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46 CFR Parts 535 and 572

Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984; Final Rule

FEDERAL MARITIME COMMISSION

46 CFR Parts 535 and 572

[Docket No. 98–26]

Ocean Common Carrier and Marine Terminal Operator Agreements Subject to the Shipping Act of 1984

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission is amending its regulations governing agreements among ocean common carriers and marine terminal operators to reflect changes made to the Shipping Act of 1984 by the recently enacted Ocean Shipping Reform Act of 1998, Pub. L. 105–258. In accordance with that Act, the Commission is proposing to establish new rules for ocean carrier agreements regarding carriers' service contracts with shippers, amend the scope of marine terminal agreements subject to the Act, establish rules for agreements on freight forwarder compensation, reduce the mandatory notice period for carriers' independent action on tariff rates, and make other conforming changes. The Commission is also deleting much of its format requirements for filed agreements and making other technical amendments to the filing rules for clarity and administrative efficiency.

DATES: Effective May 1, 1999.

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SUPPLEMENTARY INFORMATION:

Background

On December 15, 1998, the Commission published in the **Federal Register** (63 FR 69034) a proposed rule in this proceeding to bring its rules for ocean common carrier and marine terminal operator agreements into conformity with the Ocean Shipping Reform Act, Pub. L. 105–258, 112 Stat. 1902, (''OSRA''), and the Coast Guard Authorization Act of 1998, 1999 and 2000, Pub. L. 105–383, 112 Stat. 3411. These recently enacted statutes make several changes to the Federal Maritime Commission's (''FMC'' or ''Commission'') authorities and responsibilities under the Shipping Act of 1984, 46 U.S.C. app. 1701 *et seq.* (''1984 Act''). At the same time, the Commission proposed to amend its rules to eliminate certain unnecessary formal requirements and make other clarifications and changes.

Comments in this proceeding were filed by: Fruit Shippers Ltd.; Port of Philadelphia Marine Terminal Association, Inc.; China Ocean Shipping (Group) Company (''COSCO''); P&O Nedlloyd Ltd. (''P&ON''); American Institute for Shippers'' Associations, Inc. (''AISA''); Japan-United States Eastbound Freight Conference and its Member Lines (''JUEFC''); Ocean Carrier Working Group Agreement (''Carrier Group''); National Industrial Transportation League (''NITL''); Croatia Line; Council of European & Japanese National Shipowners'' Associations (''CENSA''); Sea-Land Service, Inc.; and American President Lines, Ltd. and APL Co. Pte. Ltd. (collectively, ''APL'').

The Final Rule

The final rule redesignates the Commission's agreement rules, formerly 46 CFR part 572, as part 535, and makes changes to its authority citations to reflect OSRA's passage.

The following discussion first covers the four issues in the proposed rule that generated the most attention from commenters: (1) Proposed reporting requirements; (2) changes regarding service contracts; (3) changes in agreement form; and (4) a revised definition of ocean common carrier. Following those matters is a discussion of the remainder of the rule changes and other matters raised by the commenters.

Proposed Reporting Requirements

The Commission proposed to adopt a new reporting requirement for ocean common carriers to aid in implementing OSRA's new prohibitions in sections 10(c)(7–8), barring discrimination against ocean transportation intermediaries and shippers' associations based on status. The proposal would have required each member of an agreement to provide summary statistics on numbers of service contract ''requests,'' ''denials,'' and ''approvals,'' tallied by class of shipper.

Several commenters, including APL, Sea-Land, COSCO, JUEFC, and the Carrier Group object strongly to the Commission's proposed reporting requirements for service contracting activity. These commenters characterized the proposal as excessively burdensome or intrusive; P&O Nedlloyd estimates the annual cost of such data collection at $2 million. Sea-Land asserts that the proposed reporting categories, i.e., the terms ''requested,'' ''adopted,'' or ''denied,'' have no meaning in the context of the actual marketplace of contract negotiations. NITL echoes many of these sentiments, using examples of negotiating situations that cannot easily be characterized as ''requests'' or ''denials'' under the rule. NITL is concerned that the reporting requirements might limit flexibility in carriers' contracting processes. Sea-Land and other carrier commenters suggest that the proposed reporting requirements are outside the scope of the Commission's authority, or they have no valid regulatory purpose, inasmuch as they reach wholly individual contracting activities not within the scope of the new sections 10(c)(7–8).

AISA supports the proposed reporting requirement, suggesting that it will be minimally intrusive, and will aid the Commission in carrying out its responsibilities under section 10(b) (barring, among other things, unreasonable refusals to deal) as well as section 10(c)(7–8). AISA states that under the 1984 Act, it has been able to detect when shippers' associations have been discriminated against by conferences, and has sought ''marketplace alternatives to remedy such discrimination,'' using, among other things, its ''me-too'' rights to obtain competitive contracts. However, AISA notes that, with the absence of me-too contract rights for similarly situated shippers and the confidentiality of service contracts and agreement contract guidelines, its ability to protect itself from discrimination will be compromised. It calls the proposed reporting ''prudent,'' ''a good minimum,'' and a ''first step'' for administering the new statutory protections for intermediaries and shippers' associations.

The carriers' sweeping legal arguments that the reporting requirement exceeds the Commission's authority are unconvincing. Inasmuch as the information sought is reasonably related to the Commission's oversight responsibilities under the Act, it can defensibly be compelled by the agency under section 15 of the Shipping Act.

More persuasive, however, are many of the commenters' explanations that the proposed categories of reporting do not comport with the market realities of shipping sales practices and commercial inquiries and negotiations. After considering the examples set forth in NITL's and the carriers' comments, we believe that the proposed reporting would generate a large quantity of data of questionable utility. Shippers often

may make inquiries of, and explore negotiations with, a number of carriers (with regard to both contract and tariff rates) before making final transportation arrangements. In this environment, the proposed rule would seem likely to lead to ambiguous tallies reflecting inquiries, quotes, offers, or counteroffers.

