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FEDERAL MARITIME COMMISSION

46 CFR PART 581

[DOCKET NO. 92-20]

SERVICE CONTRACTS IN FOREIGN-TO-FOREIGN TRADES

AGENCY: Federal Maritime Commission.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Federal Maritime Commission is considering publication of a proposed rule that would allow voluntary filing of service contracts that include foreign-to-foreign ocean transportation. The purpose of this Advance Notice is to solicit comments and information from the public on the feasibility and desirability of such a proposed rule.

DATE : Written comments in response to this Advance Notice are to be submitted within 45 days of publication in the Federal Register.

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

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(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).

The Commission's regulations currently limit the scope of service contracts that may be filed as follows:

> Service contracts shall apply only to transportation of cargo moving from, to or through a United States port in the foreign commerce of the United States.

46 CFR 581.2. That regulation was promulgated in Docket No. 86-6, Service Contracts, ___ F.M.C. ___, 24 S.R.R. 277 (1987). During the notice-and-comment period in Docket No. 86-6, several commenters opposed the geographic restriction, arguing that the Commission should assert jurisdiction over service contracts that include foreign-to-foreign traffic because shippers and carriers sometimes negotiate a single contract package covering U.S.-foreign and foreign-to-foreign cargo movements.

The Commission held that the 1984 Act does not apply to such "mixed" contracts. It stated:

> In arguing that the scope of service contracts should be broad enough to include foreign-to-foreign cargo, the commenting parties appear to be treating the issue as purely one of policy which is within the Commission's discretion to decide. The Commission, however, cannot expand by its own regulations the power given to it by Congress.

24 S.R.R. at 284. The Commission cited Austasia Intermodal Lines, Ltd. v. FMC, 580 F.2d 642 (D.C. Cir. 1978) ("ACE"), which held that the tariff provisions of the Shipping Act, 1916 ("1916 Act"), applied only to a "common carrier by water in foreign commerce," which the 1916 Act defined as a carrier offering a U.S. port call as part of the service held out to the shipper. ACE also established that the use of "common carrier" in the 1916 Act was a gauge of the Act's subject matter jurisdiction, and that subject matter jurisdiction fails if the person responsible for the activities in question does not fit within the statutory definition.

ACE left open the question whether the Commission could assert jurisdiction over foreign-to-foreign ocean transportation if the carrier also offered U.S.-foreign voyages and thus was a Shipping Act "common carrier" at least to that extent. However, when Congress wrote the 1984 Act and defined a "common carrier" within the scope of the Act as one holding itself out to the general public to provide transportation between the United States and a foreign country that . . .

> . . . utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country . . .,

46 U.S.C. app. 1702(6), Congress not only left ACE undisturbed, but also made it clear that the FMC may not assert jurisdiction over the carriage of U.S. cargoes through foreign ports on the ground that the carrier in question also makes U.S. port calls, or on the ground that the carrier carries U.S. cargoes out of U.S. ports and U.S. cargoes out of foreign ports on the same voyage. The Senate Commerce Committee stated:

> [The] definition [of "common carrier"] applies only to the extent the passengers or cargo transported are loaded or discharged at a U.S. port. Thus, a liner carrier that accepts U.S.-origin intermodal cargo (or, for that matter, Canadian-origin cargo) at Halifax and calls at Boston for further loading enroute to Rotterdam would be a "common carrier" for purposes of the bill only with respect to the Boston-Rotterdam leg of its voyage.

S. Rep. No. 3, 98th Cong., 1st Sess. 19 (1983).

In Service Contracts, the Commission applied the ACE test for subject matter jurisdiction in noting that "[o]nly service contracts offered by an 'ocean common carrier or conference' are

subject to Section 8(c) of the 1984 Act." 24 S.R.R. at 284. After quoting the legislative history of the definition of "common carrier" set forth above, the Commission concluded that ". . . inclusion of foreign-to-foreign cargo, over which the Commission has no jurisdiction, in service contracts subject to filing under section 8(c) of the 1984 Act would be contrary to the intent of Congress to limit the scope of the 1984 Act to cargo moving in the ocean commerce of the United States which is loaded or discharged at a U.S. port." Id.

