FEDERAL MARITIME COMMISSION

46 CFR PART 572

[DOCKET NO. 92-16]

CONFERENCE INDEPENDENT ACTION PROVISIONS

AGENCY: Federal Maritime Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Maritime Commission ("Commission") proposes to amend its regulations governing the filing of agreements submitted to the Commission pursuant to section 5 of the Shipping Act of 1984 ("1984 Act" or "Act"). The proposed rule would amend Part 572 of the Commission's regulations to add new requirements concerning conference agreement independent action ("IA") provisions. The proposed rule would: (1) interpret the term "adopt" as it pertains to the filing of IAs that match an originating carrier's IA; (2) specify the conditions under which conference members could adopt another member's IA time/volume rate ("TVR"); (3) prohibit conferences from establishing notice periods, other than the notice period required by section 5(b)(8) of the 1984 Act for taking initial IAs; (4) prohibit conference provisions that provide authority for the allocation of costs on a usage basis for publishing and maintaining member lines' IAs; and (5) prohibit conference provisions that authorize automatic expiration dates for IAs. The purpose of the proposed rule is to preserve an unencumbered right of independent action by conference members as provided for in the 1984 Act.

DATE: Comments (original and 15 copies) must be received at the Commission (on or before 30 days from date of publication of the Proposed Rule in the FEDERAL REGISTER); the date of mailing will not be accepted as the date of filing in this proceeding.

ADDRESS: Comments (Original and 15 copies) to:

Joseph C. Polking, Secretary
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573-0001

FOR FURTHER INFORMATION CONTACT:

Austin L. Schmitt, Director
Bureau of Trade Monitoring and Analysis
Federal Maritime Commission
1100 L Street, N.W.
Washington, D.C. 20573-0001
(202) 523-5787

SUPPLEMENTARY INFORMATION:

Section 5 of the 1984 Act, 46 U.S.C. app. 1704, requires, among other things, that each conference agreement provide for independent action by a conference member on any rate or service item required to be filed in a tariff. Section 5(b)(8) of the Act, *id.* app. 1704(b)(8), specifically states that each conference agreement must . . .

> . . . provide that any member of the conference may take independent action on any rate or service item required to be filed in a tariff under section 8(a) of this Act upon not more than 10 calendar days' notice to the conference and that the conference will include the new rate or service item in its tariff for use by that member, effective no later than 10 calendar days after receipt of the notice, and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date, in lieu of the existing conference tariff provision for that rate or service item.

Congress realized the importance of a strong requirement of independent action to counterbalance the enhanced economic power of conferences. The Conference Report which accompanied the 1984 Act states:

> A critical factor enabling the Conferees to agree on a more narrowly drawn general standard is the inclusion in this bill of numerous other provisions which address the nation's interest in competition in the ocean common carrier industry. * * * [T]he bill includes * * * specific and major procompetitive reforms that will affect the operation of ocean carriers and conferences -- notably a strong requirement of independent action with a limited notice period. . . .

H.R. Report No. 600, 98th Cong. 2d Sess. at 33-34 (1984).

In *Independent Action - Notice and Meeting Provisions in Conference Agreements*, _ F.M.C _, 23 S.R.R. 1022, 1026 (1986), the Commission took the opportunity to emphasize that:

> As the Conference Report makes clear, Congress intended independent action to be a procompetitive balance to the more narrowly drawn general standard. * * * Although Congress continued to allow for collective ratemaking by conferences, it provided for a strong, effective right of IA in the clearest of terms.

Section 5(b)(8) permits conferences to require a period of notice, not to exceed 10 days, as a condition for member lines taking independent action. That section does not specify any other condition, requirement, or limitation that may be imposed by a conference upon a member line wishing to take IA.

One of the purposes of the 1984 Act was to achieve a balance between shippers and carriers. By prohibiting a conference from restraining a member line that wishes to unilaterally establish its own rate, mandatory IA allows conference carriers to respond to rapidly changing trade conditions without leaving the conference and be more flexible in their responses to shippers. Conversely, a conference carrier's option to take IA on rate and service items provides shippers with greater flexibility in their dealings with conferences. In this manner, IA functions as a mediating mechanism between carrier and shipper.

On November 15, 1984, the Commission issued its Final Rule implementing the agreements provisions of the 1984 Act. *Rules Governing Agreements by Ocean Common*

Carriers and Other Persons Subject to the Shipping Act of 1984, _ F.M.C. _, 22 S.R.R. 1453. This Rule, among other things, removed from the Commission's regulations prescribed mandatory language for conference independent action provisions, and announced a policy that parties to conference agreements were free to develop their own provisions in accordance with the requirements of section 5(b)(8) of the Act. *Id.* at 1498-99. Subsequently, the Commission did limit conference discretion in this area by prescribing some IA safeguards. On April 25, 1986, in *Independent Action - Notice and Meeting Provisions*, the Commission revised its regulations to require conference agreements to: (1) establish a maximum notice period of not more than ten days for member lines taking IA; (2) provide for a single notice to the conference of a member line's IA; and (3) state that a member line taking independent action was not required to attend a meeting, or to comply with other procedures, for the purpose of explaining, justifying or compromising a proposed IA.