AISA is correct that the Commission must engage in active policing if the new nondiscrimination provisions of the Act are to be given effect, as the Commission will be the only body that can compare and analyze terms of otherwise confidential contracts. However, the Commission's monitoring and enforcement resources will be better spent investigating or analyzing specific allegations or complaints about particular instances of status-based discrimination, rather than laboring over questionable market-wide statistics. Thus, the reporting provision of the proposed rule has not been finalized.

Proposed Amendments Regarding Service Contracts

The proposed rule contained provisions implementing new restrictions and requirements for carrier agreements and service contracting, as set forth in the new section 5(c) of the Shipping Act. That section states:

> Ocean common carrier agreements. An ocean common carrier agreement may not—
>
> (1) prohibit or restrict a member or members of the agreement from engaging in negotiations for service contracts with 1 or more shippers;
>
> (2) require a member or members of the agreement to disclose a negotiation on a service contract, or the terms and conditions of a service contract, other than those terms and conditions required to be published under section 8(c)(3) of this Act; or
>
> (3) adopt mandatory rules or requirements affecting the right of an agreement member or agreement members to negotiate and enter into service contracts.
>
> An agreement may provide authority to adopt voluntary guidelines relating to the terms and procedures of an agreement member's or agreement members' service contracts if the guidelines explicitly state the right of the members of the agreement to not follow these guidelines. These agreement guidelines shall be confidentially submitted to the Commission.

The proposed rule included a proposed § 535.802(a–b) indicating that the new sections 5(c)(1–2) (prohibiting restrictions on members' negotiations and requirements for members to disclose contract negotiations and terms) applied to enforceable and unenforceable agreements. It contained a definition of voluntary guidelines which limited them to ''contract terms a carrier or carriers may include in the texts of their individual contracts; or the procedures that a carrier or carriers may follow in negotiating, modifying, or terminating contracts with shipper customers.'' The proposed rule also would have barred guidelines that contained commitments, policies, or procedures for notification or pre-clearance of proposed service contract terms with other carriers or agreement officials, or imposition or acceptance of any liability or sanction whatsoever for non-compliance with contract terms.

The proposed § 535.802 is supported by AISA and NITL. NITL says it ''believes that the proposed rules generally comport with the provisions and policies of the statute, and in general correctly implement the important new restrictions imposed on collective carrier action by OSRA.'' NITL at 3. NITL suggests that the proposed section barring guidelines for auditing and pre-clearing contracts be amended to include the catch-all phrase: ''and any other commitment, policy, or procedure that would have a similar effect.''

The proposal is strenuously objected to by the Carrier Group, APL, Sea-Land, JUEFC, P&ON, and CENSA. APL states that the proposed § 535.802(a) and (b) are ''overbroad,'' because they ''forbid carriers from reaching a consensus concerning service contracts or their negotiations which restrict negotiations or require disclosure.'' APL at 1. APL asserts that carriers have a right to enter into ''lawful, independent, parallel courses of conduct with respect to service contracts.'' Under OSRA, according to APL, ''carriers may not adopt rules affecting a carrier's rights to negotiate or enter into a service contract,'' but carriers can ''discuss[] and adopt[] consciously parallel action in service contract practices.'' *Id.* at 1–2.

APL suggests that carriers must be able to offer multi-carrier service undertakings; to do that, carriers must have extensive voluntary discussions and agreements regulating that activity. APL urges that the Commission adopt the draft rule set forth in the Carrier Group's comments.

The Carrier Group states that the proposed regulations are inconsistent with OSRA, and that the proposed § 535.802(d) (which would limit voluntary guidelines to procedures between shippers and carriers, not among carriers) is in direct conflict with section 5(c) of the Act. The Carrier Group suggests that the Commission cannot place any limitation on the scope of voluntary guidelines. The only limitation on voluntary guidelines' content, according to the Carrier Group, is that they must in some way relate to the terms and procedures of service contracting; referring to Black's definition of ''related to'' and Supreme Court cases, the carriers assert that guidelines must ''stand in some relation; have bearing or concern; pertain; refer; (or) bring into association with or connection with'' service contracts.

The Carrier Group states that ''the Commission's position that any type of voluntary guidelines or procedures is contrary to the disclosure requirements in section 5(c) is unsupported'' and contrary to the legislative history. The Carrier Group cites the following passage from the Report of the Senate Committee on Commerce, Science, and Transportation on the version of OSRA reported out of that committee:

> The provisions in new section 5(b)(9) do not extend to the discussion, agreement and adoption of voluntary guidelines by agreement members concerning their negotiation and use of service contracts. Thus, nothing in this Act is intended to preclude agreement members from promulgating voluntary guidelines relating to the terms and procedures of individual service contracts, as long as those guidelines make clear that there is no penalty associated with the failure of a member to follow any such guideline.

S. Rep. 105–61, 105th Cong. 1st Sess. 21.

Sea-Land states that the authority to enter into voluntary guidelines is ''clear and unambiguous, and does not exclude any subject matter from its scope.'' Sea-Land at 1–2.

JUEFC makes similar points, stating, ''the plain wording indicates that if what is adopted is ''mandatory'' it is banned, and that if what is adopted is ''voluntary,'' it is allowed.'' JUEFC at 2. JUEFC suggests that carriers could agree to a system of sanctions for failure to adhere to service contract guidelines, as long as the sanctions were denoted as voluntary. JUEFC suggests that any issues regarding what may or may not be permissible guidelines ''should be reserved for resolution in specific cases.'' *Id.* at 3.

