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FEDERAL MARITIME COMMISSION

46 CFR PART 571

[DOCKET NO. 92-46]

UNPAID FREIGHT CHARGES

AGENCY: Federal Maritime Commission.

ACTION: Proposed Interpretive Rule.

SUMMARY: The Federal Maritime Commission proposes to add to its regulations in Part 571, Interpretations and Statements of Policy, a statement that the Commission does not have jurisdiction to adjudicate a complaint brought by an ocean common carrier against a shipper over unpaid ocean freight bills. Under this proposed jurisdictional ruling, such a complaint would be required to be brought in an appropriate court, similar to a suit for breach of a service contract. All pending Commission proceedings involving such complaints will be held in abeyance pending final action in this proceeding.

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:

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FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

BACKGROUND

In recent years, a series of complaints has been filed with the Federal Maritime Commission ("FMC" or "Commission") by ocean common carriers seeking to recover unpaid freight from shippers. These complaints have been brought under section 10(a)(1) of the Shipping Act of 1984 ("1984 Act"), which provides that no person may . . .

> . . . knowingly and wilfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable . . . .

46 U.S.C. app. 1709(a)(1).

As described in more detail below, the passage of the 1984 Act removed a long-standing procedural barrier to complaints of any kind against shippers. The subsequent carrier freight collection complaints typically have not been defended by the shipper respondents, and default judgments have resulted. However, an issue exists as to whether the Commission has substantive (as distinguished from procedural) jurisdiction *over* such complaints. As a general matter, the Commission may raise at any time an issue regarding its own jurisdiction, if it does so in an appropriate manner. See, e.g., Judice v. Vail, 430 U.S. 327, 331 (1977); Liberty Mutual Insurance Co. v. Wetzel, 414 U.S. 737, 740 (1976). In order to give interested persons a full opportunity to state their views, the Commission is raising this jurisdictional issue in

the form of a proposed interpretive rule. Pending receipt of comments and issuance of a final rule, all current FMC proceedings involving unpaid freight allegations under section 10(a)(1) have been placed in hiatus.

A. Procedural History

Section 22 of the old Shipping Act, 1916 ("1916 Act"), allowed complaints that alleged violations by three specified classes: carriers and "other persons subject to the Act," which section 1 of the Act defined to mean freight forwarders and terminal operators. 46 U.S.C. 801, 821 (1982). Originally, the substantive prohibitions of the 1916 Act did not include shippers.

In 1936, section 16 of the 1916 Act was expanded to include a specific proscription against certain behavior by shippers.[1] A new initial paragraph stated:

> That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

Id. 815 (1982). However, no change was made in section 22 regarding private complaints. Shipper transgressions against the new provision of section 16 created only a public remedy, i.e., criminal penalties which were to be sought in the courts by the

[1] Pub. L. No. 74-685, 49 Stat. 1518.

Department of Justice ("DOJ").[2] Both before[3] and after[4] the 1936 amendment to section 16, complaints by carriers seeking reparations from shippers were held to be unauthorized by the 1916 Act. This applied to any private reparations complaint against a shipper, not just carrier complaints seeking reparations for unpaid freight: a shipper simply was not liable for reparations under the old 1916 Act.

In 1972, Congress decriminalized the provision of section 16 addressed to shippers, changing the criminal penalty to a civil penalty in the same amount.[5] Enforcement authority remained with DOJ until 1979, when the penalties were increased substantially and the Commission was given authority to assess or compromise penalties in the context of a Commission investigation.[6] Nonetheless, no provision was made for private reparations actions against shippers. This did not occur until passage of the 1984 Act, section 11(a) of which authorizes complaints for reparations

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[2] Section 16 originally stated: "Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense." Enforcement actions could be initiated either by DOJ originally, United States v. American Union Transport, Inc., 232 F.Supp. 700 (D.N.J. 1962), or by an initial investigation by the Commission and a later referral to DOJ, e.g., In Re: Rubin, Rubin and Rubin Corp., 6 F.M.B. 235 (1961).

[3] Prince Line, Ltd. v. American Paper Products, Inc., 55 F.2d 1053, 1056 (2d Cir. 1932).

[4] Maritime Service Corp. v. Plaza Provision Co., Inc., 13 S.R.R. 524 (1973).

[5] Pub. L. No. 92-416, 86 Stat. 653.