This proceeding was initiated by an Advance Notice of Proposed Rulemaking ("Advance Notice") published in the FEDERAL REGISTER, 57 FR 14551 (April 21, 1992), requesting comment on certain conference policies and procedures concerning IA. The Advance Notice requested comment on five specific areas: (1) conference agreement provisions that provide authority for member lines to adopt the independent action of another member line, but permit variations from the terms of the original IA; (2) conference agreement provisions that provide for the adoption of, and participation in, IA time/volume rates; (3) conference agreement provisions that impose notice-period conditions on member lines other than the notice-period conditions specifically stated in section 5(b)(8) of the 1984 Act; (4) conference agreement provisions and conference policy/procedures that provide authority for the conference to assess its members the costs

for processing and maintaining individual member lines' IA filings on a usage basis; and (5) conference procedures that impose an automatic expiration date on independent actions.

Twenty-one comments were received in response to the Advance Notice. Comments were submitted by the following conferences: the Asia North America Eastbound Rate Agreement, the "8900" lines and the Mediterranean North Pacific Coast Freight Conference ("ANERA *et al.*"); the South Europe/USA Rate Agreement ("SEUSA"); the North Europe-USA Rate Agreement and the USA-North Europe Rate Agreement ("NEC"); the Venezuelan American Maritime Association, Atlantic and Gulf/West Coast South America Conference, United States/Central America Liner Association, Central America Discussion Agreement, United States Atlantic & Gulf/Hispaniola Steamship Freight Association, Hispaniola Discussion Agreement, United States Atlantic Gulf/Southeastern Caribbean Steamship Freight Association, Southeastern Caribbean Discussion Agreement, Jamaica Discussion Agreement, United States/Panama Freight Association, PANAM Discussion Agreement, Puerto Rico/Caribbean Discussion Agreement, and the Caribbean and Central American Discussion Agreement ("Latin American Agreements"); the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic and Gulf Freight Conference ("Japan Conferences"), the Inter-American Freight Conference ("IAFC"), and the Transpacific Westbound Rate Agreement ("TWRA").

Shipper comments were submitted by: the National Industrial Transportation League ("NIT League"); the Society of the Plastics Industry, Inc. ("SPI"); Westvaco Corporation ("Westvaco"); the Agriculture Ocean Transportation Coalition ("AgOTC"); the American Paper Institute, Inc. ("API"); E. I. du Pont de Nemours and Company ("Du Pont"); the First International Shippers Association ("FISA"); Dole Citrus ("Dole"); the United Fresh Fruit and Vegetable Association ("UFFVA"); Stone International Pulp Sales ("Stone Intl.");

Corning Incorporated ("Corning"); and the Weyerhaeuser Paper Company ("Weyerhaeuser"). The Department of Justice ("DOJ") and the Department of Transportation ("DOT") also submitted comments. A number of commenters take essentially similar positions. Accordingly, we will make generalized representations without individual attribution, unless otherwise appropriate.

The Meaning of "Adopt"

Several conferences have filed amendments to their agreements which have raised the issue of whether an adopting IA can be different from the original IA. Both section 5(b)(8) of the 1984 Act and the Commission's rules governing IA use the term "adopt" when referring to one member taking on another member's initial IA. However, the term "adopt" never has been defined in the Commission's rules or in a Commission proceeding. Although the legislative history of the 1984 Act discusses the general concept of independent action, it is silent regarding the specifics of an adopting IA, including the meaning of the term "adopt." In *Modifications to the Trans-Pacific Freight Conference of Japan Agreement, the Japan-Atlantic and Gulf Freight Conference Agreement, and the Japan-Puerto Rico and Virgin Islands Freight Conference Agreement*, _ F.M.C. _ 23 S.R.R. 1391 (1986), the Commission stated: "The term 'adopt' signifies an action whereby a following member line takes the action of the initiating member line and makes it its own without any connotation of its having been another's." *Id.* at 1400 (footnote omitted). Nothing in that proceeding, however, specifically indicates how "adopt" should be defined.

The Advance Notice requested comments on whether an adopting IA can be different from an original IA. Eleven comments specifically address this issue. Most of these commenters agree with SEUSA that the term "adopt," ". . . is best defined to allow

a member line to adopt the initial IA in whole or in part without change in the terms of the initial IA by the adopting member." SEUSA at 1. The commenters argue that member lines should not be required to adopt the IA in its entirety, but should be allowed the flexibility to adopt a portion of an initial IA that is applicable to its service. As one commenter states: "The word 'adopt,' should be interpreted to permit of [sic] some modicum of flexibility. Where, for example, an adoption action does not alter the rates or charges or terms and conditions, or add anything new that was not originally published, but does not embrace the entirety of the original IA action, such a partial matching should be regarded as a legally permissible adoption." Japan Conferences at 2. Commenters are careful to point out, however, that any portion adopted should be identical to that part of the original IA.

ANERA *et al.* and two shippers believe that the Commission should afford conference members the greatest flexibility possible in serving their customers' needs. These commenters would define the term "adopt" to permit a member line to adopt the initial IA but to adjust it as it applies to the adopting carrier. They view such an interpretation as "a liberalizing device" which would give individual carrier members additional flexibility.

DOJ asserts that any Commission interpretation of section 5(b)(8) of the 1984 Act should "not substantially reduce the incentives of conference members to exercise the right of independent action." DOJ at 2. DOJ also believes that the Commission must ". . . prevent impediments to the free exercise of the right of independent action." DOJ at 5. DOJ is in favor of the Commission seeking further comment on several specific questions on this issue.