In light of the comments, the Commission has determined not to adopt the proposed rule regarding service contracts and voluntary guidelines. Instead, the Commission is adopting a final rule covering agreement restrictions on service contracting and voluntary guidelines that follows the language of OSRA, affording the carriers more flexibility than under the proposed rule.

No objections were raised to the proposed § 535.803, which is included in the final rule. It tracks the new statute's mandate that carriers may not

agree to limit freight forwarder compensation to less than 1.25 percent of charges, and must be allowed to take independent action on freight forwarder compensation on not more than five days' notice.

Proposed Changes Regarding Form of Agreements

The Commission proposed to eliminate many of the form and manner requirements for agreements set forth in subpart D. While this change was not mandated by OSRA, the Commission suggested that requirements for filing highly structured, tariff-type agreements seemed inconsistent with OSRA's focus on the marketplace and emphasis on commercial flexibility.

Reaction to the proposal to eliminate the form requirements for agreements was varied. APL is the sole carrier expressly in favor of the move, stating:

> We commend the Commission for removing its prior requirements for a uniform format for filed agreements. This will cure the anomalous situation in which carriers and others subject to the act entered into agreements which were commercially and legally appropriate, but then had to be rewritten in the prescribed format for the regulatory act of filing.
> * * * * *
> However, we share the concern of TSA, JUEFC, ANERA and others that any new enforcement activity by the Commission based on novel and unpublished standards as to what does or does not constitute an agreement which is properly interstitial to a filed agreement should await another rulemaking.

APL at 2. APL recognizes that the Commission's regulations, recodified at 46 CFR 535.407, provide specific guidance as to the content of filed agreements. APL is ''encouraged by the fact that these standards remain unchanged by the proposed rule, and we do not think that the Commission's elimination of the formatting requirement itself changes any of the standards of completeness by which agreements filing is to be governed.'' *Id.*

Other carrier commenters, however, objected strongly to the proposed move. Sea-Land explains:

> Sea-Land would not oppose changes in the agreement form and manner requirements if they resulted in increased flexibility or decreased burdens. What this Proposed Rule has done, however, is generate great concern that, whether intended or not, this rulemaking could create enormous uncertainty and potential regulatory infractions for what has been accepted agreement filing practice and conduct that has existed without a problem for well over a decade.

Sea-Land at 4.

P&ON, JUEFC, the Carrier Group, and CENSA also suggest that the deletion of form requirements would change the standards for the content of agreements. The Carrier Group states that ''we believe the true purpose * * * is that elimination of the form and manner requirements is, in fact, intended to require the parties to slot charter agreements to file their actual operational/administrative agreements rather than an agreement in 'FMC format.' '' Carrier Group at 13. This, according to the Carrier Group, would ''replace one set of uncertainties with another.'' Carrier Group at 14. Various carrier commenters suggest that when carriers are involved in ongoing cooperative working arrangements, they need to enter into various detailed agreements to establish the actual working particulars of the partnerships. According to the commenters, these so-called ''operational'' agreements often contain sensitive or confidential business information, are revised frequently, and generally are not filed with the Commission.

The Carrier Group asserts that the issue of operational agreements is related to the proposed deletion of form requirements:

> [O]perational/administrative agreements contain a myriad of provisions necessary for the parties to carry out the authority contained in a slot charter agreement filed with the Commission. Such provisions include, but are not limited to, slot charter hire, financial accounting, terminals to be used at each port, the name of the contact person for each party at each port, the type and size of containers to be accepted, * * * etc. Most, if not all, of these provisions are of no concern to the Commission. They have little or no anti-competitive impact. Yet, the Commission's proposed rule would require that all such provisions be publicly filed, and amended whenever changed.

Carrier Group at 16.

The Carrier Group does not explain specifically why it believes the content standards have changed. JUEFC states, however, that ''(b)y removing the list of required elements from (part) 572, this could affect future and existing agreements, including those agreements under challenge today, by prohibiting carriers from defending their agreements based on the existing regulations.'' JUEFC at 9.

APL's assessment—that elimination of the form requirements does not affect standards for content—is accurate. The deletion of the form provisions, such as ordering of provisions, page numbering, and use of appendices, does not have any impact on the issue of whether particular operational or administrative matters need to be filed with the Commission. The fact that particular provisions are required to be set forth in a fixed order does not provide carriers with a comprehensive list of particulars that must be filed in agreements, nor otherwise contribute to the certainty or clarity of agreement content requirements.[1]

Agreement content is controlled by sections of the Act and regulations that have remained unchanged. Ocean common carriers are required under section 5 of the 1984 Act to file a true copy of any agreement with respect to an activity described in section 4, unless such agreement falls within one of the narrow exceptions or exemptions set forth in the Act or the Commission's rules. The Commission's rules require that filed agreements be ''complete,'' ''in detail,'' ''clear,'' ''definite,'' and ''specific.'' 46 CFR 572.103(g) and 572.407(a). The issue of routine administrative or operational matters is addressed in an exception in 46 CFR § 572.407(c) (which is left unchanged), which states:

> Further specific agreements or understandings which are established pursuant to express enabling authority in an agreement are considered interstitial implementation and are permitted without further filing under section 5 of the Act only if the further agreement concerns routine operational or administrative matters, including the establishment of tariff rates, rules, and regulations.

The Commission has determined to adopt the approach urged by APL. First, it is proceeding at this time with the elimination of agreement form requirements. This step has no substantive effect on the content requirements for agreements. Indeed, even with form requirements eliminated, nothing bars carriers from continuing to structure their agreements as they have done under the old rules.