[6] Pub. L. No. 96-25, 93 Stat. 71.

for any injury caused by any violation of the Act, 46 U.S.C. app. 1710(a), without the former restriction to violations by carriers, terminal operators and freight forwarders. A few years after the enactment of this new complaint provision, FMC Docket No. 89-10, Safbank Line Limited v. The Hairlox Co., Inc., began a steady stream of carrier actions before the Commission seeking to collect freight charges from shippers.[7]

The 1984 Act freight collection cases have been filed under section 10(a)(1), but that part of the new Shipping Act simply carried forward in essentially unchanged language, without comment of any kind from Congress,[8] the initial paragraph added in 1936 to section 16. Also, there is no indication in the legislative history or elsewhere that Congress meant to expand the Commission's substantive jurisdiction in enacting section 11(a) 's complaint-filing provision.[9] Thus, the legislative history and the subsequent case law interpretations of the original section 16, initial paragraph, are the best available guides to the proper scope of section 10(a)(1).

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[7] The current 1916 Act, which applies to the domestic offshore trades, continues to limit complaints to those against carriers, freight forwarders and terminal operators. 46 U.S.C. app. 801, 821. This proposed interpretive rule thus concerns only the Commission's foreign commerce jurisdiction under the 1984 Act.

[8] See H.R. Rep. No. 53 (Part I), 98th Cong., 1st Sess. 35-36 (1983), reprinted in 1984 U.S. Code Cong. & Admin. News 167, 200-201.

[9] See n.12 supra, at 36-37.

B. Substantive Jurisdiction

The addition in 1936 of the shipper prohibitions to section 16 was urged by carriers, which complained that deceptive practices by shippers during the first twenty years of the 1916 Act could not be reached under the Act as it then stood."[10] The House Committee stated that the amendment was meant to protect carriers (and honest shippers) from dishonest shippers seeking to cheat on their freight bills:

> The purpose of this legislation is to extend to the common carriers by water protection similar to that extended to common carriers by land against the use of false billing, false labeling, false or misclassification of freight, or other means or devices used by shippers for the purpose of securing from the carrier a lower rate for the transportation of property by water than that currently in force by the carrier.

False Billing, H.R. Rep. No. 2205, 74th Cong., 2d Sess. 1 (1936). An important benefit of the legislation, in the carriers' view, was that such shipper practices were made subject to a uniform federal standard rather than varying state fraud laws, which were viewed as an unsatisfactory deterrent."[11]

However, the carriers did not also seek to expand the jurisdiction of the Commission's predecessor (at the time, the United States Shipping Board Bureau) to include private complaints seeking recovery of unpaid freight. It appears that the carriers expected to continue to pursue unpaid freight through civil

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[10] False Billing, Hearings on S. 3467 before the House Committee on Merchant Marine and Fisheries, 74th Cong., 2d Sess. 5 (1936).

[11] N. 14 supra, at 2.

litigation in the courts, while any underlying deception or concealment would be subject to a separate (and perhaps parallel) criminal prosecution under the new provision of section 16. One of the carrier witnesses before the House Committee had stated:

> Insofar as it lies in our power, we, of course, for purely selfish reasons wish to get our proper charges. But Congress has not gone far enough. It must make it a misdemeanor on the part of the shipper to indulge in those practices forbidden in that act. Naturally, any time that we catch a shipper using false billing, we call upon him for the additional freight charges, but there is no punishment to the man involved.

False Billing, Hearings on S. 3467 before the House Committee on Merchant Marine and Fisheries, 74th Cong., 2d Sess. 5 (1936) (testimony of Daniel H. Walsh, General Secretary, Gulf Associated Freight Conferences). In recommending passage of the bill, the House Committee quoted a similar statement from the same witness that, with respect to existing cases of shippers obtaining transportation at improperly low rates, carriers had "already collected certain amounts [of the charges underpaid] and will enforce the collection of the existing amount due if the assets of offending shipper permit." False Billing, H.R. Rep. No. 2598, 74th Cong., 2d Sess. 3 (1936).[12]

There is no indication in the legislative history of the 1936 amendment that a simple failure by a shipper to pay ocean freight charges was to be considered a chargeable offense under the original criminal penalties attached to section 16, or, later, a violation subject to civil penalties under the 1972 and 1979

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[12] The House Committee issued two reports on the bill.

amendments. The hearings and the House Reports were concerned exclusively with active subterfuges, especially false declarations and false weighing. H.R. Rep. No. 2598 at 2-4; H.R. Rep. No. 2205 at 1-2; Hearings at 2-3, 5, 16-18, 21-23.[13] For the most part, administration of the statute by the Commission and its predecessors was similarly focused. In Pacific Far East Lines -- Alleged Rebates, 11 F.M.C. 357 (1968), aff'd, 410 F.2d 257 (D.C. Cir. 1969), the Commission stated that section 16 was "aimed at protecting competing shippers and carriers from shippers who attempt to obtain (or succeed in obtaining) transportation at reduced rates through devices or representations involving fraud, falsehood, or concealment." 11 F.M.C. at 362. The Commission further advised that the statute's secondary reference to "unjust or unfair device or means" did not broaden its scope:

> These words have a restrictive meaning derived from their proximity to the words "false billing," etc. . . . Applying the principles of eiusdem generis, the Commission and the courts have uniformly held that the act forbidden must be similar to those specifically proscribed in order to be an unjust or unfair device or means. In other words, the unjust or unfair device or means must partake of some element of falsification, deception, fraud, or concealment, in order to satisfy the legal requirements of these subsections.

