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FEDERAL MARITIME COMMISSION

46 CFR PART 580

[ DOCKET NO. 92-25 ]

REGULATION OF MILITARY RATES UNDER  
THE SHIPPING ACT OF 1984

AGENCY: Federal Maritime Commission.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Federal Maritime Commission ("Commission" or "FMC") is considering whether military rates should be exempted from the filing requirements of section 8 of the Shipping Act of 1984 ("1984 Act") and possibly also section 10 of that Act, or, alternatively, be made fully subject to the requirements of section 8 of the Act. The purpose of this Advance Notice is to solicit comments and information from the public regarding the treatment of military rates by the Commission.

DATE: Comments are due 45 days after publication of this Advance Notice in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Since the end of World War II, part of the armed forces' need for ocean transportation between the United States and foreign countries has been met by U.S.-flag commercial ocean carriers.

Originally, this ocean transportation was procured on behalf of the armed forces by the Army Transportation Corps. Later, this function was taken over by the Military Sea Transportation Service. Today, it is the responsibility of the Military Sealift Command ("MSC").

MSC is responsible for arranging ocean transportation services for all components of the Department of Defense ("DOD"). Although MSC can utilize commercial tariff rates and service contracts for the carriage of DOD cargo, most DOD cargo moves pursuant to rates contained in special contractual arrangements or "tenders" which MSC enters into with carriers.

These tenders are the result of a bid process. MSC is charged with selecting the bid that is "most advantageous to the United States, considering only price \* \* \* and price related factors . . . ." 10 U.S.C. 2305(b)(3). Arrangements for the carriage of military cargo are subject to the provisions of the Cargo Preference Act of 1904, id. 2631, which provides that:

Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons.

Historically, most cases involving military rates that have come before the Commission have focused on whether the military rates resulting from this bid process were unreasonably low.

Section 18(b)(5) of the Shipping Act, 1916 ("1916 Act"), 46 U.S.C. 817(b)(5) (1982), authorized the Commission to . . .

. . . disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

There was no exception in the 1916 Act permitting ocean carriers in the U.S. foreign commerce to provide service to agencies of the government at reduced rates. In order to assure that military rates complied with the provisions of section 18(b)(5), the Commission, in 1972, adopted regulations (General Order 29) requiring military rates to be set at a level that would enable them to recover fully distributed costs. Regulations Governing Level of Military Rates, 13 S.R.R. 411 (1972). A number of proceedings were instituted pursuant to section 18(b)(5) and General Order 29, however none resulted in a final Commission decision.<sup>1</sup> This was largely due to the fact that the military rate

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<sup>1</sup> Docket No. 71-35, Investigation of Competitive Procurement Practices on Military Cargo; Docket No. 72-10, American Export Isbrandtsen Lines, Inc. v. Military Sealift Command; Docket No. 72-23, American President Lines, Inc., American Mail Line, Inc., Sea-Land Service, Inc., and United States Lines, Inc. - Possible Violations of Section 18(b)(5) of the Shipping Act, 1916; Docket No. 72-64, American Export Line, Inc., Sea-Land Service, Inc. and United States Lines, Inc. - Possible Violations of Section 18(b)(5) of the Shipping Act, 1916, in Connection with Rates on Military Cargo; Docket No. 72-65, American Mail Line, Inc., American President Lines and Sea-Land Service, Inc. - Possible Violations of Section 18(b)(5) of the Shipping Act, 1916, in Connection with Rates on Military Cargo; Docket No. 73-57, Sea-Land Service, Inc. - Possible Violations of Section 18(b)(5) of the Shipping Act, 1916, in Connection with Rates on Military Cargo; Docket No. 73-58, United States Lines, Inc. Violation of Section 18(b)(5) of the Shipping Act, 1916, in Connection with Rates on Military Cargo - Order to Show Cause; and Docket No. 75-14, Pacific Far East Line,  
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tenders under investigation only remained in effect for six months. Thus the cases were rendered moot before a final decision could be issued. In addition to cases brought pursuant to section 18(b)(5) of the 1916 Act, there were other cases involving military rates brought under other sections of the 1916 Act. E.g., Violations of Sections 14 Fourth, 16 First and 17, Shipping Act, 1916, in the Nonassessment of Fuel Surcharges on Military Sealift Command (MSC) Rates Under the MSC Request for Rate Proposals (RFP) Bidding System, 15 F.M.C. 92 (1972).