Second, the Commission has determined, in the face of a request from the nearly-unanimous carrier community, to institute a subsequent rulemaking on the issue of content of filed agreements. The carrier commenters apparently seek far more specific requirements as to what matters do or do not have to be filed. The

[1] The form requirements do not purport to be an exhaustive list of required content; indeed they do just the opposite. The current 46 CFR 572.403(b)(5) (which states that every agreement must have an Article 5 providing a summary of the agreement authority) states, in part:

> To the extent that the summary provided does not represent the full arrangement between the parties, additional articles or appendices of the parties' own designation and subsequent to these enumerated articles will be required to provide the specification of the authority to be exercised and the mechanics of that exercise.

Commission's rules, according to the commenters, should provide protections for confidential business information, provide maximum flexibility for carriers to modify cooperative arrangements without overly burdensome filing requirements or waiting periods, and possibly include guidance tailored for different types of agreements. These prospective issues would appear to warrant a further public airing and Commission review.

Therefore, § 535.402 is amended as follows. Sections 535.402(a–b) (paper size, margins, title page) are modified. A revised § 535.402(d) clarifies that agreements are to be signed by each individual contracting party or its designated agent, as opposed to a single official signing on behalf of the group as a whole. Inasmuch as agreements should represent the true understanding of each party, it does not appear unreasonable that the assent of each individual party should be indicated by signature. The Carrier Group and JUEFC object that this requirement may be burdensome. This does not appear correct, however, as each agreement party can, if it wishes, select the same agent for signature purposes. A revised § 535.402(d), permitting faxed or photocopied signatures, will also minimize any administrative delay.

The ordering and pagination requirements in §§ 535.402(e) and 403 are almost entirely removed. Agreements must either include or be accompanied by a table of contents, and by information such as contact names, addresses, and specific geographic scope involved. While the Commission sought to eliminate as many formalities as possible, these requirements are necessary to the expeditious processing and oversight of the agreement, and are retained in the final rule.

Section 535.404 is revised to delete the requirement that conference-specific agreement language be ordered in a particular fashion. However, the content requirements, which track section 5 of the 1984 Act's provisions, are largely retained.

The Carrier Group suggests that the use of the ''revised pages'' format for modifications, as proposed in § 535.405, is ''not consistent with how carriers necessarily structure their commercial agreements.'' No alternative approach is suggested by the group, however. Therefore, the revised page format has been retained in the final rule, as it appears from experience to be the most efficient and expedient way of processing amendments. If carriers wish to take an alternative approach, they can seek a waiver of the requirement pursuant to § 535.406. We would also again note, that the elimination of the form requirements implicitly provides carriers more flexibility to amend their understandings by filing additional agreement pages or sections, rather than revised language. Mandatory republication is eliminated, replaced with a new § 535.405(e), providing that the Commission may mandate republication when it is deemed necessary to maintain the clarity of an agreement. In addition, the waiting period exemption for miscellaneous amendments, set forth in § 535.309, is amended to remove specific form requirements.

Proposed Revised Definition of Ocean Common Carrier

The Commission proposed an amended definition of ''ocean common carrier'' to resolve uncertainty generated by the 1984 Act's definition (which simply is ''a vessel-operating common carrier'') and clarify the regulatory dividing line between ocean common carriers and non-vessel-operating common carriers (''NVOCCs'').

Croatia Line objects to the proposed definition of ''ocean common carrier.'' Among other things, Croatia Line represents that the Commission provided inadequate notice by including this issue in a short-notice OSRA rulemaking. Both Croatia Line and CENSA suggest that the definition should be broadened to include a vessel operator that provides service to the U.S. pursuant to a transshipment arrangement, even if the carrier only operates the foreign-to-foreign leg of the service.

The Commission believes that, given the brevity of the comment period in this proceeding and the paucity of comments received on this issue, it would be useful to provide an additional opportunity for interested parties to comment. The Commission would also benefit from more time to consider the merits of this issue. A separate notice seeking additional comments in a further rulemaking proceeding will be issued shortly. [2]

Other Proposed Changes

Redesignated § 535.102 is amended to reflect that marine terminal agreements are no longer limited to solely international commerce.

The definition of ''common carrier'' in § 535.104(f) is amended to reflect changes made in the 1984 Act by section 424(d) of the Coast Guard Authorization Act. That act inserted a qualified exception in the definition for certain vessels carrying perishable agricultural commodities.

The definition of ''conference agreement,'' in redesignated § 535.104(g), is changed to clarify that the term (and the rule sections that apply it, such as the mandatory independent action requirements) extends only to ocean common carrier conferences, and not to marine terminal conferences, which are defined elsewhere in this part. The definition is also changed to eliminate two elements that do not appear to correspond with the statutory text: (1) The requirement that, to be a conference, carriers must agree to collective administrative affairs, and (2) the statement that carriers may have a common tariff and must participate in some tariff.

The Carrier Group states that there is no statutory need to change the definition in the regulations of ''conference agreement,'' and opposes the proposed definition, saying that it could create ''unintended results.'' Carrier Group at 24. The definition does need to be changed, however, to comport with OSRA. Under the new Act, agreements other than conferences can enter into service contracts. The members of these agreements must, as a matter of course, agree to fix and adhere to those service contract rates that they have in common. Under the old definition (which said ''conference agreement means an agreement * * * which provides for: (1) The fixing of and adherence to uniform rates, charges * * *'') an agreement such as a vessel sharing agreement that offered joint service contracts would seem to be classified as a conference, undermining Congress's intentions. Therefore, the definition was amended to make clear that conferences provided for the fixing of and adherence to *tariff* (not service contract) rates.