Id. at 364 (footnotes omitted).[14]

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[13] In order to show what practices were targeted by the new statute, the Committee quoted extensively from "war story" testimony by a witness who had been employed at a bureau established by several carriers to police against false description of merchandise and incorrect weights. H.R. Rep. No. 2598 at 4.

[14] Accord, United States v. Open Bulk Carriers, 727 F.2d 1061, 1064-65 (11th Cir. 1984); Levatino & Sons, Inc. v. Prudential-Grace Lines, 18 F.M.C. 82, 113 (1974).

Capitol Transportation, Inc. v. United States, 612 F.2d 1312 (1st Cir. 1979), presented facts bearing some similarities to the current freight collection complaints. The Commission found that Capitol Transportation, Inc. ("Capitol"), and seven other non-vessel-operating common carriers had violated section 16 by refusing to pay demurrage charges billed to them in their capacity as cargo consignees by various complaining ocean carriers." Capitol had continually asserted baseless defenses to longstanding demurrage claims even after its own auditor had verified the amounts of the claims, conspired with the other respondents to boycott the ocean carrier's collection agent and to seek illegal concessions, and raised other objections to paying its bills that the Commission found were essentially tactical maneuvers.[16]

On appeal, Capitol cited the Commission's Pacific Far East Lines decision and argued that section 16 did not apply to an open refusal to pay demurrage because the statute required fraud or concealment. The First Circuit noted that the Commission had rejected that proposition in its decision, saying without elaboration that "section 16 is not so limited."[17] The court then stated:

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[15] The Commission's decision is reported at 21 F.M.C. 194, reconsideration denied, 21 F.M.C. 561 (1978), under the title Sea-Land Service, Inc. v. Acme Fast Freight of Puerto Rico. The Commission could hear this complaint under the 1916 Act because the respondents were carriers as well as cargo consignees and thus covered by former section 22.

[16] See 21 F.M.C. at 204-206.

[17] 21 F.M.C. at 196 (footnote omitted).

> If by this the Commission meant to say that a carrier's mere stubborn but good faith refusal to pay a disputed rate or charge constitutes an "unjust or unfair device or means," we disagree. The language of Section 16, language which speaks in terms of both wilfull and knowing conduct and false billing, false classification, false weighing and other unjust or unfair mechanisms, cannot be read so broadly.

612 F.2d at 1323. The court proceeded to accept the Commission's finding that, in any event, fraud or concealment was established:

> * * * The Commission could properly find on this record that Capitol's refusal to pay had never been based upon a good faith legal defense, but simply reflected a calculated judgment to fight [the collection agent] to the end, forcing it to pay in blood, sweat and treasure for every penny eventually collected. On the merits of the demurrage claim, Capitol failed to present a legal defense of any substance, and belatedly raised a variety of ever-changing contentions afterthetime for discovery or hearing was over. Those facts, coupled with earlier correspondence indicating an adamant and legally unexplained resistance to the notion of [the collection agent's] centralized demurrage billing procedure entitled the Commission to conclude that Capitol was not only knowing and wilfull in its refusal to pay, but that its policies, conducted as they were in bad faith, were tantamount to an unjust or unfair means of obtaining transportation by water at lower than applicable rates. Although it would not be proper to extend this rationale to cases involving refusal to pay based on honest differences, we think the conduct reflected in the present record was sufficiently egregious to support the Commission's finding that the requisite element of fraud or concealment was here established. * * * A calculated effort in bad faith to avoid the payment of demurrage legitimately owing would, if successful, allow shippers and consignees to accomplish what Section 16 was intended to prevent--the receipt of carrier *service* at less than applicable rates and at less than rates charged to competitors.

Id. at 1323-24 (emphasis supplied). However, the court ended this discussion by warning that Capitol's conduct, "egregious" though it was, "undoubtedly nears the outer limits of Section 16 . . . ." Id. at 1324.

