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FEDERAL MARITIME COMMISSION

46 CFR PART 572

[DOCKET NO. 92-16]

CONFERENCE INDEPENDENT ACTION PROVISIONS

AGENCY: Federal Maritime Commission.

ACTION: Advance Notice of Proposed Rulemaking ("Advance Notice").

SUMMARY: The Federal Maritime Commission ("Commission") solicits comments on Conference policies and procedures concerning independent action ("IA"). The Notice addresses such issues as the interpretation of the term "adopt," IA on time volume rates, IA filing and maintenance fees, automatic IA expiration dates, and notice periods on IA withdrawals. The comments received will assist the Commission in determining whether it should amend its regulations at 46 CFR Part 572.

DATE: Comments (original and 15 copies) must be submitted (on or before 60 days from date of publication of the Notice in the FEDERAL REGISTER).

ADDRESS: Comments (Original and 15 copies) to:

Joseph C. Polking, Secretary
Federal Maritime Commission
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FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Section 5(b)(8) of the Shipping Act of 1984 (" 1984 Act or Act"), 46 U.S.C. app. 1704(b)(8), requires that each conference agreement:

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 states:

A critical factor enabling the conferences 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. . . . Even more importantly, the bill includes other 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. 98-600, 98th Cong. 2d Sess. at 33-34 (1984).

Additionally, in Docket No. 85-7, *Independent Action - Notice and Meeting Provisions in Conference Agreements*, the Commission stated:

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. (at 6).

The purpose of mandatory IA is to require a conference to allow a member to unilaterally establish its own tariff rate. Independent action may allow conference carriers to respond to rapidly changing trade conditions without leaving the conference, and enables conference members to be more flexible in their responses to shippers. From a shipper's

perspective, a conference carrier's option to take IA 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 governing agreements filed pursuant to the 1984 Act. This rule deleted the prescribed mandatory language for conference independent action provisions, and announced a policy that parties to conference agreements were free to develop their own IA provisions in accordance with the requirements of section 5(b)(8) of the Act (46 CFR 572.103(f), 49 FR 45351).

On April 25, 1986, the Commission revised its regulations governing the filing of conference agreements, requiring such agreements to: (1) establish a maximum notice period of not more than 10 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 (46 CFR 572.502(a)(4), 51 FR 16038). The Commission also has addressed IA issues in Docket No. 86-3, *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*, and Docket No. 85-7, *Independent Action - Notice and Meeting Provisions in Conference Agreements*.

There have been a number of recent filings by conferences that raise issues under section 5(b)(8) of the Act. The following five issues are addressed in this Advance Notice: (1) conference agreement provisions that provide authority for member lines to adopt the independent action of another member line, but permit deviations 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 those conditions specifically stated in section 5(b)(8) of the Act; (4) conference agreement provisions and conference policies or procedures that provide authority for the conference to assess members the costs separately incurred for processing and maintaining individual member lines' IA or open rate filings on a usage basis; and (5) conference procedures that impose an automatic expiration date on independent actions.

Discussion

A. Definition of "Adopt"

Several conferences have recently 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 make use of the term "adopt" when referring to the taking-on of one member's initial IA by another member. 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 Docket No. 86-3, the Commission stated that, "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."

The Commission is thus interested in public comment on the issue of whether an adopting IA can be different from an original IA. Such comments should address this issue's legality under the 1984 Act and its impact on conferences, independent carriers and shippers.

B. Adoption of and Participation in IA Time/Volume Rates ("TVR")

The Commission has recently received agreement filings which have raised the issue of whether a carrier can participate in an IA TVR, thus making it a joint rate. A TVR is a type of rate whereby a carrier or conference agrees to offer a shipper a special rate, provided the shipper tenders a certain minimum amount of cargo for carriage within a specified time period. Should the shipper fail to meet this minimum cargo commitment within the time allotted, then the cargo previously carried is re-rated by the carrier at the applicable higher tariff rate for the commodity at issue.