The Carrier Group appears to object to removing the references to ''utiliz(ing) a common tariff'' from the current definition. However, the deleted clause appeared to add nothing to the old definition, insofar as it said that conference carriers ''*may*'' (but do not

[2] Croatia Line incorrectly asserts that the Commission is proposing a change in policy. As explained in the proposed rule, the proposed definition is a codification of the Commission's longstanding, but uncodified, policy. That the Commission has taken no enforcement action against Croatia Line in connection with its recently filed agreements is not an indication of a proposed policy shift. Rather, the Commission is seeking to ensure that it had provided the maximum opportunity for notice and comment on its longstanding policy in a rulemaking context before considering specific enforcement action against any one carrier. In deferring the issue to a separate proceeding, the Commission is in no way adopting or endorsing Croatia Line's interpretation of the law or its characterization of its own status, but rather is seeking to be as procedurally fair and inclusive as possible.

have to) use a common tariff, but *must* participate in some tariff. While this seems to be an accurate synopsis of the Act's tariff publication rule, it does not appear to be an integral component of the definition of ''conference.'' The revised definition will not, as the Carrier Group suggests without elaboration, subject other carrier agreements to various statutory requirements set forth in section 5(b) of the Act. *Id.*

The definition of ''effective agreement'' in redesignated § 535.104(j) is changed to remove references to the Shipping Act, 1916, and the definition of ''information form'' in paragraph (m) is amended to clarify that it extends to some types of agreement modifications. ''Marine terminal operator'' is redefined in paragraph (q) to accord with the new definition in OSRA, and the definition of NVOCC is removed.

OSRA's changes regarding jurisdiction over marine terminal operators are also reflected in redesignated § 535.201, the list of agreements subject to the Act. Also in that section, the reference to cooperative working agreements with non-vessel-operating common carriers, is deleted in accordance with OSRA. Also, references to NVOCC and freight forwarder agreements are removed from the non-subject agreements section, redesignated § 535.202(f) and (g).

The exemption provisions in redesignated § 535.301 are changed to comport with the new law's more liberal standard. The exemption procedures are being moved to a general exemption section in the Commission's Rules of Practice and Procedure, 46 CFR part 502.

In the marine terminal agreements exemption, redesignated § 535.307, the definition of ''marine terminal conference'' in paragraph (b) is amended to reflect that such agreements do not have to involve solely international commerce. Also, the extraneous references to collective administrative affairs and tariff filing are removed (as with the definition of ''conference agreement'' in redesignated § 535.104(g)). In the marine terminal services exemption in redesignated § 535.310, a definition of marine terminal services is incorporated in paragraph (a), and paragraph (a)(2), which excepts previously filed agreements from the exemption, is removed.

Redesignated § 535.501(a) is amended, and a new § 535.503(b) is added to make clear that agreement modifications that expand the geographic scope or change the class designation of the underlying agreement must be accompanied by an appropriate information form. At NITL's suggestion, the reference in § 535.502(a)(5) to ''regulation or discussion of service contracts'' is changed to ''discussion or agreement on service contracts,'' to more closely track the text of OSRA. Also, redesignated § 535.706(c)(1) is amended to accord with OSRA's changed tariff requirements.

The mandatory provisions for independent action for conferences in redesignated § 535.801 are changed to reflect that shortened notice period, from ten to five days. The rules are amended to reflect the statutory change that conferences must allow independent action on all rates and service items, not just those required to be included in tariffs. That is, if a conference fixes a rate on a commodity exempt from tariff publication, for example, waste paper, it must allow members to take independent action on the waste paper rates. If the conference publishes a waste paper rate in its tariff (it does not have to, but it can do so voluntarily), then it must publish the member's IA waste paper rates as well. Section 535.801(i), a transitional provision that applied to the 90-day period immediately after the IA rules were adopted, is deleted.

In its comments, the Port of Philadelphia seeks confirmation of its view of the relationship between the Commission's agreement rules and its regulations for marine terminal operator schedules. The port's observations are correct, as discussed in more detail in the final rule in Docket No. 98–27.

P&ON suggests that the Commission broaden the exception to the 45-day waiting period when new parties are added to pre-existing agreements. It also suggests that a new process be implemented to effect name changes in multiple agreements. Both of these suggestions could have some merit, and will be noticed for comment in a subsequent rulemaking proceeding.

The Carrier Group recommends that the Commission take this opportunity to eliminate its current Class A reporting requirements for high market share rate agreements. However, that reporting requirement (adopted less than three years ago) provides information that is indispensable for the Commission's ongoing oversight of potentially substantially anticompetitive agreements, pursuant to the 6(g) standard. Any modifications in the current agreement monitoring program based on changed market conditions will be considered only after an opportunity to evaluate the competitive effects of OSRA's regulatory changes.

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, the Chairman of the Federal Maritime Commission has certified to the Chief Counsel for Advocacy, Small Business Administration, that the rule will not have a significant impact on a substantial number of small entities. In its Notice of Proposed Rulemaking, the Commission stated its intention to certify this rulemaking because the proposed changes affect only ocean common carriers, marine terminal operators, and passenger vessel operators, entities the Commission has determined do not come under the programs and policies mandated by the Small Business Regulatory Enforcement Fairness Act. As no commenter refuted this determination, the certification remains unchanged.

The Commission has received Office of Management and Budget (OMB) approval for the collection of this information required in this part. Section 530.991 displays the control numbers assigned by OMB to information collection requirements of the Commission in this part by the pursuant to the Paperwork Reduction Act of 1995, as amended. In accordance with that Act, agencies are required to display a currently valid control number. In this regard, the valid control number for this collection of information is 3072–0045.

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

List of Subjects in 46 CFR Parts 535 and 572

Administrative practice and procedure; Maritime carriers; Reporting and recordkeeping requirements.