The Commission believes that the term "adopt" should be confined to mean "identical" to whatever portion of an originating IA is being adopted. Both the terminology used in the statute and the possible adverse impact of altering initial IAs under the adoption process support this interpretation.

As stated previously, section 5(b)(8) of the Act provides that a conference must allow its member lines, if they so choose, to take independent action and to adopt the IAs of other members. Development of an appropriate definition for the term "adopt" with respect to IA requires an analysis of the use of the word "the" and its overall effect on section 5(b)(8) of the Act. "The" is defined as:

> -- a function word to indicate that a following noun or noun equivalent is definite or has been previously specified by context or by circumstances.[1]

"The" is used in section 5(b)(8) in two separate places that deal with initial and adopting IA. Once a member line elects to initiate its own IA rate or service item, the conference must ". . . include the new rate or service item in its tariff for use by that member, * * * and by any other member" who "elects to adopt the independent rate or service item . . ." (emphases added).

The statutory text that follows "the" clearly refers back to the original independent action rate or service item. That is, when a member line "elects to adopt the independent rate or service item," it adopts that of the originating member. It follows that any change or alteration from the original IA results in a new independent action, and should not be considered an adoption of the original member's IA.

Nothing in the language of the statute supports the proposition that an adoption of an IA is anything more than the adoption of the identical IA of the originating member

---

[1] Webster's Ninth New Collegiate Dictionary 1222 (Merriam-Webster Inc., 1986).

line. If Congress had intended otherwise, it would have avoided use of the word "the." Therefore, with respect to the adoption of IAs, it appears that the phrase "independent rate or service item" following the word "the" is definite, and requires adoption of the initial IA as it is specified.

In addition to an evaluation of the statutory text, it is important to point out three possible adverse effects of altering initial IAs under the adoption process. First, a member line could be inhibited from taking IA if another member line, in an adoption action, can alter the original member's IA. For example, assume a conference rate per twenty-foot container for toys from Hong Kong to Long Beach is $2000 and Carrier A initiates an IA rate of $1500 per twenty-foot container in response to a shipper's request. The shipper then solicits Carrier B for the same IA rate, but Carrier B cannot match the rate of Carrier A because it has higher operating costs due to a superior service. Carrier B then "adopts" Carrier A's rate at a level of $1650 per twenty-foot container, slightly higher than Carrier A's rate but less than the conference rate. Since Carrier B's superior service justifies a $150 difference in the rate, the shipper chooses to ship its cargo with Carrier B instead of Carrier A.

Thus, the initiating carrier's future incentive to take IA may be diminished by the threat of other carriers working off its IA rate. Unlike an initial IA, the adoption of an IA is not restricted by a maximum ten-day waiting period. A carrier, working off an initiating carrier's IA but substantially altering the original IA, could achieve an advantage over the initiating carrier, as well as other conference carriers, that it would not have if it were required to file its IA as an initial IA and wait the maximum ten-day period before executing the rate.

Second, there would be nothing to keep an adopting IA carrier from lowering the original IA rate reduction, but without being restricted by the maximum ten-day notice period required of initial IAs. In such circumstances, an adopting IA could be used to undercut a weaker competitor that took the original IA. This could be particularly important in a situation where a block of attractive cargo is ready to be moved. Again, a carrier's incentive to initiate IA may be diminished.

Third, allowing an adopting member to alter an initial IA could cause ambiguity in the agreement process. If a member line does not adopt the original IA in its entirety, it becomes difficult to determine when an independent action is, in fact, a new or an adopting IA.

The Commission therefore proposes a rule that would explicitly affirm that any adoption of an independent-action rate or service item or a particular portion of such rate or service item must be identical to the initial independent action. The Commission views any change made to the original independent action by another member line as a new IA subject to the filing provisions of the applicable agreement. The proposed rule also specifies that, in order to comply with section 5(b)(8) of the 1984 Act, conference agreement provisions must use the term "adopt" when referring to the adoption of one member's independent action by another member line. The proposed rule interprets the word "adopt" to refer to the filing of independent action by carriers who wish to offer a rate or service which matches exactly the independent rate or service of the originating carrier, with the exception that in the case of an IA TVR, the actual dates offered by an adopting carrier may vary from the dates offered by the originating carrier, so long as the duration of the adopting IA is the same as the originating IA.

Adoption of and Participation in Time/Volume Rates

The Commission has received agreement filings which permit members to participate in the IA TVRs of other members by filing a "following independent action" notice with the conference office. These filings raise concerns regarding the adoptability of TVRs and whether participation in an originating carrier's IA TVR is permissible under the Act.

A TVR is a type of rate whereby a carrier or conference offers a shipper a special rate that varies with the volume of cargo shipped over a specified period of time. Should the shipper fail to ship the minimum level of cargo specified in the TVR within the time prescribed, the cargo carried from the beginning of the TVR time period is re-rated by the carrier at the otherwise applicable tariff rate. When a conference carrier breaks from a conference rate (whether it be a TVR or conventional rate) and sets its own rate, it exercises its right of independent action. If the carrier chooses to establish a TVR, such independent action is known as an IA TVR.

An adoption of an IA TVR occurs when a conference carrier adopts the TVR of another conference member who has filed an IA TVR. The adoption of an IA TVR can be implemented in at least two ways. First, an adopting carrier can participate in the original IA TVR ("participating IA TVR"). In this instance, the shipper receives the volume discount rate from the initiating and adopting IA carriers once its combined shipments among the IA and adopting IA carriers meet the IA TVR's volume commitment. For example, if the IA TVR required 500 containers to secure a rate of $2000 per container, and another carrier adopted that IA TVR, then the shipper would get the IA TVR discount once it shipped 500 containers, regardless of how the 500 containers was divided between the two carriers. In this scenario, the adopting IA-TVR carrier literally joined in the TVR of the originating IA-TVR carrier.

