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FEDERAL MARITIME COMMISSION

46 CFR PART 581

[DOCKET NO. 92-31]

SERVICE CONTRACTS

AGENCY: Federal Maritime Commission.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Federal Maritime Commission ("Commission" or "FMC") is considering the publishing of a proposed rule that would permit 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 purpose of this Advance Notice is to solicit comments and information from the public on the desirability and feasibility of such a proposed rule.

DATE: Comments due [insert date 30 days after date of publication in the Federal Register]. Comments must be received at the Commission by the due date; the date of mailing will not be accepted as the date of filing in this proceeding.

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

Joseph C. Polking, Secretary
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1100 L Street, N.W.
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(202) 523-5725

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Section 8(c) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1707(c), permits an ocean common carrier or conference to enter into a service contract with a shipper or shippers' association.¹ The 1984 Act defines a "service contract" as . . .

. . . a contract between a shipper and an ocean common carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier or conference commits to a certain rate or rate schedule as well as a defined service level - such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party.

Id. app. 1702(21).

The definition of "service contract," contained in the FMC's earliest rules implementing the 1984 Act, was identical to that contained in the Act. See Docket No. 84-21, Service Contracts, 22 S.R.R. 1424 (1984). However, when the Commission later revised its service contract rules based on its experience under the 1984 Act, it initially proposed to define "service contract" as "a contract

¹ A "shippers' association" is defined as . . .

. . . 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.

46 U.S.C. app. 1702(24).

between one or more shippers or shippers' associations and one or more ocean common carriers or conferences . . ." (emphases supplied). Docket No. 86-6, Service Contracts, 24 S.R.R. 277, 282 (1987). Based on comments expressing reservations with this definition, the Commission declined to adopt the proposed definition and retained the definition which is currently set forth at 46 C.F.R. 581.1(n).²

The Commission's decision in this regard may have been based on an unnecessarily restrictive interpretation of the 1984 Act's definition of "service contract." Moreover, permitting two or more unaffiliated shippers to join together in a service contract would not appear contrary to the intent and purpose of the 1984 Act. On the contrary, it could lead to an increasing number of small or medium-sized shippers being able to engage in service contracts, one of the Act's goals.

The Commission is accordingly seeking comment on whether it should propose a rulemaking to permit unaffiliated shippers to enter into a joint service contract. This issue can best be addressed initially through the issuance of an Advance Notice of Proposed Rulemaking to solicit the views of all interested persons.

² In making this determination, the Commission explained:

Under the definition, shippers can continue to affiliate to take advantage of service contracts, if that affiliation meets the definition of a "shippers' association."

Id. There may be good reason, however, why shippers wanting to join together on a service contract may not also want to assume the obligations and responsibilities that a shippers' association relationship may entail.

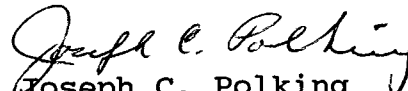
Commenters are requested to submit proposed rule language if they believe such a rule is warranted.

Specific comments are sought on the following specific issues, as well as on any other matter deemed to be relevant.

1. Should two or more shippers be permitted to access a service contract originally entered into by only one shipper, or vice versa?
2. If two or more unaffiliated shippers enter into a service contract, should they be jointly and severally liable for all obligations thereunder or could the contract apportion their liabilities in the event of a default? Is this an issue the FMC should be concerned about or is it a matter for the contracting parties to address?
3. If two or more unaffiliated shippers enter into a service contract and one shipper defaults during the course of the contract, should the others be permitted to continue at a reduced cargo commitment? Is this a matter for the FMC or the contracting parties to address? Would this affect the rights of other shippers who were unable to meet the original commitment but might be able to meet the reduced commitment?
4. Should NVOCCs be treated any differently from proprietary shippers, e.g. should two or more NVOCCs be permitted to enter into a service contract?
5. Should affiliates of shipper contract parties be allowed to participate in the contract?

6. Are there implications for shippers' associations of permitting two or more unaffiliated shippers to enter into a joint service contract that the Commission should address?

By the Commission.


Joseph C. Polking
Secretary