Therefore, for the reasons set forth above, part 572, subchapter C of Title 46, Code of Federal Regulations, is redesignated and amended as follows:

PART 572—AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984 [REDESIGNATED AS PART 535 AND AMENDED]

1. The authority citation for part 572 [redesignated as part 535] is amended to read as follows:

Authority: 5 U.S.C. 553, 46 U.S.C. app. 1701–1707, 1709–1710, 1712 and 1714–1717, Pub. L. 104–88, 109 Stat. 803.

2. Redesignate part 572 as part 535 of subchapter B, chapter IV of 46 CFR.

3. Revise redesignated § 535.101 to read as follows:

§ 535.101 Authority.

The rules in this part are issued pursuant to the authority of section 4 of the Administrative Procedure Act (5 U.S.C. 553), sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17 and 19 of the Shipping Act of 1984 (''the Act''), and the Ocean Shipping Reform Act of 1998, Pub. L. 104–88, 109 Stat. 803.

§ 535.102 [Amended]

4. Amend redesignated § 535.102 to remove the parenthetical phrase ''(to the extent the agreements involve ocean transportation in the foreign commerce of the United States).''

5. Amend redesignated § 535.103 to add paragraph (h) to read as follows:

§ 535.103 Policies.

* * * * *

(h) In order to promote competitive and efficient transportation and a greater reliance on the marketplace, the Act places limits on carriers' agreements regarding service contracts. Carriers may not enter into an agreement to prohibit or restrict members from engaging in contract negotiations, may not require members to disclose service contract negotiations or terms and conditions (other than those required to be published), and may not adopt mandatory rules or requirements affecting the right of an agreement member or agreement members to negotiate and enter into contracts. However, agreement members may adopt voluntary guidelines covering the terms and procedures of members' contracts.

6. Amend redesignated § 535.104 as follows: paragraphs (f), (g), (j), (m) and (q) are revised, paragraph (u) is removed, paragraphs (v), (w), (x), (y), (z), (aa), (bb) and (cc) are redesignated (u), (v), (w), (x), (y), (z), (aa) and (bb), paragraph (dd) is redesignated (cc) and revised, paragraph (ee) is redesignated (dd), redesignated paragraph (dd) is revised, paragraphs (ff), (gg), (hh), (ii), (jj), and (kk) are redesignated (ee), (ff), (gg), (hh), (ii) and (jj), as follows:

§ 535.104 Definitions.

* * * * *

(f) *Common carrier* means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

(2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel tanker, or by a vessel when primarily engaged in the carriage of perishable agricultural commodities:

(i) If the common carrier and the owner of those commodities are wholly owned, directly or indirectly, by a person primarily engaged in the marketing and distribution of those commodities; and

(ii) Only with respect to those commodities.

(g) *Conference agreement* means an agreement between or among two or more ocean common carriers which provides for the fixing of and adherence to uniform tariff rates, charges, practices and conditions of service relating to the receipt, carriage, handling and/or delivery of passengers or cargo for all members. The term does not include joint service, pooling, sailing, space charter, or transshipment agreements.

* * * * *

(j) *Effective agreement* means an agreement effective under the Act.

* * * * *

(m) *Information form* means the form containing economic information which must accompany the filing of certain kinds of agreements and agreement modifications.

* * * * *

(q) *Marine terminal operator* means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of Title 49 U.S.C. This term does not include shippers or consignees who exclusively furnish marine terminal facilities or services in connection with tendering or receiving proprietary cargo from a common carrier or water carrier.

* * * * *

(cc) *Service contract* means a written contract, other than a bill of lading or a receipt, between one or more shippers and an individual ocean common carrier or an agreement between or among ocean common carriers in which the shipper or shippers make a commitment to provide a certain volume or portion of cargo over a fixed time period, and the ocean common carrier or the agreement commits to a certain rate or rate schedule and a defined service level—such as assured space, transit time, port rotation, or similar service features. The contract may also specify provisions in the event of nonperformance on the part of any party.

(dd) *Shipper* means:

(1) A cargo owner;

(2) The person for whose account the ocean transportation is provided;

(3) The person to whom delivery is to be made;

(4) A shippers' association; or

(5) A non-vessel-operating common carrier (i.e., a common carrier that does not operate the vessels by which the ocean transportation is provided and is a shipper in its relationship with an ocean common carrier) that accepts responsibility for payment of all charges applicable under the tariff or service contract.

* * * * *

7. Amend redesignated § 535.201 to revise paragraphs (a)(5), (a)(6), (a)(7) and (b) to read as follows:

§ 535.201 Subject agreements.

(a) * * *

(5) Engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators;

(6) Control, regulate, or prevent competition in international ocean transportation; or

(7) Discuss and agree on any matter related to service contracts.

(b) *Marine terminal operator agreements.* This part applies to agreements among marine terminal operators and among one or more marine terminal operators and one or more ocean carriers to:

(1) Discuss, fix, or regulate rates or other conditions of service; or

(2) Engage in exclusive, preferential, or cooperative working arrangements, to the extent that such agreements involve ocean transportation in the foreign commerce of the United States.

8. Amend redesignated § 535.202 to revise paragraphs (d) and (e) and to remove paragraphs (f) and (g) to read as follows:

§ 535.202 Non-subject agreements.

* * * * *

(d) Any agreement among common carriers to establish, operate, or maintain a marine terminal in the United States; and

(e) Any agreement among marine terminal operators which exclusively and solely involves transportation in the interstate commerce of the United States.

9. Amend redesignated § 535.301 to revise paragraphs (a) and (c), to remove paragraphs (d) and (e), and to redesignate paragraph (f) as paragraph (d) to read as follows:

§ 535.301 Subject agreements.