General Order 29 remained in effect until 1982, when it was temporarily suspended by the Commission after the conditions which had led to its promulgation were found to no longer exist. A year later, General Order 29 was suspended indefinitely. Indefinite Suspension of Regulations Governing Level of Military Rates, 21 S.R.R. 1177 (1982). Section 20 of the Shipping Act of 1984 ("1984 Act") amended the 1916 Act to limit its scope to the domestic offshore trades. Section 18(b)(5), which only applied to the foreign trades, was repealed. No provision similar to section 18(b)(5) was included in the 1984 Act. Accordingly, the Commission rescinded General Order 29 shortly after the 1984 Act became law.<sup>2</sup>

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<sup>1</sup>(...continued)  
Inc. - Possible Violations of Section 18(b)(5) of the Shipping Act, 1916, in Connection with Rates on Military Cargo.

<sup>2</sup> Section 6 of the Intercoastal Shipping Act, 1933, 46 U.S.C. 846, originally permitted carriers in the domestic offshore trades to provide transportation to the government at free or reduced rates. After the repeal of section 6 in 1974, the reasonableness of certain military rates in the domestic offshore trades was challenged under section 18(a) of the 1916 Act, id. 817(a), in  
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Although there is no longer any statutory authority to regulate the level of military rates in the foreign trades, military rates remain subject to the prohibitions of section 10 of the 1984 Act, 46 U.S.C. app. 1709, including the anti-discrimination and anti-rebate provisions. Since 1984, there have been no proceedings brought under the provisions of section 10. The Commission has exempted military rate tenders from its regulations governing tariff notice form and content. 46 CFR 580.1(d).

The Commission is considering whether changes should be made to the regulatory scheme applicable to military rates. If the FMC's treatment of military rates is seen as making meaningful rate comparisons difficult or as being unfair, disadvantageous or prejudicial to MSC, U.S.-flag carriers or any other party, the Commission could remove format exemptions presently enjoyed by U.S.-flag operators filing military rates and require such rates to be published in exactly the same manner and format as commercial rates, e.g., tariffs and service contracts.

Alternatively, if military rates do not present such difficulties or problems or, given their nature, do not otherwise

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<sup>2</sup>(...continued)  
several Commission proceedings. Department of Defense and Military Sealift Command v. Matson Navigation Company, 19 F.M.C. 503, reconsideration denied, 20 F.M.C. 24 (1977); Puerto Rico Maritime Shipping Authority - Rates on Government Cargo, 21 F.M.C. 188, reconsideration denied, 21 F.M.C. 502 (1978); Sea-Land Service, Inc. - Rates on Government Cargo, 21 F.M.C. 905 (1979), and Seatrain Gitmo, Inc. - Rates on Government Cargo, 21 F.M.C. 894 (1979). Since 1979 there have been no cases brought under section 18(a) of the 1916 Act involving military rates.

raise the sort of issues that the 1984 Act was intended to address, a full or partial exemption from 1984 Act requirements may be warranted. The exemption could be limited to the tariff filing requirements of section 8, 46 U.S.C. app. 1707, or might extend to the provisions of section 10 as well.

The Commission believes that the regulatory treatment of military rates under the 1984 Act can best be explored through the issuance of this Advance Notice of Proposed Rulemaking to solicit the views of governmental bodies, carriers, shippers, and any other interested members of the public. While the Commission requests comments on the specific issues set forth below, it also invites interested persons to submit views and information on any matter that relates to the broader issue of the FMC's treatment of military rates.

ISSUES UPON WHICH SPECIFIC COMMENTS ARE REQUESTED

1. What is the cost of filing military tenders or quotations with the Commission?

2. Do interested parties use tenders or tariffs on file with the Commission as a source of information regarding military rates or is this information obtained directly from MSC?

3. Is the filing of a military tender or tariff with the Commission necessary in order to bring an action involving military rates under the 1984 Act?

4. Given that past proceedings have focused on the level of military rates and that the Commission no longer has any authority

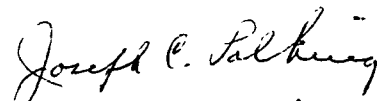
to regulate the level of rates in the foreign trades, is there any valid regulatory purpose in subjecting military rates to any or all of the requirements of the 1984 Act?

5. What are the differences between the transportation service provided under military tenders and the service provided to commercial customers by U.S.-flag ocean carriers pursuant to tariffs or service contracts? Is it possible to compare the two?

6. What, if any, is the legal or economic basis for treating rates offered to MSC different from those offered commercial shippers from a regulatory perspective?

7. What, if any, would be the impediments to the Commission requiring military rate tenders to be filed as service contracts, as provided in section 8(c) of the 1984 Act? Could such arrangements be filed under section 8(a)(E) as loyalty contracts defined in section 3(14) of the Act?

By the Commission.

  
Joseph C. Polking  
Secretary