the level of a claim for relief under

Section 19. King Ocean cites as analogous cases two instances in which Section 19 petitions were dismissed, Petition of ACE Lines, Ltd., 19 S.R.R. 481 (FMC 1979) ("ACE Lines") and Petition of Refrigerated Express Lines (A/Asia) Pty. Ltd., 19 S.R.R. 1403 (FMC 1980) ("Refrigerated Express"). The situations in those cases are, however, distinguishable from that existing here.

In ACE Lines, the petitioner sought relief from an action of the New Zealand Wool Board which required that only members of rate agreements be permitted to carry wool from New Zealand to the United States, thereby excluding ACE Lines, an independent operator. The Commission denied the petition because the action affected only the wool trade and had not resulted in inadequate service to American exporters or importers. 19 S.R.R. 482.

The Commission subsequently described the narrow basis for its ruling in ACE Lines:

Ace Lines involved foreign-imposed restrictions on a single carrier affecting a particular commodity - wool - in the New Zealand-United States import trade.

(Emphasis in original). Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Venezuela Trade, 21 S.R.R. 1621, 1626 (FMC 1983).

In Refrigerated Express, the petitioner sought relief from an action of the Australian Meat and Livestock Corporation's failure to reauthorize Refrigerated Express to transport refrigerated meat from Australia to the United States. The Commission denied the petition because the meat board's action was based on sound transportation factors.

Again the Commission subsequently explained the limited scope of its denial in Refrigerated Express as follows:

REL involved the failure of a single carrier to obtain foreign authorization to engage in the transportation of a single commodity - refrigerated meat - in the Australia-United States import trade. The Commission concluded that the foreign entity met its burden of establishing acceptable transportation factors to justify its decision not to authorize the complaining carrier. It had acted on the basis of "sound economic and trade considerations," including the advantages of containerization over breakbulk carriage and the preference of Australian exporters and U.S. importers.

21 S.R.R. at 1629.

The circumstances of Total Ocean's Petition are different from those of the ACE Lines and Refrigerated Express cases. Total Ocean would be excluded from carriage of at least 50 percent of all general cargo in both import and export trade, not just a single commodity in a single trade. Moreover, denial of Total Ocean's application would not appear to be based on transportation factors as in Refrigerated Express. In short, there is nothing in Ace Lines or Refrigerated Express which would favor dismissal of the Petition in this case.

Opponents of the Petition also contend that service in the Trade is adequate and that there is therefore no unfavorable shipping condition. The Commission, however, has clearly indicated that adequacy of service is not a defense to allegations of unfavorable shipping conditions. Thus, in its earlier Section 19 case dealing with Venezuela, the Commission stated:

Adequacy of service was relevant in Ace Lines and REL because of the nature of the activity in issue in those proceedings. There was no intention in those cases to establish adequacy of service as the primary criterion

in all Section 19 proceedings. The issue is not critical here because of the breadth of the Venezuelan cargo restrictions. Nevertheless, the Venezuelan carriers apply far too narrow an interpretation of what factors affect "adequacy of service". As discussed herein, the documented concerns of shippers that they may be denied their carrier of choice and that competition in the trade would be severely restricted are also relevant to the issue.

21 S.R.R. 1626-1627. Moreover, most recently in its proceeding involving the United States trade with Peru the Commission addressed the defense of adequacy of service as follows:

Nor do the allegations made regarding adequacy of service dispose of the matter before us. Adequacy of service is not necessarily the primary consideration in Section 19 proceedings. The issue, while important, is not determinative here, given the scope of the Peruvian cargo reservation decrees. Nevertheless, the fact that the Peruvian cargo reservation decrees impose burdens and restrictions on non-Peruvian-flag carrier participation in the Trade and may, as a result, deny shippers their preferred choice of carrier, tends to call into question the adequacy of service in the Trade.

Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Peru Trade, Notice of Proposed Rulemaking, 52 FR 11832, 11835 (April 13, 1987). Here there is an indication that at least 50 percent of general cargo is reserved to national-flag carriers. Moreover, the Petition is supported by shipper submissions which claim inadequate service in the Trade.

