FEDERAL MARITIME COMMISSION

46 CFR Part 535

Docket No. 09-02

RIN 3072-AC 35

Repeal of Marine Terminal Agreement Exemption

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission repeals the marine terminal agreements exemption, which exempted such agreements from the Shipping Act's 45-day statutory waiting period, and amends the Commission's regulations to transfer an existing definition of the marine terminal conference agreement to another section. This rule also corrects a typographical error.

DATES: Effective December 10, 2009.

FOR FURTHER INFORMATION CONTACT:

Peter J. King, General Counsel
Federal Maritime Commission
800 North Capitol Street, N.W.
Room 1018
Washington, D.C. 20573-0001
generalcounsel@fmc.gov

SUPPLEMENTARY INFORMATION:

By Notice of Proposed Rulemaking (NPR) published in the Federal Register on July 2, 2009, 74 FR 31666, the Commission proposed to repeal 46 CFR 535.308, which exempts marine terminal agreements from the 45-day waiting period requirement of the Shipping Act. The NPR

addresses the Commission's findings and concerns that agreements filed under section 535.308 could cause anticompetitive consequences that the Commission deemed unlikely when it first adopted the exemption in 1987.

The Commission invited comments on the NPR. The comments period was later extended to September 8, 2009. 74 FR 41831, Aug. 19, 2009.

Comments

Three comments were filed with the Commission. Two comments support repeal of section 535.308 exemption as proposed in the NPR, and one comment opposes the repeal.

The National Customs Brokers and Forwarders Association of America (NCBFAA) is the national trade association representing the interests of freight forwarders, NVOCCs, and customs brokers in the ocean shipping industry. NCBFAA notes that under section 535.308, exempt marine terminal agreements (MTAs) are immunized from the antitrust laws immediately upon filing with the Commission. NCBFAA states that agreements between terminal operators have evolved in their nature from simple landlord-tenant agreements, and that some marine terminal operators have begun using the exempt MTAs to "collectively adopt policies, procedures and regulations" affecting the shipping industry. Due to the exemption, parties adversely affected by exempt MTAs, as well as the Commission itself, are deprived of opportunities to consider the adverse consequences of any exempt MTAs before such agreements become effective. Although NCBFAA does not challenge continued antitrust immunity under the Shipping Act, it believes that MTAs that could have anticompetitive consequences should no longer be exempted from the 45-day waiting period established by the Shipping Act, 46 U.S.C. 40304.

The National Industrial Transportation League (NITL) is a national association that represents approximately 700 member companies that tender goods to carriers for transportation in interstate and international commerce or that arrange or perform transportation services. NITL's membership includes large multinational and national corporations as well as small and medium-sized companies. NITL states that MTAs have an impact on the shipment of its members because many of them are U.S. importers and exporters. NITL notes that agreement of terminal operators have become "more complex and broader in scope." This change, NITL states, has created a legitimate concern as to whether MTAs should be granted antitrust immunity immediately upon filing with the Commission. NITL supports repeal of the exemption for MTAs from the 45-day waiting period.

The Ports of Los Angeles and Long Beach (the Ports) submitted a comment objecting to the elimination of the 45-day waiting period exemption for MTAs. The Ports allege that the Commission's efforts to eliminate the waiting period exemption arise largely out of the efforts to delay and block the implementation of agreements the Ports filed in connection with their environmental programs. The Ports state that the MTA exemption does not impede Commission oversight. The Ports argue that elimination of the section 535.308 exemption will cause them "to interrupt and delay operational matters" to accommodate the 45-day waiting period.

The Ports also argue that the Commission's marine terminal operator agreement rules are unclear and provide no guidance regarding the degree of specificity and detail required for filed agreements. The Ports allege that this confusion stems from the Commission's elimination in Docket No. 03-15 of the exemption for "routine operational and administrative matters," which were previously exempted from filing under 46 CFR 535.407(c) (2003). The Ports assert that, in lieu of the section 535.407(c) exemption, the Commission provided in section 535.408 a list of

exemptions that are specific to vessel-operating common carriers and do not address marine terminal operators at all. The Ports claim that repeal of the section 308 exemption will cause long delays for every "trivial" amendment to any arrangement between marine terminals. The Ports urge that the Commission discontinue the instant rulemaking or revisit the issue of "routine operational and administrative" agreement filing by undertaking a more thorough effort to clarify and update the Commission's agreement rules as applicable to marine terminal operators.

