

(S E R V E D)  
(OCTOBER 28, 1992)  
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR PARTS 514 AND 581

[DOCKET NO. 92-31]

SERVICE CONTRACTS

AGENCY: Federal Maritime Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Maritime Commission ("Commission" or "FMC") is proposing to amend its service contract and ATFI rules to refine its definition of a "shippers' association." The proposed rule provides that any group of shippers shall be deemed to be such an association for the purpose of negotiating service contracts and volume rates if the group meets certain minimal requirements. The purpose of this Notice is to solicit comments and information from the public on the desirability and feasibility of such a rule.

DATE: Comments due [insert date 30 days after date of publication in the Federal Register].

ADDRESS: Comments (original and 15 copies) are to be submitted to:

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

FOR FURTHER INFORMATION CONTACT:

Robert D. Bourgoïn, General Counsel  
Federal Maritime Commission  
1100 L Street, N.W.  
Washington, D.C. 20573  
(202) 523-5740

SUPPLEMENTARY INFORMATION:

The Commission initiated this proceeding by Advance Notice of Proposed Rulemaking ("ANPR") published in the Federal Register, 57 FR 24220. The ANPR stated that the Commission was considering the publication of a proposed rule ("Proposal") that would allow two or more shippers to enter into a service contract with an ocean common carrier, or conference of such carriers, regardless of whether the shippers were members of a shippers' association. The Commission also identified six specific issues upon which it sought comment.

The Commission received comments in response to the ANPR from:

- (1) Household Goods Forwarders Association of America, Inc. ("HHGFAA");
- (2) New York Foreign Freight Forwarders and Brokers Association ("NYFFFBA");
- (3) International Association of NVOCCs ("IANVOCC");
- (4) Votainer USA Inc.;
- (5) National Industrial Transportation League ("NITL");
- (6) Hiram Walker & Sons, Inc.;
- (7) American Institute for Shippers' Associations, Inc. ("AISA");
- (8) American Import Shippers Association ("Import SA");
- (9) Streamline Shippers Association, Inc.;
- (10) Fashion Accessories Shippers' Association, Inc. ("FASA");
- (11) Hyundai Merchant Marine Co., Ltd.;
- (12) Hanjin Shipping Co., Ltd.;
- (13) a group of 15 South/Central American Conferences<sup>1</sup> ("South/Central American Conferences");
- (14)

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<sup>1</sup> Venezuelan American Maritime Association; Atlantic and Gulf/West Coast South America Conference; United States/Central America Liner Association; Central America Discussion Agreement; United States Atlantic & Gulf/Hispaniola Steamship Freight Association; Hispaniola Discussion Agreement; United States Atlantic Gulf/Southeastern Caribbean Steamship Freight Association; Southeastern Caribbean Discussion Agreement; Jamaica Discussion Agreement; United States/Panama Freight Association; PANAM  
(continued...)

a group of 9 conferences of ocean common carriers<sup>2</sup> ("COCC"); (15) North Europe - USA Rate Agreement and USA - North Europe Rate Agreement ("NEC"); (16) Trans-Pacific Freight Conference of Japan and Japan-Atlantic and Gulf Freight Conference ("Japan Conferences"); (17) Inter-American Freight Conference ("IAFC"); and (18) Transpacific Westbound Rate Agreement ("TWRA").

#### COMMENTS

HHGFAA and NITL support issuance of a proposed rule that would permit two or more unaffiliated shippers to enter into a service contract even though they are not members of a shippers' association. HHGFAA suggests that NVOCCs should be permitted to obtain the same consolidation advantages they already achieve by being able to pool their shipment requirements under service contracts, thereby achieving the lowest ocean freight rates. NITL likewise supports publication of a proposed rule. It contends that joint service contracts would increase the opportunities for shippers to participate in the world marketplace and to accommodate

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<sup>1</sup>(...continued)

Discussion Agreement; Puerto Rico/Caribbean Discussion Agreement; Caribbean and Central American Discussion Agreement; Ecuador Discussion Agreement; and United States Atlantic and Gulf/Ecuador Freight Association.