(a) *Authority.* The Commission, upon application or its own motion, may by order or rule exempt for the future any class of agreements between persons subject to the Act from any requirement of the Act if it finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce.

* * * * *

(c) *Application for exemption.* Applications for exemptions shall conform to the general filing requirements for exemptions set forth at § 502.67 of this title.

* * * * *

10. Amend redesignated § 535.307 to revise paragraph (b) to read as follows:

§ 535.307 Marine terminal agreements—-exemption.

* * * * *

(b) 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 which 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.

* * * * *

11. Amend redesignated § 535.309 to revise paragraphs (a)(2) to read as follows:

§ 535.309 Miscellaneous modifications to agreements—exemptions.

(a) * * *

(2) Any modification to the following:

(i) Parties to the agreement (limited to conference agreements, voluntary ratemaking agreements having no other anticompetitive authority (e.g., pooling authority or capacity reduction authority), and discussion agreements among passenger vessel operating common carriers which are open to all ocean common carriers operating passenger vessels of a class defined in the agreements and which do not contain ratemaking, pooling, joint service, sailing or space chartering authority).

(ii) Officials of the agreement and delegations of authority.

(iii) Neutral body policing (limited to the description of neutral body authority and procedures related thereto).

* * * * *

12. Amend redesignated § 535.310 to revise paragraph (a) to read as follows:

§ 535.310 Marine terminal services agreements—exemptions.

(a) *Marine terminal services agreement* means an agreement, contract, understanding, arrangement or association, written or oral (including any modification, cancellation or appendix) between a marine terminal operator and an ocean common carrier that applies to marine terminal services, including checking; dockage; free time; handling; heavy lift; loading and unloading; terminal storage; usage; wharfage; and wharf demurrage and including any marine terminal facilities which may be provided incidentally to such marine terminal services) that are provided to and paid for by an ocean common carrier. The term ''marine terminal services agreement'' does not include any agreement which conveys to the involved carrier any rights to operate any marine terminal facility by means of a lease, license, permit, assignment, land rental, or similar other arrangement for the use of marine terminal facilities or property.

* * * * *

13. Amend redesignated § 535.402 to revise paragraphs (a), (b) introductory text, (d) and (e) and remove paragraphs (f) and (g) to read as follows:

§ 535.402 Form of agreements.

* * * * *

(a) Agreements shall be clearly and legibly written. Agreements in a language other than English shall be accompanied by an English translation.

(b) Every agreement shall include or be accompanied by a title page indicating:

* * * * *

(d) Each agreement and/or modification filed will be signed in the original by an official or authorized representative of each of the parties and shall indicate the typewritten full name of the signing party and his or her position, including organizational affiliation. Faxed or photocopied signatures will be accepted if replaced with an original signature as soon as practicable before the effective date.

(e) Every agreement shall include or be accompanied by a Table of Contents providing for the location of all agreement provisions.

14. Revise redesignated § 535.403 to read as follows:

§ 535.403 Agreement provisions.

If the following information (necessary for the expeditious processing of the agreement filing) does not appear fully in the text of the agreement, it shall be indicated in an attachment or appendix to the agreement, or on the title page:

(a) *Details regarding parties.* Indicate the full legal name of each party, including any FMC-assigned agreement number associated with that name; and the address of its principal office (to the exclusion of the address of any agent or representative not an employee of the participating carrier or association).

(b) *Geographic scope of the agreement.* State the ports or port ranges to which the agreement applies and any inland points or areas to which it also applies with respect to the exercise of the collective activities contemplated and authorized in the agreement.

(c) *Officials of the agreement and delegations of authority.* Specify, by organizational title, the administrative and executive officials determined by the parties to the agreement to be responsible for designated affairs of the agreement and the respective duties and authorities delegated to those officials. At a minimum, specify:

(1) The officials with authority to file agreements and agreement modifications and to submit associated supporting materials or with authority to delegate such authority; and

(2) A statement as to any designated U.S. representative of the agreement required by this chapter.

15. Revise redesignated § 535.404 to read as follows:

§ 535.404 Organization of conference and interconference agreements.

(a) Each conference agreement shall include the following:

(1) *Neutral body policing.* State that, at the request of any member, the conference shall engage the services of an independent neutral body to fully police the obligations of the conference and its members. Include a description of any such neutral body authority and procedures related thereto.

(2) *Prohibited acts.* State affirmatively that the conference shall not engage in conduct prohibited by section 10(c)(1) or 10(c)(3) of the Act.

(3) *Consultation: Shippers' requests and complaints.* Specify the procedures for consultation with shippers and for handling shippers' requests and complaints.

(4) *Independent action.* Include provisions for independent action in accordance with § 535.801 of this part.

(b)(1) Each agreement between carriers not members of the same conference must provide the right of independent action for each carrier.

(2) Each interconference agreement must provide the right of independent action for each conference and specify the procedures therefor.

16. Amend redesignated § 535.405 to revise paragraphs (a), (b), (c), (d) and (e),

and to remove paragraphs (f) and (g) to read as follows:

§ 535.405 Modification of agreements.

* * * * *

(a) Agreement modifications shall be: filed in accordance with the provisions of § 535.401 and in the format specified in § 535.402.

(b) Agreement modifications shall be made by reprinting the entire page on which the matter being changed is published (''revised pages''). Revised pages shall indicate the consecutive denomination of the revision (e.g., ''1st Revised Page 7''). Additional material may be published on a new original page. New pages inserted between existing pages shall be numbered with an appropriate suffix (e.g., a page inserted between page 7 and page 8 shall be numbered 7a, 7.1, or similarly).