F. Government Agreements

Finally, the opponents of the Petition argue that the present situation should not be disturbed because of certain government agreements between the United States and Venezuela. They argue that the Trade has functioned smoothly under these agreements and should not be disrupted by Section 19 action. The agreements

referred to are three documents issued by the two governments following a series of consultations in 1983. These documents are: (1) a Memorandum of Understanding of January 14, 1983; (2) an Agreed Minute of June 3, 1983; and (3) a Memorandum of Consultations of September 9, 1983.

In its letter, the Department of State notes that ". . . in each of these documents, both sides acknowledged as desirable the continued active presence of third-flag carriers in the U.S.-Venezuela trade." Moreover, DOS does not regard the 1983 statements ". . . as freezing third-flag entrants to some historical point, but rather intending to encourage their participation in the trade." DOS concludes that approval of Total Ocean's application ". . . would be consonant with the 1983 statements, including the Memorandum of Understanding, and not necessarily inconsistent with Venezuelan law."¹ The Commission concurs that these 1983 agreements and understandings may not be

¹ DOS further states that the provisions of Venezuela's law do not correspond to modern shipping practices and that Trade conditions have changed significantly since the Cargo Reservation Law was enacted in 1973. DOS advises:

Conditions in the trade have changed significantly since the 1973 passage of this law, and the law does not address the issue of third-flag vessels engaged by shipping services of a trading partner or the other charter arrangements common today. Moreover, denial of access to competitive shipping through cargo reserve practices typically results in imposition of higher rates on shippers than would otherwise be the case -- in apparent violation of the Law's own requirement in Article 16 that the reserve policy not "mean the charging of freight charges in excess of those prevailing in the international market for the traffic concerned."

invoked in order to exclude Total Ocean from equal competitive access to the Trade.

IV. CONCLUSION

The Venezuelan Cargo Reservation Law as it is currently interpreted and enforced is clear, at least in broad outline. At a minimum, it reserves 50 percent of general import and export cargo to national-flag carriers. A U.S. company which proposes to utilize vessels of third-flag registry appears to be excluded from access to the reserved portion of the Trade. Moreover, it appears that Venezuelan authorities have withheld from the Petitioner authorization to undertake operation as a common carrier by chartering third-flag vessels. While there is some question as to whether a U.S. company which proposes to use third-flag vessels may have access to the unreserved portion of general import and export cargoes without obtaining government approval, it appears that as a practical, commercial matter shippers would be discouraged from utilizing the services of a non-Venezuelan-flag carrier that has not obtained express government authorization to serve the Trade. The Cargo Reservation Law thus appears to restrict shippers in their selection of a carrier.

As set forth in Total Ocean's Petition, it would appear that unfavorable shipping conditions may exist in the foreign oceanborne trades between the United States and Venezuela, under section 585.3(a), (b), (c) and (d) of the Section 19 Regulations and Section 19 of the Merchant Marine Act, 1920. As a direct result

of Venezuelan laws, regulations, policies and practices, indications are that conditions exist which: (1) impose restrictions upon third-flag vessels different from those imposed on Venezuelan-flag vessels competing in the Trade or preclude or tend to preclude third-flag carriers from competing in the Trade on the same basis as Venezuelan-flag carriers; (2) reserve substantial cargoes to the national-flag or other vessels and fail to provide for effective and equal access to cargo by third-flag vessels; (3) discriminate between third-flag carriers and shippers and their competitors; and (4) are otherwise unfavorable to shipping in the foreign trade of the United States.

Therefore, pursuant to Section 19 of the Merchant Marine Act, 1920, as amended, and the Commission's regulations at 46 CFR Part 585, the Commission hereby grants the Petition of Total Ocean Marine Services, Inc. and issues a Proposed Rule to address the apparent existence of unfavorable shipping conditions in the foreign oceanborne trade between the United States and Venezuela, and prescribes an appropriate remedy or remedies to adjust or meet those conditions. The Proposed Rule states a primary remedy of a \$100,000 per voyage fee. In the event that such fees are not paid, the rule provides for suspension of tariffs and denial of clearance from or access to U.S. ports.