When a conference carrier exercises its right of independent action it breaks from a conference rate (whether it be a TVR or conventional rate) and sets its own rate. 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 original IA TVR. An IA TVR might be implemented in at least one of two ways. The adopting carrier could join in the original IA TVR with the shipper splitting its shipments (in any percentage) between the originating IA-TVRR carrier and the adopting IA-TVRR carrier(s). Alternatively, the adopting IA-TVRR carrier could give the shipper an identical, but separate arrangement from the originating IA-TVRR carrier.

The 1984 Act and its legislative history are both silent regarding the adoption of independent actions taken as time/volume rates. The Commission itself has not previously addressed adopting the IA TVR of another carrier.

The Commission is therefore interested in public comment on the interpretation of section 5(b)(8) of the Act and whether a carrier is legally permitted to participate in an IA TVR, thus apparently making it a joint rate. 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. . . ." Such comments should address not only this issue's legality under the 1984 Act but also its impact on conferences, independent carriers and shippers.

C. Notice Period

The Commission has recently received conference agreement filings that raise the issue of whether a conference can establish notice-period requirements for IAs, other than the notice period provided for by the 1984 Act for initial IAs. For example, one agreement requires a member who had taken independent action on a commodity or service item to give the agreement office 48 hours' notice of the withdrawal of the IA in order to meet a lower agreement rate applicable to the same commodity or service item.

Section 5(b)(8) of the 1984 Act permits conferences to require a period of notice, not to exceed 10 days, as a condition for member lines taking independent action. Section 5(b)(8) does not specify any other condition, requirement, or limitation that may be imposed by a conference upon a member line wishing to take independent action.

The Commission has ruled in the past that the only restrictions that may be placed on the right of carriers to take IA are those present in the Act.

In order to gain industry-wide views on notice period requirements for IAs, the Commission requests public comment on a conference's ability to establish notice-period requirements for IAs, other than the notice period provided for by the Act for initial IAs. Such comments should address this issue's legality under the 1984 Act and its impact on conferences, independent carriers and shippers.

D. Filing and Maintenance Fees

The Commission has become aware that several conferences are assessing their individual member lines the costs incurred in processing both IA and open rate filings. These costs include initial IAs, matching or adopting IAs (if separately filed), the maintenance of IAs, and the costs incurred in processing open rate filings.

In order to appropriately address conference IA and open rate filing and maintenance fee practices, the Commission is interested in public comment on whether a conference can legally assess member lines the costs incurred in processing tariff filings which were requested or initiated by individual lines for their own use, and if so, how should the costs be assessed. Such comments should address this issue's legality under the 1984 Act and its impact on conferences, independent carriers and shippers.

E. Automatic Expiration Dates

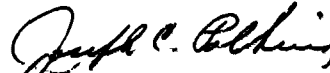
Several conferences have adopted the practice of assigning an automatic expiration date for IAs unless the proposing carrier has specified a shorter or longer duration. Under this automatic expiration date procedure, if the initiating member neglects to indicate a specific expiration date or does not wish to have the IA expire, a conference-imposed expiration date is automatically added to the IA.

In order to appropriately address this issue, the Commission requests public comment on whether conferences can assign automatic expiration dates for IAs. Such comments should address this issue's legality under the Shipping Act of 1984 and its impact on conferences, independent carriers and shippers.

Conclusion

The issues discussed above are significant. In order that the Commission have the most complete information available to enable it to make an informed judgment in these matters, interested persons are invited to address the specific questions listed above, as well as offer any other comments regarding these issues that they believe are appropriate and pertinent. Commenters are requested to refer to the item numbers when discussing the various issues. Commenters are also asked to accompany their responses, where appropriate, with factual examples or descriptions of experience supporting their response. All comments should, where appropriate, be accompanied by suggested rule language which would be considered in any rulemaking. Should the Commission determine to propose any modifications to 46 CFR 572 after receiving comments, it will do so by separate rulemaking proceeding.

By the Commission


Joseph C. Polking
Secretary