<sup>2</sup> Asia North America Eastbound Rate Agreement; Israel Trade Conference; Mediterranean North Pacific Coast Freight Conference; South Europe/U.S.A. Freight Conference; U.S. Atlantic and Gulf/Australia-New Zealand Conference; United States Atlantic and Gulf Ports/Eastern Mediterranean and North African Freight Conference; U.S. Atlantic and Gulf/Western Mediterranean Rate Agreement; United States/East Africa Conference; and United States/Southern Africa Conference.

changing transportation needs. However, NITL also notes that it fully supports the application of the antitrust laws to ocean transportation transactions. NITL surmises that most joint contracts would not violate such laws.

The remaining commenters urge discontinuance of this proceeding. They generally argue that the Proposal is outside the Commission's legal authority and contrary to the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. §§ 1701-1719. Commenters also take the position that the 1984 Act's definition of "shippers' association" as "a group of shippers that consolidates . . . freight . . . to secure . . . service contracts," indicates that this was the means contemplated by Congress for groups of shippers to secure service contracts. They submit that Congress gave statutory recognition to shippers' associations for the express purpose of enabling groups of shippers to negotiate collectively. It is suggested, by some, that the Proposal would result in the demise of the international shippers' association industry.

Some commenters maintain that shippers' associations are easily formed and operated. They note that the definition of shippers' association does not establish any onerous preconditions and that the only prerequisite is that the group operate on a non-profit basis. In this regard, Import SA notes that, as a result of Commission interpretations, shippers' associations are not required to physically consolidate cargo.

IAFC and TWRA submit that joint service contracts by multiple shippers could raise antitrust concerns, especially if shippers are

competitors. TWRA further suggests that competing shippers of the same product may be unwilling to share service contracts and access to their commercial information. FASA notes that the Department of Justice has set out antitrust "safe harbor" standards for shippers' associations. These standards are said to imply an organization charged with administering the group's activities to avoid anticompetitive effects.

#### DISCUSSION

While other approaches have been suggested for permitting shippers to band together to enter into service contracts and negotiate volume rates with carriers and conferences, the Commission believes that this objective can best be accomplished by clarifying that it is relatively simple for multiple shippers desiring to enter into joint contracts to do so by forming and operating a shippers' association. There are no onerous statutory preconditions to the formation of such an entity and the Commission has not adopted any. In fact, since the 1984 Act became effective, the Commission has resisted attempts by carriers or conferences to impose restrictions or conditions on shippers' associations. This appears to have resulted in the rise of a large number of rate-negotiator shippers' associations that do not actually physically consolidate cargo but rather simply negotiate service contracts for their members.

A group of shippers desiring to operate as a shippers' association does not have to structure itself in any particular

way. Although the non-profit corporation appears to be the most prevalent organizational structure, there is nothing that precludes other forms of organizations. The only requirement that the Commission has imposed is that any group of shippers operates consistent with the definition of "shippers' association" contained in the 1984 Act - i.e., on a nonprofit basis, consolidating or distributing the freight of the members, and securing volume rates or service contracts.

In an effort to clarify the scope and status of shippers' associations, the Commission is therefore proposing an amendment to the definition of "shippers' association" contained in its service contract and ATFI rules. This proposed rule provides that combinations of two or more shippers will be deemed to be a shippers' association if they operate as such and pursuant to an agreement providing who can execute service contracts on their behalf and providing for the apportionment of liability among themselves. The apportionment of liability is a matter which may be addressed in negotiations with the carrier or conference and need not be finally determined prior to the execution of the contract. In this event, the agreement among the shippers would need to so provide.

This proposal will permit multiple shippers, desirous of entering into joint service contracts, the freedom to do so subject to minimal, non-burdensome requirements. Such associations between or among shippers will remain subject to antitrust laws. As the Commission has determined in the past, however, carriers or

conferences may not require from the association a business review letter from a government antitrust agency as a condition to negotiating or agreeing to a volume rate or service contract. See 46 CFR § 571.1; Docket No. 88-17, Interpretations and Statements of Policy, 24 S.R.R. 1368 (1988).