The remedies of the Proposed Rule would be imposed upon the seven named carriers in Total Ocean's Petition. In addition, a review of current tariffs on file at the Commission indicates that the following may also be Venezuelan carriers serving the Trade:

Consorcio Naviero de Occidente C.A.; Naviera Lavinel C.A.; Naviera Transpapel, C.A.; Vencaribe C.A.; Naviera Caribana C.A.; Zade, C.A.; and Naviera Naviprobo C.A.² These carriers are also included in the list of carriers subject to the sanctions in the Proposed Rule.

The Commission notes that recent reports in the trade press indicate that a number of South American countries, including Venezuela, may be considering a liberalization of their cargo reservation policies. The Commission invites comment on any such developments in the U.S.-Venezuela Trade. The Commission also seeks updated information concerning the impact of the Cargo Reservation Law as well as any additional information concerning its implementation which would be useful to the Commission in assessing current conditions in the Trade. In particular, the Commission invites interested persons to provide additional information and comment concerning the following:

1. Whether there is any procedure by which a U.S. company which utilizes exclusively vessels of third-flag registry may have access to the reserved portion of general import and export cargoes;

2. Whether a U.S. company which utilizes exclusively vessels of third-flag registry may have access to the unreserved portion

² The tariff of Naviera Naviprobo C.A. indicates that it was issued by Inagua Lines, Inc. The Commission is unable to determine whether the company identified in the Petition as "Inagua-Naviprobo" is the same or distinct from Naviera Naviprobo C.A. Accordingly Naviera Naviprobo C.A. and Inagua-Naviprobo are listed as separate and distinct carriers in the Proposed Rule.

of general import and export cargoes without obtaining government approval;

3. Whether waivers or other administrative procedures are involved for both Venezuelan importers and non-Venezuelan-carriers in obtaining access to reserved or unreserved portions of cargo;

4. Whether there are methods or procedures for differentiating between reserved and non-reserved cargoes, for crediting and accounting for such cargoes, and for providing notice of carrier eligibility to shippers;

5. Whether importers may be discouraged from utilizing the services of a non-Venezuelan-flag carrier that has not obtained express government authorization to serve the Trade; and

6. Whether there are other implementing regulations or policies which may apply to access to unreserved cargoes.

Interested persons also are invited to comment generally on the Proposed Rule including the remedies, and to provide any other updated, additional, or clarifying information including information on any changes in GOV policy with respect to cargo reservation as noted above. Factual submissions relating to conditions in the United States/Venezuela trade, where relevant, should include evidence or statistics showing commercial loss. To the extent possible, factual submissions should be supported by sworn documents and affidavits.

Finally, the Commission has determined that the Petition and supplementary submissions of Total Ocean as well as the comments

and other filings concerning the Petition are hereby made a part of the record in this proceeding.

List of Subjects in 46 CFR Part 586

Cargo vessels; Exports; Foreign relations; Imports; Maritime carriers; Penalties; Rates and fares; Tariffs.

Therefore, pursuant to section 19(1)(b) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(1)(b), as amended, Reorganization Plan No. 7 of 1961, 75 Stat. 840, and 46 CFR Part 585, it is proposed to amend Part 586 of Title 46 of the Code of Federal Regulations as follows:

1. The authority citation is amended to read as follows:

AUTHORITY: 46 U.S.C. app. 876(1)(b); 46 U.S.C. app. 876(5) through (12); 46 U.S.C. app. 1710a; 46 CFR Part 585; Reorganization Plan No. 7 of 1961, 26 FR 7315 (August 12, 1961).

2. A new section 586.4 is added reading as follows:

§ 586.4 Conditions unfavorable to shipping in the United States/Venezuela trade ("Trade").

