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FEDERAL MARITIME COMMISSION

46 CFR PART 581

[DOCKET NO. 92-21]

AMENDMENTS TO SERVICE CONTRACTS

AGENCY: Federal Maritime Commission.

ACTION: Proposed Rule.

SUMMARY: The Federal Maritime Commission proposes to amend its regulations in Part 581 governing service contracts to allow the parties to a filed service contract to amend the contract's "essential terms." The intent of this proposal is to create a more flexible service contract system in order to benefit carriers, U.S. shippers and consumers. Similarly situated shippers who had previously accessed the contract would have the option of either continuing under the original contract or accessing the amended terms. The Commission also solicits comments on related issues that may result in further amendments to its service contract regulations.

DATE: Comments due [insert date 45 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:

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SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 8(c) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1707(c), states the regulatory requirements for "service contracts" filed with the Federal Maritime Commission ("FMC" or "Commission"). A service contract is defined by section 3(21) of the 1984 Act 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. 1702(21). Section 8(c) requires that . . .

. . . each [service] contract * * * shall be filed confidentially with the Commission, and at the same time, a concise statement of its essential terms shall be filed with the Commission and made available to the general public in tariff format, and those essential terms shall be available to all shippers similarly situated. The essential terms shall include -

- (1) the origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements;
- (2) the commodity or commodities involved;
- (3) the minimum volume;
- (4) the line-haul rate;
- (5) the duration;
- (6) service commitments; and
- (7) the liquidated damages for nonperformance, if any.

Id. 1707(c) (emphasis added).

The FMC's regulations provide that "[t]he essential terms originally set forth in a service contract may not be amended" 46 CFR 581.7(a). The policy behind this restriction was originally stated by the Commission in November, 1984, when it published final rules implementing the new service contract provisions of the 1984 Act. The Commission explained that the proscription was adopted out of a concern for similarly situated shippers:

* * * For instance, if a shipper was unable to meet its cargo volume commitment under a contract and the parties agreed to lower that amount during the term of the contract, this could discriminate against another shipper who was not able to take advantage of the contract during its initial 30-day offering, because of the volume of cargo originally required to be committed but who could have done so under the lower minimum. Also, the contract parties could agree to alter the geographic areas or port ranges covered by the contract thereby including similarly situated shippers who were not included under the original contract. These situations could be exacerbated if the non-contract shipper had already shipped all or a substantial portion of its cargo prior to the time of the modifications and is, therefore, no longer able to take advantage of the altered terms.

Service Contracts; Loyalty Contracts; and Publishing and Filing of Tariffs by Common Carriers in the Foreign Commerce of the United States, ___ F.M.C. ___, 22 S.R.R. 1424, 1432 (1984).

The prohibition against contract amendments was carried forward in subsequent rule revisions promulgated in Service Contracts, ___ F.M.C. ___, 24 S.R.R. 277, 300 (1987). The Commission there pointed out that contract parties could, however, provide for potential modifications through contingency clauses

published with the essential terms, which similarly situated shippers can also access. Id. at 295.¹

More recently, the Commission adopted a procedure to provide relief to contract parties where the contract change being sought is to correct clerical or administrative errors in the contract's published essential terms. Service Contracts, ___ F.M.C. ___, 24 S.R.R. 1513 (1989). The request for permission to correct must be filed with the Commission within 45 days of the contract's original filing; the filing party must submit an affidavit attesting with specificity to the factual circumstances that gave rise to the clerical or administrative error; the other contract party must submit a statement concurring in the request for correction; and the access rights of similarly situated shippers are protected. 46 CFR 581.7(b). The commercial rigidity caused by the Commission's "no amendment" rule still exists, however, and still prevents consenting parties to a contract from agreeing to change the terms of their agreement. Existing procedures for correcting clerical or administrative errors do not permit substantive changes to contracts, even when all parties would like to do so.

DISCUSSION

When the FMC surveyed shippers about the Shipping Act of 1984 during the preparation of its Section 18 Report to the Advisory

¹ The current regulation permitting contingency clauses is published at 46 CFR 581.5(a)(3)(viii). The Commission has also prescribed a procedure whereby similarly situated shippers are informed of changes in a contract as a result of an activated contingency clause. Id. 581.6(b)(5).

Commission on Conferences and Ocean Shipping ("ACCOS"), permitting contracts to be amendable was identified as the number one administrative change shippers would like to see in the Commission's current service contract regulations. The inability of contract parties to amend service contracts under FMC rules was also raised as an issue by both shippers and conferences before ACCOS.

It is a basic principle of contract law that . . .