Discussion

After review of the comments and careful consideration, the Commission has determined to adopt the NPR as final, and to repeal the exemption at 46 CFR 535.308.

I. The Shipping Act requires the Commission to repeal section 535.308.

Pursuant to section 16 of the Shipping Act, 46 U.S.C. 40103, the Commission exempted MTAs from the Shipping Act's 45-day waiting period requirement after finding that such exemption would not substantially impair effective regulation by the Commission, be unjustly discriminatory or detrimental to commerce, nor result in a substantial reduction in competition within the meaning of Section 16 of the Shipping Act. *Marine Terminal Agreements*, 24 S.R.R. 192, 193-194 (FMC 1987).

More recently, the Commission has found that potentially anticompetitive agreements could be filed with the Commission claiming the exemption under section 535.308. MTAs filed with the Commission have revealed the greater complexity of subject matter and the wider range of operational issues that the marine terminal industry seeks to address in MTAs. MTAs increasingly have the potential to cause the anticompetitive consequences that the Commission deemed unlikely when it first adopted the exemption.

Under the current section 535.308, MTAs become effective upon filing, depriving the Commission of the opportunity to review the agreements during the statutory 45-day waiting period and the opportunity to seek additional information from the agreement parties. The absence of any waiting period requirement for MTAs may frustrate the Commission's function of advance review and analysis of filed agreements to prevent a reduction in competition under section 6 of the Shipping Act. 46 U.S.C. 40304, 41307.

The Ports allege that the Commission's efforts to eliminate the exemption are intended primarily to delay and block the Ports' environmental programs. Contrary to the Ports' allegation, the Shipping Act permits the Commission to continue the exemption from the Act's requirements only "if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce." 46 U.S.C. 40103. When the Commission finds that the section 535.308 exemption may lead to substantial reduction in competition or be detrimental to commerce, the Commission is required under the Shipping Act to repeal the exemption.

II. The current exemption under section 535.308 frustrates Commission functions under the Shipping Act.

Under section 6 of the Shipping Act, the Commission may reject a filed agreement that does not meet the requirements of the Act. 46 U.S.C. 40304(b). The Commission may request additional information and documents to make the determination required under the Shipping Act. 46 U.S.C. 40304(d). If, at any time after the filing or effective date of an agreement, the Commission determines that the agreement is likely, by reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, the Commission may bring a civil action to enjoin the operation of the agreement. 46 U.S.C. 41307(b).

The Ports argue that the section 535.308 exemption does not impede the Commission's oversight for MTAs. This argument overlooks concerns that, under the current section 535.308 exemption, MTAs become effective immediately upon filing with the Commission, depriving the industry and the Commission of any pre-effectiveness review. Under the section 535.308 exemption, the Commission may seek to enjoin potentially anticompetitive MTAs only after the MTAs have become effective, thereby allowing, by a reduction in competition, an unreasonable reduction in transportation service or an unreasonable increase in transportation cost. Congress cautioned that the Commission should not stand idle while awaiting "actual commercial harm," noting that a blanket requirement for such evidence would "undermine the agency's ability to take necessary preventive action." Senate Report 105-61 at 14 (1997).

NCBFAA and NITL have expressed substantially the same concerns as the Commission. NCBFAA states that MTAs should be subject to pre-effectiveness review. NCBFAA points out that "Due to the exemption, any party adversely affected by a proposed MTA is essentially disenfranchised, and is given no opportunity to complain either about the agreement's substance or the fact that competing MTO's [sic] may have collectively established policies that arguably have adverse consequences on competition or transportation costs." NCBFAA's comments of August 13, 2009, at 2. NCBFAA believes that pre-effectiveness review of MTAs by the industry and the Commission is both helpful and essential to maintaining an efficient and competitive shipping industry, especially when the parties are seeking the extraordinary benefit of antitrust immunity.

