

FEDERAL MARITIME COMMISSION

NOTICE OF INQUIRY – VESSEL-OPERATING COMMON
CARRIER DEFINITION AND APPLICATION OF THE TERM
“MERCHANT” IN BILLS OF LADING

DOCKET NO. 20-16

Issued: October 7, 2020

AGENCY: Federal Maritime Commission

ACTION: Notice of Inquiry

SUMMARY: The Federal Maritime Commission (“FMC” or “Commission”) is issuing this Notice of Inquiry (“NOI”) to solicit public comment on the practice of vessel-operating common carriers (VOCCs or carrier) defining “Merchant” in their bills of lading to apply to persons and entities with whom the VOCCs may not be in contractual privity. Generally, the Commission seeks public comment as to 1) how VOCCs apply the term “Merchant” in their bills of lading; 2) whether the definition, as applied, subjects third parties who are not in contractual privity with the carrier to joint or several liability; and 3) whether carriers have enforced the definition of merchant against third parties that have not consented to be bound by, or otherwise accept, the terms and conditions of the bill of lading.

DATES: Submit comments on or before November 6, 2020.

ADDRESSES:

Submit comments to:

Rachel E. Dickon, Secretary
Federal Maritime Commission
secretary@fmc.gov

(email comments at attachments preferably in MS Word or PDF)

800 North Capitol Street, N.W. Room 1046
Washington, D.C. 20573-0001
Phone: 202-523-5725

FOR FURTHER INFORMATION CONTACT:

Benjamin K. Trogdon, Director, and
Cory Cinque, Trial Attorney
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Washington, D.C. 20573-0001
Phone: 202-523-5783
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SUPPLEMENTARY INFORMATION:

Submit Comments: Comments may be submitted by e-mail as an attachment (preferably in Microsoft Word or PDF) addressed to secretary@fmc.gov on or before November 6, 2020. Include in the subject line: “Response to FMC NOI – Merchant Clause.” The Commission will provide confidential treatment for comments received to the extent permitted by law and will not

post comments to the public docket. Questions regarding filing or treatment of confidential responses to this inquiry should be directed to the Commission's Secretary, Rachel E. Dickon, at the telephone number or e-mail provided above. This NOI will be made available via the Federal Register and on the Commission's web-site at www.fmc.gov.

Background:

The Commission has received information from shipping industry participants that VOCCs have defined "merchant" in their respective bills of lading to include persons or entities who have no beneficial interest in the cargo, but rather are providing service as third parties on behalf of someone specifically identified on the bill of lading. The concerns expressed indicate that VOCCs may be enforcing the terms of the bill of lading (including, without limitation, collection of freight rates and charges, equipment charges, detention and demurrage charges) jointly and severally against entities that are not party to, and have not agreed to be bound by the bill of lading. The Commission has been advised by third-party logistics providers, harbor truckers, stevedores, customs brokers and freight forwarders, many of whom have no connection to the cargo or the shipment, other than providing service to entities that may own or have a proprietary interest in the cargo covered by a VOCC bill of lading, that VOCCs seek payment from such third parties for rates and charges pursuant to the terms and conditions of the bill of lading. Allegations have also been received that VOCCs threaten to discontinue allowing such third parties to provide service for future shipments unless amounts due on current shipments are paid.

This issue was raised in Docket No. 19-05, *Interpretive Rule on Demurrage and Detention Under the Shipping Act* by several commenters, including the New York New Jersey Freight Forwarders and Customs Brokers, the National Customs Brokers and Freight Forwarders

Association, the Agricultural Transportation Coalition, as well as other industry participants since the issuance of the Final Rule. As noted in the Final Rule, “the Commission’s emphasis in the NPRM that ocean carriers bill the correct party reflected concerns raised by truckers that they were being required to pay charges that were more appropriately charged to others.” 85 FR. 29638, at 29662 (May 18, 2020). Several commenters reiterated these concerns. AgTC contended that “carriers should impose detention and/or demurrage on the actual exporter or importer customer with whom the carrier has a contractual relationship.” The New York New Jersey Foreign Freight Forwarders & Brokers Association asserted that VOCCs define the term “merchant” in their bill of lading too broadly, resulting in parties being billed for demurrage and detention “regardless of whether they are truly in control of the cargo when the charges were incurred.” Id.

The Commission clarified that one of its goals for the Interpretive Rule “was to emphasize the importance of ocean carriers and marine terminal operator bills aligning with contractual responsibilities.” Id. In doing so, the Commission noted that it “does not believe it is appropriate in this interpretive rule to prescribe” specific billing practices, or to address the application of the merchant definition as it related to such practices. Id. The Commission further noted it would address such issues in the context of particular facts, considering all relevant arguments. Although the Commission incorporated reference to certain billing practices and regulations in the Final Rule, it declined to prescribe specific billing practices or regulations which would be deemed reasonable under 46 U.S.C. 41102(c).

General contract law principles provide that one party cannot enforce a contract against another who did not assent to be bound by its terms and conditions. This can include situations where one party attempts to bind another party with unilaterally defined terms. Accordingly, the

Commission has determined to request public comment on the manner in which VOCCs are defining the term “Merchant” and enforcing that definition in their bills of lading.

The purpose of the inquiry is to determine whether such carrier enforcement (i.e., seeking to collect freight and other charges) is unfairly or unjustly wielded against third parties who have not directly contracted with the VOCC nor assented to be bound by the contract of carriage. The Commission encourages all interested parties, including VOCCs, shippers, ports, maritime terminal operators, ocean transportation intermediaries, truckers, stevedores or customs brokers to submit comments or to identify information relevant to the manner in which VOCCs have applied their respective definitions of “Merchant.” As part of this NOI, the Commission will also be contacting certain VOCCs to provide information about the manner in which they have defined and applied their definition of a “Merchant.”

The Commission will consider relevant comments submitted by any party. Along with comments, commenters should provide their name, title/position, contact information (e.g., telephone number and/or e-mail address), name and address of the company or other entity and the type of company or entity (e.g., carrier, exporter, importer, trade association, etc.).

Responses to the NOI will help the Commission ascertain more precisely the practices of VOCCs, including whether they may be imposing liability on entities who may not have assented to be bound to the terms and conditions of a VOCC's bill of lading, and in determining whether additional analyses or action by the Commission may be necessary.

By the Commission.

Rachel Dickon

Secretary