Another way IA TVR might be adopted would be for the adopting IA TVR carrier to give the shipper an identical, but separate arrangement from the originating IA-TVR carrier, and to not join in the original IA TVR ("non-participating IA TVR"). Again, using the above example, if the originating IA-TVR carrier required 500 containers to meet the $2000 rate per container, the adopting IA-TVR carrier would also require 500 containers. The shipper would only get the $2000 per container rate from the carrier with whom it shipped 500 containers (or from both carriers if it shipped at least 500 containers with each). The shipper would not be permitted to combine shipments with both carriers to meet the 500-container requirement. In this situation, there is no joint IA TVR; the adopting IA-TVR carrier is simply offering a TVR identical to the originating carrier's IA TVR.

The 1984 Act and its legislative history are silent regarding the adoption of IA TVRs. To date, the Commission has not addressed the issue.

Section 5(b)(8) states in part that an IA shall be "for use by that [initiating carrier], * * * and by any other member that notifies the conference that it elects to adopt the independent rate . . . ." The Advance Notice sought comment on whether section 5(b)(8) of the Act permits a carrier to participate in an IA TVR. Commenters were asked to address the issue's impact on conferences, independent carriers and shippers, as well as its legality under the 1984 Act.

The commenters fall into three groups: those in favor of adopting IA TVRs without restriction,[2] those who support prohibiting the adoption of IA TVRs,[3] and those who would restrict (but not abolish) the adoption of IA TVRs.[4]

Those in favor of adopting IA TVRs without restriction argue that the authority to adopt an IA TVR is essentially a guaranteed right under the Act.

> Allowing member lines to adopt and participate in the same IA time/volume rate ('TVR') as the initiating member line not only carries out the plain meaning of the Act, but is the only interpretation of the Act that gives maximum service options and competitive flexibility to all concerned. Any other view would restrict the flexibility of shippers and carriers and eviscerate the right of other members to exercise their statutory right to adopt IA TVRs.

ANERA *et al.* at 2.

Those arguing for prohibiting the adoption of IA TVRs believe that permitting adopting IA TVRs creates disincentives to take IA.

> A Conference Agreement which allows an 'adopting carrier' to join in the original IA TVR with the shippers splitting shipments between the IA TVR carrier and the adopting IA TVR carrier(s), robs the originating IA TVR carrier of the benefits of its initiative. It thus serves as a major disincentive to IA TVRs, and therefore constitutes a restriction on independent action not envisioned or allowed by the Shipping Act.
>
> As to the question of whether an IA TVR may be adopted by another Conference carrier in a manner which would give the shipper an identical, but separate arrangement from the originating IA TVR carrier, the impact would seem to be the same -- to threaten the cargo commitment expected by the originating carrier, and thus to have a chilling effect on any carrier considering an IA TVR.

API at 9.

---

[2] ANERA *et al.*, DOT, IAFC, Latin American Agreements, NEC, SEUSA and TWRA.

[3] AgOTC, API, Dole, UFFVA and Westvaco.

[4] DOJ, Japan Conferences and Weyerhaeuser. This group also includes Du Pont, which would permit adopting IA TVRs with the shipper's permission, and SPI, which would require the originating IA TVR carrier's permission in addition to the shipper's permission.

The third group is generally opposed to the adoption of participating IA TVRs, but would allow the adoption of non-participating IA TVRs.

> The Conferences recognize independent action [sic], including the right to 'adopt' the independent actions of others, applies equally to time/volume rates. Conference Report, p. 29. However, in the case of an IA TVR, this does not include the right to join in the IA filing made by the originating carrier and convert that independent filing into a joint holding out. It is simply the right to offer the same rate under the same terms and conditions as the originating carrier.

Japan Conferences at 5-6 (emphasis in original).

The Commission believes that IA TVRs must be viewed as any other adopting IA rate action. Two issues arise in this context, however. The first is whether a carrier can adopt an identical IA TVR after it has become effective without altering the time period. Altering the time period no longer makes it identical. Under this circumstance, the statutory language requiring conferences to permit the adoption of an original IA after its effective date would appear to take precedence over an insistence that "adopt" always means "identical" as to the specific time period covered by the original IA where IA TVRs are concerned. In other words, the term "adopt" does not seem to require "identical" time periods in those instances where a carrier wishes to adopt an IA TVR after it has become effective.

The second issue IA TVRs raise is whether a conference carrier should be permitted to join in an IA TVR already filed by another member line. We believe not.

First, the adopting IA language in the statute would appear to cover a rate offering that is materially identical to the original IA offering -- a rate offering that has material differences is simply treated as a new IA rate. When an adopting IA-TVR carrier participates with the original IA-TVR carrier, this changes the original IA TVR and would seem to be a new rate offering, not an adopting IA. A material change would exist because

the originating carrier may be forced to give a shipper the discounted TVR even though the shipper may not tender that carrier the same volume of cargo specified in the originating IA TVR. Thus, the originating IA-TVR carrier would be forced into offering a participating TVR without its consent. The statute does not appear to sanction such a result.