(a) Conditions Unfavorable to Shipping in the Trade. (1) The Federal Maritime Commission has determined that the Government of Venezuela ("GOV") has created conditions unfavorable to shipping in the foreign trade of the United States by enacting, implementing and enforcing laws and regulations which unreasonably restrict non-Venezuelan-flag carriers from competing for general import and export cargoes, in the trade between the United States and Venezuela on the same basis as Venezuelan-flag carriers.

(2) Venezuelan law unilaterally reserves 50 percent of import and export general cargoes, between the United States and Venezuela

for carriage by Venezuelan-flag carriers who utilize Venezuelan-flag vessels or charter third-flag vessels, or U.S.-flag carriers who utilize U.S.-flag vessels or charter third-flag vessels. The enforcement of this system discriminates against U.S. maritime companies desirous of participating in the Trade through the exclusive charter of third-flag vessels and denies to these carriers effective and equal access to import and export general cargoes in the Trade. It also discriminates against shippers whose opportunities to select a carrier of their choice are restricted and whose ability to compete in international markets is hampered.

(b) Venezuelan-flag carriers - assessment of fees. (1) Voyage means an inbound or outbound movement between a foreign country and the United States by a vessel engaged in the United States trade. Each inbound or outbound movement constitutes a separate voyage. For purposes of this section, the transportation of cargo by water aboard a single vessel inbound or outbound between ports in Venezuela and ports in the United States under one or more bills of lading issued by or on behalf of the Venezuelan-flag carriers named in paragraph (b) (2) of this section, whether on board vessels owned or operated by the named carriers or in space chartered by the named carriers or in space chartered by the named carriers on vessels owned or operated by others, or carried for the account of the named carriers pursuant to agreements on file with the Federal Maritime Commission, under any of the tariffs enumerated in paragraph (b) (4) of this section, shall be deemed to constitute a voyage.

(2) For each voyage completed after the effective date of this section, the following carriers shall pay to the Federal Maritime Commission a fee in the amount of \$100,000: Venezuelan Container Line, C.A. ("VCL"); Naviera Pacifico C.A. ("Naviera Pacifico"); Compania Anonima Venezolana de Navigacion ("CAVN"); Maritima Aragua, S.A. ("Maragua Line"); King Ocean Service de Venezuela, S.A. ("King Ocean"); C.A. Maritima Oceanica Granelera ("Camogra"); Inagua Line-Naviprobo ("Inagua"); Consorcio Naviero de Occidente C.A.; Naviera Lavinel C.A.; Naviera Transpapel, C.A.; Vencaribe C.A.; Naviera Caribana C.A.; Zade, C.A.; and Naviera Naviprobo, C.A. The fee for each voyage shall be paid by certified or cashiers check made payable to the Federal Maritime Commission within 7 calendar days of the completion of the voyage for which it is assessed.

(3) Each Venezuelan-flag carrier named in paragraph (b)(2) of this section shall file with the Federal Maritime Commission a report setting forth the date of each voyage completed, amount of cargo carried, and amount of fees assessed pursuant to paragraph (b)(2) of this section during the preceding calendar quarter. Each such report shall include a certification that all applicable fees assessed pursuant to paragraph (b)(2) of this section have been paid, and shall be executed by the Chief Executive Officer under oath. Such reports shall be filed within 15 days of the end of each calendar quarter.

(4) If any Venezuelan-flag carrier shall fail to pay any fee assessed by paragraph (b)(2) of this section within the prescribed

time for payment, or fail to file any quarterly report required by paragraph (b)(3) of this section within the prescribed period for filing, the tariffs identified below, as applicable to such carrier, shall be suspended effective 30 calendar days after the expiration of the calendar quarter in which such fees or report were due:

(i) (A) Naviera Pacifico C.A. (Naviera Pacifico)

FMC No. 1 - Applicable Between Ports in Washington, Oregon, Idaho & California and Inland Points and Ports in Venezuela, Panama, Mexico, El Salvador, Costa Rica, Nicaragua and the Caribbean

(B) Compania Anonima Venezolana de Navigacion (Venezuelan Line)