Although the Commission, as an independent regulatory agency, is not subject to Executive Order 12291, dated February 17, 1981, it nonetheless has reviewed the proposed rule in terms of this Order and has determined that the rule, if adopted, is not a "major rule" as defined 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 enterprises 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 Commission certifies that the proposed rule will not, if adopted, have a significant economic impact on a substantial number of small entities, including small businesses, small organization units and small governmental jurisdictions. The proposed rule essentially codifies the Commission's treatment of shippers' associations under the 1984 Act. To the extent that the proposal has any new economic impact on small entities, it could increase

their opportunities to operate pursuant to shippers' associations and, as a result, lower their transportation costs.

LIST OF SUBJECTS

46 CFR Part 514

Barges, Cargo, Cargo vessels, Exports, Fees and user charges, Freight, Harbors, Imports, Maritime carriers, Motor carriers, Ports, Rates and fares, Reporting and recordkeeping requirements, Surety bonds, Trucks, Water carriers, Waterfront facilities, Water transportation.

46 CFR Part 581

Freight, Maritime carriers, Rates, Reporting and recordkeeping requirements.

Therefore, pursuant to 5 U.S.C. 552, 553; 31 U.S.C. 9701; 46 U.S.C. app. 804, 812, 814-817(a), 820, 833a, 841a, 844, 845, 845a, 845b, 847, 1702-1709, 1712, 1714-1716, 1718 and 1722; and sec. 2(b) of Pub. L. 101-92, 103 Stat. 601, the Federal Maritime Commission proposes to amend Title 46, Code of Federal Regulations, parts 514 and 581 as follows.

Part 514 - [AMENDED]

1. The authority citation for Part 514 continues to read as follows:

**Authority:** 5 U.S.C. 552 and 553; 31 U.S.C. 9701; 46 U.S.C. app. 804, 812, 814-817(a), 820, 833a, 841a, 843, 844, 845, 845a, 845b, 847, 1702-1712, 1714-1716, 1718, 1721 and 1722; and sec. 2(b) of Pub. L. 101-92, 103 Stat. 601.

2. In section 514.2, revise the definition of "Shippers Association" to read as follows:



§ 514.2 Definitions.

\* \* \* \* \*

Shippers' Association (foreign commerce) means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts. A combination of two or more shippers will be deemed to be a shippers' association if they are parties to an agreement that, at a minimum, provides:

- (1) That the combination will operate consistent with the preceding definition;
- (2) Which parties have the authority to execute a service contract on behalf of the combination; and
- (3) Whether liability is apportioned among the combination members.

For the purposes of this definition, the term "consolidates" does not require physical handling of freight and does include aggregating cargo volumes from different shippers for the sole purpose of negotiating a volume rate or service contract. The term "nonprofit basis" does not require the shippers to obtain nonprofit status from the Internal Revenue Service or any other government agency, nor does it mean the shippers may not benefit from the association; it simply requires that the association itself not be a profit-making enterprise.

\* \* \* \* \*

Part 581 - [AMENDED]

1. The authority citation for Part 581 continues to read as follows:

**Authority:** 5 U.S.C. 553; 46 U.S.C. app. 1702, 1706, 1709, 1712, 1714-1716, 1718 and 1722.

2. Paragraph (r) of section 581.1 is revised to read as follows:

§ 581.1 Definitions.

\* \* \* \* \*

(r) Shippers' association means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts. A combination of two or more shippers will be deemed to be a shippers' association if they are parties to an agreement that, at a minimum, provides:

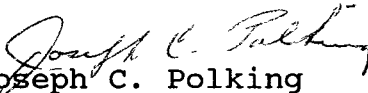
- (1) That the combination will operate consistent with the preceding definition;
- (2) Which parties have the authority to execute a service contract on behalf of the combination; and
- (3) Whether liability is apportioned among the combination members.

For the purposes of this definition, the term "consolidates" does not require physical handling of freight and does include aggregating cargo volumes from different shippers for the sole purpose of negotiating a volume rate or service contract. The term "nonprofit basis" does not require the shippers to obtain nonprofit

status from the Internal Revenue Service or any other government agency, nor does it mean the shippers may not benefit from the association; it simply requires that the association itself not be a profit-making enterprise.

\* \* \* \* \*

By the Commission.

  
Joseph C. Polking  
Secretary