Second, participation could reduce the amount of cargo and revenue the shipper provides to the carrier originating the IA TVR, and essentially require the carrier to give a volume discount without the volume. It would appear that the only protection a carrier would have from the possibility of being forced into such a situation would be to never file an original IA TVR. Therefore, permitting additional carriers to participate in the IA TVR of an originating carrier could inhibit the taking of an IA TVR in the first instance.

The Commission, therefore, proposes a rule that specifies the conditions under which conference members can adopt another member's IA TVR. The proposed rule provides that a member line can adopt an initiating member's IA TVR before its effective date, in its entirety, without change to any aspect of the original rate offering. Adoption of an initiating member's IA TVR after its effective date would be permitted, provided the adopting carrier appropriately adjusted the beginning and ending date of its adopting IA TVR to make the duration the same as the originating IA TVR. The proposed rule would prohibit member lines from participating in an IA TVR filed by another member line. Member lines may, however, offer joint TVRs if permitted to do so under the terms of their agreement. The proposed rule also allows any TVR participated in by another conference member and in effect prior to the effective date of any final rule in this proceeding to remain in effect until 90 days from the effective date of such final rule.

Notice Period

The Advance Notice requested comment on whether conference agreement provisions that impose notice-period conditions on member lines, other than those specifically stated in section 5(b)(8) of the Act, should be permitted. For example, one conference requires a member to give the conference office forty-eight hours' notice of the withdrawal of an IA in order to meet a lower conference rate applicable to the same commodity or service item.

The Commission received eleven comments on this notice period issue. All commenting conferences oppose a Commission rule that would prohibit conferences from imposing on their member lines notice-period conditions not expressly allowed by section 5(b)(8) of the Act. They argue that they may establish other notice period requirements because section 5(b)(8) does not explicitly prohibit them. Some conferences contend that Congress did not intend to restrict conferences from imposing other notice period requirements on member lines. NEC states that, while it is not opposed to a rulemaking regarding particular types of IA notice provisions that may raise specific legal issues, it does not consider a rule prohibiting all conference IA notice provisions, other than those expressly stated in the Act, to be appropriate or necessary.

Some conferences believe that they can establish supplementary IA notice provisions as authorized by their respective agreements to apply to the withdrawal, amendment, postponement or cancellation of a previous IA. These conferences contend that reasonable notice periods for the withdrawal, amendment, postponement or cancellation of an IA are permissible under section 5(b)(8) and the Commission's regulations. It is argued that the propriety and merit of such ancillary provisions should be determined by the Commission on a case-by-case basis.

Other conferences consider the withdrawal, amendment, postponement or cancellation of an IA to be an initial or new IA, and believe that such actions are subject to the "effective on not more than ten days' notice" requirements of section 5(b)(8). The Japan Conferences state: "Other than matching [adopting] actions, * * * every independent action taken is an initial independent action irrespective of whether it amends an existing IA, cancels an existing IA or initiates an entirely new IA." Japan Conferences at 6-7 (emphasis in original). A number of conferences contend that although no-notice periods for withdrawn, amended, postponed or canceled IAs might provide more flexibility for conference member lines, no-notice periods would make it administratively difficult, if not impossible, for the conference secretariat to administer the conference tariff.

In general, all commenting shippers are concerned that the right of conference carriers to exercise IA be preserved. Of the twelve shippers commenting, five address notice periods. They believe that conference provisions imposing a notice period on the withdrawal of an IA could be used to discourage the use of IA, which undermines the objectives of section 5(b)(8). "To permit further notice period requirements would allow conferences to place unnecessary obstacles before members who wish to undertake independent action." NIT League at 3. API noted that a notice period for the withdrawal of an IA serves only to discourage a member line from taking IA at the outset. A notice period requirement for the withdrawal of an IA is said to constitute ". . . a threat to the member carrier who is thinking of taking IA. If the member carrier were to take IA * * * and subsequently the Conference were to reduce its tariff rate to a level below that of the IA, any notice period imposed upon the member which took the IA and now wishes to rejoin the Conference undermines the competitiveness of that member for the duration of the notice period." API at 5.

Some commenting shippers also argue that the 1984 Act's legislative history supports the prohibition of conference agreement provisions that impose requirements other than the maximum ten-day notice period. Others maintain that conferences should not have the authority to impose conditions on IA other than the ten-day notice period permitted by the statute, regardless of the characterization of the nature of the action.

DOJ and DOT believe that conference agreement provisions that impose advance notice requirements on IAs, other than that specifically stated in section 5(b)(8) of the Act, should be prohibited. Both note the Commission's past decisions that conferences may not impose additional restrictions on the exercise of the right of IA. DOT contends that additional restrictions would impede individual carrier flexibility, which Congress insisted upon in return for extending collective ratemaking authority. It also states that a notice period for actions such as the withdrawal of an IA "raises the possibility that the issuing conference is in fact simply trying to make the exercise of IA rights by its member lines more difficult." DOT at 4. DOJ argues that notice-period restrictions other than the ten-day waiting period authorized by the Act serve to penalize those who exercise their IA rights. It concludes that "The existence of such a threat poses a substantial disincentive to the exercise of the right of IA, and the imposition of such a burden on IA should be considered unlawful." DOJ at 11-12.