. . . the parties to any contract, if they continue interested and act upon a sufficient consideration while it remains executory, may by a new and later agreement rescind it in whole or in part, alter or modify it in any respect, add to or supplement it, or replace it by a substitute.

17A Am. Jur. 2d Contracts sec. 513 at 526 (1991). Under the present regulation at section 581.7(a), parties to service contracts do not have the same freedom to respond to unforeseen events or changing market conditions. This restriction is not literally required by the terms of the Shipping Act of 1984, but rather is imposed by FMC regulation.

Section 8(c) of the 1984 Act makes service contracts different from ordinary contracts by giving outside persons with certain qualifications a right protected by law to receive the same contract terms from the carrier as the original shipper. This is the reason the Commission felt the original "no amendment" rule was appropriate. However, while that rule is imposed on all service contracts, the Commission's staff informally estimates that only about two percent of filed contracts are subsequently "me-too'd" by other shippers. Thus, to the extent there is any benefit from the

"no amendment" rule, the beneficiaries appear to constitute an extremely small group. Also, the original Commission concern that amending service contracts might leave shippers unable to take advantage of an amended contract did not take into account the possibility that some shippers who had been unable to "me too" an original contract might be able to "me too" the contract as amended. There is also a general concern that, in an increasingly competitive world marketplace with increasingly sophisticated transportation systems and logistics, there may be a greater need in 1992 to provide a flexible regulatory system that accommodates parties' agreed-upon needs than there was in 1984.

This proposed rule is drafted to accommodate the desire for greater flexibility under service contracts in ways that also seek to protect the statutory prerogatives of similarly situated shippers. Corresponding to a procedure already in place for corrections of administrative or clerical errors, 46 CFR 581.7(b)(2)(ii), shippers who have accessed a service contract would have the choice of continuing under their original "me too" contracts or electing to amend their contracts in the same way as the basic contract parties. As noted above, the Commission has expressed concern about shippers who were unable to meet the original essential terms of a service contract, but could have met the terms as modified. The proposed rule further provides in amended section 581.6(b) that the essential terms of an "amended service contract" as well as an "initial service contract" would be

made available to all other shippers or shippers' associations similarly situated.

The proposed rule would not obviate the need for the present corrections procedure, which allows the retroactive application of essential terms corrected for clerical or administrative errors. The rule would permit only prospective application of substantively amended essential terms.

Permitting amendments to service contracts raises other issues upon which the Commission solicits comments. These include:

1. Should the ability to amend be limited to only certain essential terms (e.g., volume, origin and destination points) but not others (e.g., rates)?

2. Should the ability to amend a contract be limited in time, e.g., only during the first half of the contract's period, or within 60 days of its filing with the Commission?

3. What term should the shipper accessing an amended contract receive: the full original contract term, or only the time remaining?

4. Could and should the Commission require that the filing of amendments to a service contract be accompanied by a statement of the reason for the amendments?

Commenters desiring a particular result in these or other related areas should include suggested rule language.

The proposed rule also makes technical changes to reflect the redesignation of the FMC's Bureau of Domestic Regulation as the Bureau of Tariffs, Certification and Licensing.

Although the Commission, as an independent regulatory agency, is not subject to Executive Order 12291, dated February 17, 1981, it has nonetheless reviewed the rule in terms of that Order and has

determined that this rule is not a "major rule" as defined in Executive Order 12291 because it will not result in:

- (1) 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.

The Federal Maritime Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small government jurisdictions.

The collection of information requirements contained in this rule have been submitted to the Office of Management and Budget for review under section 3504(h) of the Paperwork Reduction Act of 1980, as amended. Public reporting burden for this amendment is estimated to average 13.64 hours per respondent, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Norman W. Littlejohn, Director, Bureau of Administration, Federal Maritime

Commission, Washington, D.C. 20573, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Maritime Commission, Washington, D.C. 20573.

List of subjects in 46 CFR Part 581: Administrative practice and procedure; Contracts; Maritime carriers; Rates and fares.

Therefore, pursuant to 5 U.S.C. 553 and sections 8 and 17 of the Shipping Act of 1984, 46 U.S.C. app. 1707 and 1716, Part 581 of Title 46, Code of Federal Regulations, is proposed to be amended as follows:

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, 1707, 1709, 1712, 1714-1716, 1718 and 1722.

2. Section 581.3 is amended by revising paragraphs (a) introductory text, (a)(1)(i), (a)((2)(iv)(B) and (a)(3)(i) to read as follows:

§ 581.3 Filing and maintenance of service contract materials.