More recently, in Puerto Rico Ports Authority v. FMC, 919 F.2d 799 (1st Cir. 1990), the First Circuit reversed a Commission assertion of jurisdiction over certain activities of a port authority. The court found that the port authority was not a regulated "marine terminal operator" for purposes of the activities in question, notwithstanding that other of its activities fell within the Shipping Act. Also, in Docket No. 87-24, Foreign-to-Foreign Agreements -- Exemption, the Commission ruled that the agreement-filing provisions of the 1984 Act did not apply to agreements among carriers governing foreign-to-foreign services. 24 S.R.R. 1448 (1988), reconsideration denied, 25 S.R.R. 455 (1989). Consistent with ACE and Service Contracts, the Commission held that carriers are not Shipping Act "common carriers" for purposes of such agreements, regardless of whether they might be "common carriers" for other purposes. The Commission rejected arguments, similar to those advanced by the Docket No. 86-6 commenters, that such agreements fell within the Act because they

were part of larger agreements that included U.S. port calls. The Commission's decision was affirmed on appeal. Transpacific Westbound Rate Agreement v. FMC, 951 F.2d 950 (9th Cir. 1991).

The prohibition against filing "mixed" service contracts that cover foreign-to-foreign as well as U.S.-foreign ocean transportation was raised as an issue by both shippers and carriers before the Advisory Commission on Conferences and Ocean Shipping. The current regulation at 46 CFR 581.2 requires in effect that the U.S.-foreign provisions of such contracts be treated as a separate contract for 1984 Act filing purposes, and, for the reasons set forth above, it is clear that the FMC has no jurisdiction to require the foreign-to-foreign provisions to be filed. However, absence of jurisdiction over complete "mixed" contracts would not appear to automatically bar the Commission from allowing by regulation the voluntary filing of such contracts as a matter of information to the public or convenience to the contract parties.

In Foreign-to-Foreign Agreements -- Exemption, the FMC rejected arguments that carriers should be able to file foreign-to-foreign agreements voluntarily if they were not subject to mandatory filing, and thereafter a Circular Letter was issued announcing that any new agreements with foreign-to-foreign provisions would be rejected. It may be possible, however, to draw distinctions between agreements and service contracts. The Commission's conclusion that agreements outside its jurisdiction may not be filed voluntarily was based on the facts that Congress specifically considered and then dropped a voluntary filing option

for foreign-to-foreign agreements, see 24 S.R.R. at 1451-53, that section 5(a)(1) of the 1984 Act excludes such agreements from mandatory filing, and that section 7(a)(3) of the Act leaves such agreements subject to the antitrust laws. 46 U.S.C. app. 1704(a), 1706(a)(3). The question of antitrust immunity does not arise in connection with service contracts, and the 1984 Act does not appear to set forth any equivalent directives against voluntary filing of service contracts that include foreign-to-foreign carriage. A basis may therefore exist to distinguish agreements from service contracts insofar as voluntary filing is concerned.

In addition to the issue of the Commission's authority to accept "mixed" service contracts, even on a voluntary basis, a number of other issues and concerns require consideration. As set forth above, section 8(c) of the 1984 Act requires that the "essential terms" of filed service contracts be made available to the general public in carrier tariffs. The Commission's regulations define "essential terms" and require carriers and conferences to maintain an "Essential Terms Publication" in a specified format. 46 CFR 581.1(f), 581.3(b), 581.4(b), 581.5. Section 8(c) further mandates that a filed service contract's essential terms "shall be available to all shippers similarly situated" to the contract shipper. 46 U.S.C. app. 1707(c). The Commission's regulations prescribe methods of compliance with this requirement. 46 CFR 581.6(b). Questions arise whether the voluntary filing of a "mixed" service contract would cause the foreign-to-foreign part of such a contract to fall under the public

"essential terms" requirement, whether similarly situated shippers would be able to demand as a matter of right the same essential terms for foreign-to-foreign transportation, whether the foreign-to-foreign provisions of a "mixed contract" might operate to bar certain shippers from accessing the contract as similarly situated shippers, and whether the Commission would have legal power to enforce section 8(c)'s requirements against the foreign-to-foreign provisions of a voluntarily filed contract.