The act of adopting, withdrawing, amending, postponing or canceling an IA, although performed by an individual member line, does not appear to create a new independent rate action or service item separate from that of the conference. Therefore, the Act's maximum ten-day notice period associated with initial independent actions does not apply. Nor does section 5(b)(8) otherwise provide a period within which a conference member must notify the conference of its intent to adopt, withdraw, amend, postpone or cancel an initial IA.

In *Independent Action - Notice and Meeting Provisions*, the Commission advised that:

> To argue that the Act's alleged silence permits other substantive requirements or conditions which would effectively add to the limited notice requirement, either as a precondition to or as a consequence of independent action, is contrary to the express language of the Act. Any condition, procedure or other mandatory requirement that in effect adds to the 10-day maximum notice requirement or places a mandatory burden on IA is, on its face, *per se* violative of section 5(b)(8).

23 S.R.R. at 1027 (emphasis added).

The Commission had earlier stated:

> The 1984 Act represents a legislative effort to balance the interests of carriers and shippers. In order to fulfill that Congressional purpose, it is necessary to ensure that the right of independent action is fully preserved and that no restrictions, other than those permitted by the statute, are placed on its exercise.
>
> * * *
>
> Preserving an unburdened right of independent action is in keeping with the Congressional purpose. Restricting, burdening, or making it more difficult to exercise independent action defeats the purpose of the Act and the legislative compromise that led to the Act's passage.

Id. at 1026.

Notice or waiting period requirements for actions taken that affect previously taken IAs or adopting IAs could hamper a conference member's right to independent action. Not only do notice periods delay adopting-IA filings, but they could also prevent a member line from filing an adopting IA in those instances where the initial IA is withdrawn prior to its intended effective date. Additionally, requiring member lines to adhere to a withdrawal notice period could serve to restrict IA by inhibiting a carrier from quickly reacting to the conference establishing a rate below that carrier's IA. Accordingly, the Commission in this proceeding proposes to prohibit conference agreement provisions that impose notice periods for adopting, withdrawing, amending, postponing or canceling IAs.

Filing and Maintenance Fees

Some conferences are assessing their individual member lines the costs incurred in processing IAs. These include initial IAs, matching or adopting IAs (if separately filed), and the maintenance of IAs. The Commission is concerned that the assessment of filing and maintenance fees on a usage basis may restrict a member's right to take independent action.

The Advance Notice requested comments on member lines being assessed conference costs incurred in processing tariff filings that were requested or initiated by individual lines for their own use, and how the costs should be assessed. The Commission was particularly interested in whether such filing and maintenance fees regarding IAs were legal under the 1984 Act, and their impact on conferences, independent carriers and shippers.

Comments on this issue fell into two categories: those who believe that maintenance and filing fees should be permitted and those who believe such fees discourage a carrier from taking IA. Some commenters in the latter group could support fees, but on a *per capita* rather than a usage basis.

Conference commenters generally believe that conference agreements may legally provide for the assessment of the costs incurred in the processing and filing of IAs. Many conferences note that both section 5(b)(8) and the legislative history of the 1984 Act are silent with regard to the assessment of costs in the context of IAs. The IAFC argues that it would be beyond the Commission's authority to prohibit a conference from seeking reimbursement for the costs associated with processing and filing IAs for its members. Some conferences make the point that other members should not subsidize the costs associated with an IA filed by another member for its exclusive use.

Conference commenters also reject the notion that assessing a member line for the costs of filing its IAs would deter it from taking IA and would interfere with its statutory right of independent action.[5] First, they do not believe the cost of filing or processing an IA outweighs the potential revenue a carrier would earn by carrying cargo it would not have transported if it had not taken IA. Second, they argue that while a member line incurs additional costs with respect to each of its IAs, it avoids the costs associated with the IAs of the other conference members.

Many conferences maintain that the assessment of IA costs is an internal conference administrative affair that the Commission should not get involved in. Several conferences argue that it is not *per se* illegal for conferences to agree on how costs of conference operations should be allocated and that the Commission, if it has reason to believe that a particular activity has the effect of penalizing a carrier and hence thwarting its statutory right of mandatory IA, may take appropriate measures. TWRA and the Japan Conferences note that the Commission has addressed the question of IA fees to recover costs, and has taken no action based on its review of information submitted by certain conferences. The situation is said not to have changed and therefore, rulemaking on this issue is deemed unnecessary.

Shipper commenters take the position that filing and maintenance fees could discourage a carrier from considering IA and that the Commission should prohibit any provisions or actions which may restrict IA. Many shippers are wary that a direct fee or charge, even if the costs are associated with processing IAs and regardless how "moderate"

---

[5] TWRA indicates that it charges substantively less for IA filing fees than the incremental costs that are attributable only to tariff page preparation and filing of IAs. It knows of no instance in which a member which wanted to take IA did not do so or hesitated to do so because of IA filing fees.

or reasonable, can be construed as a barrier to IA given the thousands of commodities considered for IA. Several shippers state that there is no express language in the 1984 Act or its legislative history allowing a conference to charge its members for costs associated with their IAs and, therefore, conferences should not be permitted to assess IA filing fees.

Other shipper commenters support the concept of assessing members a fee based upon reasonable processing and filing costs. One shipper would permit each conference member to be assessed the same rate regardless of the number of IAs it specifically requested.