(c) If the modification is made by the use of revised pages, the modification shall be accompanied by a page, submitted for illustrative purposes only, indicating the language being modified in the following manner (unless such marks are apparent on the face of the agreement):

(1) Language being deleted or superseded shall be struck through; and,

(2) New and initial or replacement language shall immediately follow the language being superseded and be underlined.

(d) If a modification requires the relocation of the provisions of the agreement, such modification shall be accompanied by a revised Table of Contents page which shall report the new location of the agreement's provisions.

(e) When deemed necessary to ensure the clarity of an agreement, the Commission may require parties to republish their entire agreement, incorporating such modifications as have been made. No Information Form requirements apply to the filing of a republished agreement.

17. Revise redesignated § 535.501 paragraph (a) to read as follows:

§ 535.501 General requirements.

(a) Certain agreement filings must be accompanied with an Information Form setting forth information and data on the filing parties' prior cargo carryings, revenue results and port service patterns.

* * * * *

18. Amend redesignated § 535.502 to revise paragraphs (a)(1), (a)(3), (a)(4), (a)(5), (b)(1), and (b)(2) to read as follows:

§ 535.502 Subject agreements.

* * * * *

(a) * * *

(1) A rate agreement as defined in § 535.104(aa);

(2) * * * * *

(3) A pooling agreement as defined in § 535.104(x);

(4) An agreement authorizing discussion or exchange of data on vessel-operating costs as defined in § 535.104(jj); or

(5) An agreement authorizing regulation or discussion of service contracts as defined in § 535.104(cc).

(b) * * *

(1) A sailing agreement as defined in § 535.104(bb); or

(2) A space charter agreement as defined in § 535.104(gg).

19. Amend redesignated § 535.503 to redesignate the introductory text as paragraph (a) and to add new paragraph (b) to read as follows:

§ 535.503 Information form for Class A/B agreements.

(a) * * *

(b) Modifications to Class A/B agreements that expand the geographic scope of the agreement or modifications to Class C agreements that change the class of the agreement from C to A/B must be accompanied by an Information Form for Class A/B agreements.

20. Amend redesignated § 535.706 by revising paragraph (c)(1) to read as follows:

§ 535.706 Filing of minutes—-including shippers' requests and complaints, and consultations.

* * * * *

(c) * * *

(1) Rates that, if adopted, would be required to be published in the pertinent tariff except that this exemption does not apply to discussions limited to general rate policy, general rate changes, the opening or closing of rates, or service or time/volume contracts; or

* * * * *

21. Revise the heading of Subpart H to read as follows:

Subpart H—Mandatory and Prohibited Provisions

22. Amend redesignated § 535.801 by: Revising paragraphs (a), (b)(1), (d), (e), the final sentence of paragraph(f)(1), and (f)(2); removing paragraph (i); and redesignating paragraphs (j) as (i) and (k) as (j), to read as follows:

§ 535.801 Independent action.

(a) Each conference agreement shall specify the independent action (''IA'') procedures of the conference, which shall provide that any conference member may take independent action on any rate or service item upon not more than 5 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 5 calendar days' notice to the conference, except that in the case of a new or increased rate the notice period shall conform to the tariff publication requirements of this chapter.

* * * * *

(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 publication 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 (except for exempt commodities not published in the conference tariff) shall be included by the conference in its tariff for use by that member effective no later than 5 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) * * * Additionally, if a party to an agreement chooses to take on an IA of another party, but alters it, such action is considered a new IA and must be published pursuant to the IA publication and notice provisions of the applicable agreement.

(2) An IA TVR published 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. The adoption procedures

discussed above do not authorize the participation by an adopting carrier in the cargo volume of the originating carrier's IA TVR. Member lines may publish and participate in joint IA TVRs, if permitted to do so under the terms of their agreement; however, no carrier may participate in an IA TVR already published by another carrier.

* * * * *

23. Revise redesignated § 535.802 to read as follows:

§ 535.802 Service contracts.

(a) Ocean common carrier agreements may not prohibit or restrict a member or members of the agreement from engaging in negotiations for service contracts with one or more shippers.

(b) Ocean common carrier agreements may not require a member or members of the agreement to disclose a negotiation on a service contract, or the terms and conditions of a service contract, other than those terms or conditions required by section 8(c)(3) of the Shipping Act.

(c) Ocean common carrier agreements may not adopt mandatory rules or requirements affecting the right of an agreement member or agreement members to negotiate or enter into service contracts.

(d) An agreement may provide authority to adopt voluntary guidelines relating to the terms and procedures of an agreement member's or agreement members' service contracts if the guidelines explicitly state the right of the members of the agreement not to follow these guidelines.

(e) Voluntary guidelines shall be submitted to the Director, Bureau of Economics and Agreement Analysis, Federal Maritime Commission, Washington, DC 20573. Voluntary guidelines shall be kept confidential in accordance with § 535.608 of this part. Use of voluntary guidelines prior to their submission is prohibited.

24. Amend Subpart H—Mandatory and Prohibited Provisions to add new § 535.803 to read as follows:

§ 535.803 Ocean freight forwarder compensation.

No conference or group of two or more ocean common carriers may:

(a) Deny to any member of such conference or group the right, upon notice of not more than 5 calendar days, to take independent action on any level of compensation paid to an ocean freight forwarder; or

(b) Agree to limit the payment of compensation to an ocean freight forwarder to less than 1.25 percent of the aggregate of all rates and charges applicable under the tariff assessed against the cargo on which the forwarding services are provided.

By the Commission.[3]

Bryant L. VanBrakle,

Secretary.

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[3] Although Commissioner Won voted to issue the Final Rule, he indicated a strong preference for the ''voluntary guidelines'' provisions set forth in the proposed rule.