C. The Recent Collection Complaints

Againstthatbackdrop, the freight collection complaints filed under section 10(a)(1) over the last three years raise serious jurisdictional concerns. These complaints have not alleged the bedrock section 10(a)(1) requirements of fraud, deception, misclassification, false weighing or similar malpractices. Instead, they have typically pleaded only that the respondent shipper failed to pay ocean freight, that this by itself amounted to a violation of section lo(a)(1), and that reparations should be awarded in the amount of the unpaid freight. Based on the relevant case law and especially the legislative history of the 1936 amendment, it appears, however, that the act of failing to pay a freight bill is not, in and of itself, an "unjust or unfair device or means" within the meaning of that phrase intended by Congress. Sound policy reasons may exist as to why carrier complaints seeking to collect unpaid freight from a shipper should be brought under the Commission's jurisdiction. Under present law, however, it appears that such complaints do not state a case under section 10(a)(1) of the1984 Act and shouldhenceforth return to the courts.[18]

[18] The precedent of Capitol Transportation makes it theoretically possible for the Commission to assert section 10(a)(1) jurisdiction over situations where overt failure to pay freight is part of a larger pattern that includes covert attempts to subvert the tariff system and cause the carrier harm compounded beyond the owed freight charges. However, no complaints similar to Capitol Transportation have been brought before the Commission in the intervening thirteen years, and the case may turn out to be sui generis. There is certainly little apparent resemblance between the wide-ranging conspiracy to avoid demurrage in Capitol Transportation and the one-count, single-respondent freight collection complaints now being filed under section lo(a)(1).

As previously noted, the shipper respondent in the recent freight collection cases has often failed to answer the complaint or to respond to procedural orders from the administrative law judge, and default judgments have been entered. E.g., Deppe Line GmbH & Co. v. Total Tank Distribution Inc., 25 S.R.R. 837, administratively final, No. 89-28 (F.M.C. Apr. 9, 1990); Safbank Line Limited v. Royale International Transport, Inc., 25 S.R.R. 951, administratively final, No. 90-5 (F.M.C. June 8, 1990). However, when the shipper has defended, uncertainties as to Commission jurisdiction have been clearly present. See China Ocean Shipping Co. v. DMV Ridgeview, Inc., motion to dismiss granted, 26 S.R.R. 50 (A.L.J.), administratively final, No. 91-37 (F.M.C. Dec. 23, 1991), reconsideration denied on other grounds, 26 S.R.R. 200 (1992). As a basic principle of administrative law, if the Commission cannot regulate freight disputes under the terms of the 1984 Act, it may not do so by reference to agency rules of procedure. Substantive jurisdiction under the 1984 Act is created by Congress in writing the statute and delegating administrative authority to the Commission; it is not created as a result of procedural failings before the Commission by private persons. It is, after all, at least theoretically possible that a shipper might ignore a freight collection complaint because it believes that the Commission has no jurisdiction over the matter. By operation of Commission Rule 64(a), 46 C.F.R. 502.64(a), silence on the part of a shipper respondent to a complaint might mean that the shipper can be deemed to have admitted that it failed to pay lawfully assessed

ocean freight charges, but a rule of practice cannot create Commission authority to give legal significance -- in the form of a reparations award -- to such an admission if no such authority exists in the Shipping Act itself.

Because carrier complaints seeking reparations for unpaid freight continue to be filed regularly with the Commission, the Commission believes that it would provide useful guidance for the ocean shipping industry to promulgate an interpretive rule which, for the reasons set forth above, states the FMC's view that section 10(a)(1) does not apply to such complaints. Interested members of the public are invited to comment on the legal analysis set forth above.

List of subjects in 46 CFR Part 571: Administrative practice and carriers; Antitrust; Maritime carriers.

Therefore, pursuant to 5 U.S.C. 553 and section 17 of the Shipping Act, 1984, 46 U.S.C. app. 1716, Part 571 of Title 46, Code of Federal Regulations, is proposed to be amended as follows:

1. The authority citation for Part 571 continues to read as follows:

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. app. 1706, 1707, 1709 and 1716.

2. Part 571 is amended by adding a new section 571.2 to read as follows:

571.2 Interpretation of Shipping Act of 1984 -- unpaid ocean freight charges.

Section 10(a)(1) of the Shipping Act of 1984 states that it is unlawful for any person to obtain or attempt to obtain ocean transportation for property at less than the properly applicable rates, by any "unjust or unfair device or means." The Federal Maritime Commission interprets this provision as not applying to a simple failure by a shipper to pay ocean freight bills for transportation rendered by a common carrier, in the absence of additional conduct constituting an unjust or unfair device or means, such as false measurement or false commodity description.

By the Commission.

Joseph C. Polking
Secretary