DOJ and DOT argue that the Commission should ensure that conferences not penalize member lines for exercising their right of IA. DOT states: "The Commission's primary regulatory concern should be that proposed charges are reasonably related to the ministerial function performed, and not in fact a penalty imposed on member lines . . . ." DOT at 4. DOJ submits that the imposition of conference charges for IA filings could be at least as burdensome as other requirements such as multiple notices and mandatory attendance at conference meetings, which the Commission has rejected as impermissible restrictions on the right of IA. DOJ states that a conference has an incentive to minimize IA; thus, there is a danger that excessive charges could be imposed as a means of deterring IA. "While nominal charges limited to recovering costs might be unobjectionable in theory, in practice, it could be very difficult to determine the reasonableness of charges to particular carriers." DOJ at 13. Thus, DOJ would not permit conferences to assess IA filing fees. Should conferences experience financial hardship as a result of their inability to impose such fees, it believes that the Commission could revisit this issue.

The statutory obligation of a conference to provide for IA should not be shifted to member lines exercising that right. Assessing members the cost of filing and maintaining

IAs on a usage basis appears to do that. If a member line does not pay the conference publishing and maintenance fees associated with IAs, the line's proposed IA presumably would not be published by the conference, thus restricting the member's ability to engage an IA rate for its own use. Expenses incurred by the conference for filing or maintaining IAs should be considered administrative costs and shared, as other administrative costs, on a per capita basis rather than on a usage basis. By charging fees for processing IAs on a per capita basis, it would be clear that members were not being discouraged from taking IA or penalized for doing so.

Thus, the proposed rule prohibits conferences from assessing their member lines either filing fees or maintenance fees on a usage basis for expenses incurred by the conference in processing and administering independent action filings.

Automatic Expiration Dates

The Advance Notice advised that at least one conference had adopted the practice of assigning automatic expiration dates for IAs when none was specified. As the Commission understands the practice, if an initiating member line neglects to indicate a specific expiration date or does not indicate that it wishes no expiration date, a conference-imposed expiration date, for example ninety days, is automatically assigned to the IA. The Commission requested comments on whether conferences should be permitted to so assign automatic expiration dates for IAs.

The comments received on this issue were divided along industry lines. Conferences generally advocated that it was permissible for them to impose automatic expiration dates -- with the understanding that member lines can "opt out" or amend the conference-imposed expiration date. Shippers, with DOJ and DOT concurring, took the position that

the Commission should not allow conferences to impose automatic expirations dates on IAs.

The conference comments contain two basic arguments. First, they contend that the 1984 Act does not specifically prohibit conferences from assigning expiration dates to IAs. Second, they refer to the imposition of expiration dates as a "housecleaning" method to rid conference tariffs of outdated and unused IAs. They believe that automatic expiration dates are lawful under the 1984 Act, and point out that member lines would be free to change or amend the conference-imposed date.

Shipper comments generally challenge conference-imposed expiration dates as not permitted by the 1984 Act and as placing an extra burden upon member lines taking IA. They urge the Commission not to allow conferences to impose automatic expiration dates on IAs.

DOT and DOJ agree with the shippers: "DOT does not believe that such provisions [automatic expiration dates] should be permitted. Carriers that take independent actions are solely responsible for the terms of their independent arrangements with shippers." DOT at 5. "Conference imposition of arbitrary termination dates on IAs * * * constitutes an unwarranted constraint on the right of independent action." DOJ at 13.

The Commission believes that the member line exercising IA, and not the conference, should be the party that initiates and decides the expiration date of an IA. The unilateral assignment of automatic expiration dates for IAs by conferences appears to restrict the exercise of IA, thereby undermining the purpose of section 5(b)(8) and the legislative compromise underlying the 1984 Act. As stated in *Independent Action - Notice and Meeting Provisions*, the only restrictions that may be placed on IA are those found in the statute. Notwithstanding the conferences' position that automatic expiration dates are permissible so long as the member line can "opt out," even such opting out of a conference-

imposed date can be viewed as an added burden on a member's IA rights. There should be other methods conferences can employ to dispose of outdated rates in their tariffs that do not hinder a member's right to take independent action.

The Commission therefore, proposes to incorporate in its agreement rules a provision expressly prohibiting a conference from designating an expiration date for an IA in the absence of such a date designated by the carrier taking the IA.

Although the Commission, as an independent regulatory agency, is not subject to Executive Order 12291, dated February 17, 1981, it nonetheless has reviewed the proposed rule in terms of this Order and has determined that the rule, if adopted, is not a "major rule" as defined because it will not result in: (1) an 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.

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Commission certifies that the proposed rule will not, if adopted, have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

The collection of information requirements contained in this proposed rule have been submitted to the Office of Management and Budget for review under the provisions of the Paperwork Reduction Act of 1980 (P.L. 96-511), as amended. Public reporting burden for this collection of information is estimated to vary from 18 to 22 hours per response, with an average of 20 hours per response, including time for reviewing

instructions, searching existing 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, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503.

Current independent action regulations contained in 46 CFR 572.502(a)(4) would be moved to a new subpart (Subpart H - Conference Agreements) and redesignated 46 CFR 572.801 -- Independent action. The new regulations recommended by this proposed rule would be added to the new Subpart H. In addition, the Commission's current rules governing conference service contract provisions (46 CFR 572.502(a)(5)) would be moved to Subpart H and redesignated 46 CFR 572.802 -- Service contracts.

List of Subjects in 46 CFR Part 572:

Administrative practice and procedure, Antitrust, Maritime carriers, Rates and fares.