The Commission believes that these issues can best be explored through the issuance of this Advance Notice of Proposed Rulemaking to solicit the views of governmental bodies, shippers, carriers and the interested public. Specific comments are sought on the following issues, as well as on any other matter deemed to be relevant. The Commission wishes to be clear that these questions concern the implications of accepting "mixed" contracts for filing purposes. The FMC is not seeking to assert jurisdiction over foreign-to-foreign transportation, but jurisdictional questions may unavoidably arise if "mixed" contracts are permitted to be filed.

ISSUES UPON WHICH SPECIFIC COMMENTS ARE REQUESTED

1. Is it a matter of significant business importance or convenience that the FMC allow the filing of service contracts that include foreign-to-foreign ocean transportation? What are the specific difficulties with the present regulation, the effect of which is to require that the U.S.-to-foreign part of such contracts be treated as a separate contract for 1984 Act filing?

2. Is there any legal bar to allowing voluntary filing of "mixed" service contracts? Would that approach be contrary to Congress's limitation of the Commission's jurisdiction through the definition of "common carrier"? Compare or contrast the Commission's refusal to allow voluntary agreement filing in Foreign-to-Foreign Agreements -- Exemption.

3. If "mixed" service contracts were permitted to be filed voluntarily, would a voluntary filing trigger complete or partial FMC jurisdiction to enforce the 1984 Act and its implementing regulations with regard to the entire contract, including the foreign-to-foreign provisions? If so, could and should the Commission require that the parties' cargo and service commitments be broken out by trade, both U.S.-foreign and foreign-to-foreign, so that the "essential terms" applicable to each trade would be identified separately? Would the "essential terms" applicable to foreign-to-foreign trades be subject to section 8(c)'s public tariff requirement? Would similarly situated shippers be able to assert a right to foreign-to-foreign "essential terms," or, conversely, would shippers be able to access only the U.S.-foreign part of a "mixed" contract without being obligated under the foreign-to-foreign provisions (address the specific case of a contract where the U.S./foreign cargo and service commitments of the shipper and the carrier depend, in whole or in part, on their foreign-to-foreign commitments)? If shippers could assert access to foreign-to-foreign essential terms, how could the Commission enforce that right?

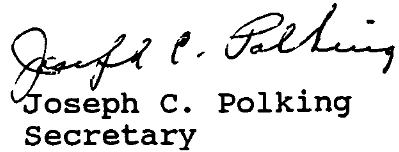
4. If the voluntary filing of a "mixed" service contract would not trigger FMC regulatory jurisdiction over the entire contract, what impact would there be on the Commission's responsibility to administer the 1984 Act with respect to service contracts in U.S.-foreign trades? For example, if a "mixed" contract were filed without the parties' cargo and service commitments being broken out between U.S.-foreign and foreign-to-foreign trades, how could the Commission determine the extent of its jurisdiction over activities undertaken pursuant to such a contract? Could the Commission ensure that such a contract would not be used to allow the parties to avoid the publicly filed rates in the U.S.-foreign trades, or was not otherwise unfairly discriminatory against other carriers or shippers? How could other shippers in the U.S.-foreign trades determine the applicable "essential terms" and assert their statutory right to access to such terms?

5. If "mixed" contracts were permitted to be filed, should they be made subject in their entirety to the Commission's reporting requirements at 46 CFR 581.10?

6. By separate notice served this same date, the Commission has published a proposed rule that would allow service contracts to be amended. Please comment on how adoption of that rule, or failure to adopt that rule, would impact and relate to the issues in this proceeding. If the current regulation at 46 CFR 581.7(a) barring amendments to service contracts should remain in place, how would that relate to the foreign-to-foreign components of filed

"mixed" contracts? Conversely, if FMC regulations are changed to permit service contracts to be amendable, what issues, if any, arise as to "mixed" contracts?

By the Commission.



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Secretary