FMC No. 9 - Applicable Between Ports in the United States and Puerto Rico and Ports Worldwide

(C) Maritima Aragua, S.A. (Maragua Line)

FMC No. 8 - Applicable From United States Gulf Ports to Ports in Curacao

FMC No. 7 - Equipment Interchange Tariff Naming Rules, Regulations and Charges Covering the Use of Carrier Provided Equipment

(D) C.A. Maritima Oceanica Granelera (Camogra)

FMC No. 1 - Applicable Between United States Atlantic and Gulf Coast Ports and Ports in the Caribbean, Central and South America

(E) Naviera Naviprobo C.A. Inc. (Naviera Naviprobo)

FMC No. 2 - Applicable Between Florida East Coast Ports and Ports in Venezuela

(F) Naviera Lavinel C.A.

FMC No. 1 - Applicable Between Ports in Mexico, Central America and South America and United States Pacific Coast Ports

(G) Naviera Transpapel, C.A.

FMC No. 1 - Applicable Between U.S. East Coast, Gulf, West Coast and Great Lakes Ports and Ports in the Caribbean Sea, Central America and South America

(H) Vencaribe C.A.

FMC No. 1 - Applicable Between U.S. Atlantic and Gulf Coast Ports and Ports in South America

(I) Naviera Caribana C.A.

FMC No. 1 - Applicable Between United States Ports and Points and Worldwide Ports and Points

(J) Zade, C.A.

FMC No. 2 - Applicable Between Ports in Puerto Rico and Ports in Venezuela

(ii) The following conference tariffs, or any other conference tariff covering the Trade, including intermodal tariffs covering service from interior U.S. points:

United States Atlantic and Gulf/Venezuela Steamship Conference
FMC No. 14 - Applicable Between Atlantic and Gulf Coast Ports of the United States (Except Florida Ports South of Jacksonville to and including Miami) and Inland or Coastal Points and Ports in Venezuela

(iii) Any other tariff which may be filed by or on behalf of the carriers listed in paragraph (b) of this section.

(iv) In the event of suspension of tariffs pursuant to this paragraph, all affected conference or rate agreement tariffs shall be amended to reflect said suspensions. Operation by any carrier under suspended, cancelled or rejected tariffs shall subject said carrier to all applicable remedies and penalties provided by law.

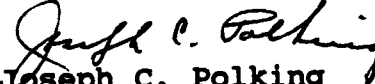
(c) Source of fees. Any fees assessed by paragraph (b)(2) of this section against Venezuelan-flag carriers operating pursuant to any agreement filed with the Federal Maritime Commission providing for revenue pooling, joint service, space-chartering or other joint operations shall be paid by such Venezuelan-flag carriers without affecting the revenue shares or amount of revenue earned by non-Venezuelan carriers operating pursuant to such agreements.

(d) Refusal of Clearance by the Collector of Customs. If a named Venezuelan-flag carrier shall fail to pay any fee assessed by paragraph (b)(2) of this section, or fail to file any quarterly report required by paragraph (b)(3) of this section within the prescribed period for filing, the Secretary of the Commission shall request the Chief, Carrier Rulings Branch of the U.S. Customs Service to direct the collectors of customs at the affected U.S. port or ports, to refuse the clearance required by section 4197 of the Revised Statutes (46 U.S.C. app. 91) to any vessel owned or operated by such Venezuelan-flag carrier.

(e) Denial of Entry to or Detention at United States Ports by the Secretary of Transportation. If a named Venezuelan-flag carrier shall fail to pay any fee assessed by paragraph (b)(2) of

this section, or fail to file any quarterly report required by paragraph (b)(3) of this section within the prescribed period for filing, the Secretary of the Commission shall request the Secretary, U.S. Department of Transportation, to direct the Coast Guard to: (1) deny entry for purpose of oceanborne trade, of a vessel of that carrier to any port or place in the United States or the navigable waters of the United States; or (2) detain a vessel of that carrier at the port or place in the United States from which it is about to depart for another port or place in the United States.

By the Commission.


Joseph C. Polking
Secretary