(a) Filing. There shall be filed with the Director, Bureau of Tariffs, Certification and Licensing, the following:

(1) * * *

(i) The outer envelope shall be addressed to the Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, DC 20573.

* * * * *

(2) * * *

(iv) (A) * * *

(B) The envelope and the inside address on the transmittal letter are to be addressed to the "Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, Washington, DC 20573."

(3) * * *

(i) The making available of contingent or amended essential terms to similarly situated shippers under § 581.6(b)(5) or § 581.6(b)(1);

* * * * *

3. Section 581.4 is amended by revising paragraphs (a)(1)(i), (b)(1)(iii) and the first sentence after the form in paragraph (b)(2)(iii)(A) to read as follows:

§ 581.4 Form and manner.

(a) * * *

(1) * * *

(i) A unique service contract number, and consecutively numbered amendment number, if any, bearing the prefix "SC";

* * * * *

(b) * * *

(1) * * *

(iii) Be identified by an essential-terms number and consecutively numbered amendment number, if any, bearing the prefix "ET No." which shall be located on the top of each page of the statement of essential terms; and

(iv) * * *

(2) * * *

(iii)(A) * * *

The Index shall include for every statement of essential terms, the ET number and consecutively numbered ET amendment number, if any, as provided in paragraph (b)(1)(iii) of this section, the effective duration, as provided in § 581.5(a)(3)(i), the page and section number(s) [where used], and a column for cancellation dates which shall be used as an alternative to cancelling each individual page of the Essential Terms Publication; and

* * * * *

4. Section 581.6 is amended by revising paragraphs (a) and (b)(1) and (2) to read as follows:

§ 581.6 Availability of essential terms.

(a) Availability of statement. A statement of the essential terms of each initial or amended service contract as set forth in tariff format shall be made available to the general public pursuant to the requirements of this section and §§ 581.3, 581.4(b) and 581.5.

(b) Availability of terms. (1) the essential terms of an initial or amended service contract shall be made available to all other shippers or shippers' associations similarly situated under the same terms and conditions for a specified period of no less than thirty (30) days from the date of filing of the initial or amended service contract as may be adjusted under § 581.8(d).

(2) Whenever a shipper or shippers' association desires to enter into an initial or amended service contract with the same

essential terms, a request shall be submitted to the carrier or conference in writing.

* * * * *

5. Section 581.7 paragraph (a) is revised to read as follows:
§ 581.7 Modification, termination or breach not covered by the contract.

For purposes of this part:

(a) Modifications. (1) The essential terms originally set forth in a service contract may be amended by mutual agreement of the parties to the contract.

(2) Amended service contracts shall be filed with the Commission pursuant to § 581.3(a) of this part.

(3) Any shipper or shippers' association that has previously entered into a service contract which is amended pursuant to this paragraph may elect to continue under that contract or adopt the modified essential terms as an amendment to its contract.

* * * * *

6. Section 581.8 is amended by revising paragraphs (a)(1), (b) introductory text, (c)(1), (c)(2) introductory text and (d) to read as follows:

§ 581.8 Contract rejection and notice; implementation.

(a) Initial filing and notice of intent to reject. (1) Within 20 days after the initial filing of an initial or amended service contract and statement of essential terms, the Commission may notify the filing party of the Commission's intent to reject a service contract and/or statement of essential terms that does not

conform to the form, content and filing requirements of the Act or this part. The Commission will provide an explanation of the reasons for such intent to reject.

* * * * *

(b) Rejection. The Commission may reject an initial or amended contract and/or statement of essential terms if the objectionable contract or statement:

* * * * *

(c) Implementation; prohibition and rerating. (1) Performance under a service contract or amendment thereto may begin without prior Commission authorization on the day both the initial or amended contract and statement of essential terms are on file with the Commission, except as provided in paragraph (c)(2) of this section;

(2) When the filing parties receive notice that an initial or amended service contract, or statement of essential terms, has been rejected under paragraph (b) of this section:

* * * * *

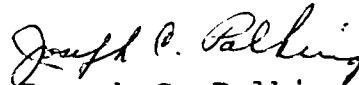
(d) Period of availability. The minimum 30-day period of availability of essential terms required by § 581.6(b) shall be suspended on the date of the notice of intent to reject an initial or amended service contract and/or statement of essential terms under paragraph (a)(1) of this section and a new 30-day period shall commence upon the resubmission thereof under paragraph (a)(2) of this section.

7. Section 581.9 is revised to read as follows:

§ 581.9 Confidentiality.

All service contracts and amendments to service contracts filed with the Commission shall, to the full extent permitted by law, be held in confidence.

By the Commission.


Joseph C. Polking
Secretary