NITL notes that recent MTA filings with the Commission demonstrate the need for greater scrutiny and public review of such agreements before they are permitted to take effect. NITL states that removal of the existing exemption and reinstitution of the 45-day waiting period

would provide the Commission and the shipping public with an opportunity to review and analyze the potential anticompetitive consequences of MTAs before any harm occurs.

Repeal of section 535.308 exemption will have a minimal impact on the industry.

The Ports argue that without the section 535.308 exemption, every "trivial" amendment to any arrangement between marine terminals will be subject to delays. This argument fails to consider the fact that section 535.308 exempts only certain narrowly defined agreements that relate "solely to marine terminal facilities and/or services . . . that completely [set] forth the applicable rates, charges, terms and conditions agreed to by the parties for the facilities and/or services provided for under the agreement." By its express terms, marine terminal conference agreements, marine terminal discussion agreements, and marine terminal interconference agreements are excluded from the exemption. Because of the narrow applicability of the exemption, only three agreements have claimed the exemption under the section during the last five years.[1]

While the Ports' concerns do not warrant discontinuance of this rulemaking, the Commission acknowledges that the exemption under section 535.408 primarily addresses carrier agreements. Section 535.408 states that "technical or operational matters of an agreement's affairs established pursuant to express enabling authority in an agreement are considered part of the effective agreement" and thus exempts certain amendments having technical or operational effects from the Shipping Act's filing requirement. 46 CFR 535.408. While not part of Docket No. 09-02, the Commission is open to reviewing this latter section to determine if additional

[1] Most agreements between marine terminals are not the narrowly defined MTAs under section 535.308, but are instead marine terminal operator agreements under section 535.201(b), for which other exemptions will continue to be available. *See, e.g.*, Sections 535.309 and 535.310.

flexibility can be provided for amendments addressing technical or operational matters of marine terminal operator agreements.

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601-612, the Chairman of the Federal Maritime Commission certifies that this rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. The regulated entities that would be affected by the rule are limited to marine terminal operators and ocean common carriers. Pursuant to the guidelines of the Small Business Administration, the Commission has determined that these entities do not qualify as small for the purpose of the Small Business Regulatory Enforcement Fairness Act. The rule would simply require that agreements between marine terminal operators, or between or among marine terminal operators and ocean common carriers, become effective subject to the requirements of section 6 of the Shipping Act of 1984, 46 U.S.C 40304, and Commission agreement rules, 46 CFR Part 535.

This regulatory action is not a "major rule" under 5 U.S.C. 804(2).

List of Subjects in 46 CFR Part 535

Administrative practice and procedure, Maritime Carriers, Terminal operators, Reporting and recordkeeping requirements.

For the reasons set forth above, the Federal Maritime Commission amends 46 CFR Part 535 Subpart C as follows:

Subpart C - Exemptions

1. The authority citation for Part 535 continues to read as follows:

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. 305, 40101-40104, 40301-40307, 40501-40503, 40901-40904, 41101-41109, 41301-41302, and 41305-41307.

§ 535.308 [Removed]

2. Remove § 535.308.

3. In § 535.309, revise paragraph (b)(1) to read as follows:

§ 535.309 Marine terminal services agreements--exemption.

* * * * *

(b) * * *

(1) They do not include rates, charges, rules, and regulations that are determined through a marine terminal conference agreement. *Marine terminal conference agreement* means an agreement between or among two or more marine terminal operators and/or ocean common carriers for the conduct or facilitation of marine terminal operations that provides for the fixing of and adherence to uniform maritime terminal rates, charges, practices and conditions of service relating to the receipt, handling, and/or delivery of passengers or cargo for all members; and

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4. In § 535.604, revise paragraph (b) to read as follows:

§ 535.604 Waiting period.

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(b) Unless suspended by a request for additional information or extended by court order, the waiting period terminates and an agreement becomes effective on the later of the 45th day after the filing of the agreement with the Commission or on the 30th day after publication of notice of the filing in the Federal Register.

* * * * *

By the Commission.

Karen V. Gregory
Secretary