Therefore, pursuant to 5 U.S.C. 553 and sections 5, 6, and 17 of the Shipping Act of 1984, 46 U.S.C. app. 1704, 1705, 1716, Part 572 of Title 46, Code of Federal Regulations, is proposed to be amended as follows:

Part 572 - [AMENDED]

1. The authority citation for Part 572 continues to read:

Authority: 5 U.S.C. 533; 46 U.S.C. app. 1701-1707, 1709-1710, 1712, and 1714-1717.

2. Paragraphs (a)(4) and (a)(5) of section 572.502 are revised to read as follows:

§ 572.502 Organization of conference and interconference agreements.

(a) * * *

(1) * * *

(2) * * *

(3) * * *

(4) Article 13 - *Independent action.*

The regulations for independent action are contained in section 572.801 of this part.

(5) Article 14 - *Service contracts.*

The regulations for service contracts are contained in section 572.802 of this part.

* * * * *

3. A new Subpart H is added reading as follows:

Subpart H - Conference Agreements

§ 572.801 Independent action.

(a) Each conference agreement shall specify the independent action procedures of the conference, which shall provide that any conference member may take independent action on any rate or service item required to be filed in a tariff under section 8(a) of the Act upon not more than 10 calendar days' notice to the conference and shall otherwise be in conformance with section 5(b)(8) of the Act.

(b)(1) Each conference agreement that provides for a period of notice for independent action shall establish a fixed or maximum period of notice to the conference. A conference agreement shall not require or permit a conference member to give more than 10 calendar days' notice to the conference, except that in the case of a new or increased rate the notice period shall conform to the requirements of § 580.10(a)(2).

(2) A conference agreement shall not require notice from member lines for adopting, withdrawing, amending, postponing or canceling independent actions.

(c) Each conference agreement shall indicate the conference official, single designated representative, or conference office to which notice of independent action is to be provided. A conference agreement shall not require notice of independent action to be given by the proposing member to the other parties to the agreement.

(d) A conference agreement shall not require a member who proposes independent action to attend a conference meeting, to submit any further information other than that necessary to accomplish the filing of the independent tariff item, or to comply with any other procedure for the purpose of explaining, justifying, or compromising the proposed independent action.

(e) A conference agreement shall specify that any new rate or service item proposed by a member under independent action shall be included by the conference in its tariff for use by that member effective no later than 10 calendar days after receipt of the notice and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date.

(f)(1) As it pertains to this part, *adopt* means the assumption in identical form of an originating member's independent action rate or service item, or a particular portion of such rate or item. In the case of an independent action time/volume rate ("IA TVR"), the dates of the adopting IA may vary from the dates of the original IA, so long as the duration of the adopting IA is the same as that of the originating IA. Furthermore, no term other than *adopt* (*e.g.*, *follow, match*) can be used to describe the action of assuming as one's own an initiating carrier's IA. Additionally, if a party to an agreement assumes an IA of another party, but alters it, such action is considered a new IA and must be filed pursuant to the IA filing and notice provisions of the applicable agreement.

(2) An independent action time/volume rate ("IA TVR") filed by a member of a ratemaking agreement may be adopted by another member of the agreement, provided that the adopting member takes on the original IA TVR in its entirety without change to any aspect of the original rate offering (except beginning and ending dates in the time period) (*i.e.*, a separate TVR with a separate volume of cargo but for the same duration). Any subsequent IA TVR offering which results in a change in any aspect of the original IA TVR, other than the name of the offering carrier or the beginning date of the adopting IA TVR, is a new independent action and shall be processed in accordance with the provisions of the applicable

agreement. No carrier may participate with another carrier in an IA TVR already filed by another carrier. Member lines may, however, jointly file TVRs if permitted to do so under the terms of their agreement. Any currently effective TVR in which two or more member lines participate shall be permitted to remain in effect until 90 days from the effective date of this section.

(g) A conference agreement shall not require or permit individual member lines to be assessed on a per carrier usage basis the costs and/or administrative expenses incurred by the agreement in processing independent action filings.

(h) A conference agreement shall not permit the conference to designate a termination date for an independent action taken by a member line in the absence of an expiration date specified by the member line itself. Only a member line may determine the duration of its IA and establish an expiration date for such IA. If no specific expiration date is established, the duration of the IA shall be deemed to be indefinite.

(i) All new conference agreements filed on or after the effective date of this section shall comply with the requirements of this section. All other conference agreements shall be modified to comply with the requirements of this section no later than 90 days from the effective date of this section.

(j) Any new conference agreement or any modification to an existing conference agreement which does not comply with the requirements of this section shall be rejected pursuant to § 572.601 of this part.

(k) If ratemaking is by sections within a conference, then any notice to the conference required by § 572.801 may be made to the particular ratemaking section.

§ 572.802 Service contracts.

(a) Each conference agreement that regulates or prohibits the use of service contracts shall specify its rules governing the use of service contracts by the conference or by individual members.

(b) Any change in conference provisions regulating or prohibiting the use of service contracts, whether accomplished by a vote of the membership or otherwise, shall not be implemented prior to the filing and effectiveness of an agreement modification reflecting that change.

(c) For the purpose of this section, conference provisions regulating or prohibiting the use of service contracts include, but are not limited to, those which permit or prohibit conference service contracts; permit or prohibit individual service contracts; permit or prohibit independent action on service contracts; permit or prohibit individual members to elect not to participate in conference service contracts; impose restrictions or conditions under which individual service contracts may be offered.

* * * * *

By the Commission.

Joseph C. Polking
Secretary