

(S E R V E D)  
(October 3, 1991)  
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR PART 550

[PETITION NO. P3-91; Docket No. 91-41]

APPLICATION OF TRAILER MARINE TRANSPORT CORPORATION  
UNDER SECTION 35 OF THE SHIPPING ACT, 1916

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission amends its regulations governing the publishing, filing and posting of tariffs in domestic offshore commerce pursuant to the Shipping Act, 1916. This amendment of Part 550 adds a new exemption for carriers providing port-to-port service in the Puerto Rico and Virgin Islands domestic offshore trades. Such carriers may now change on one day's notice any tariff regulation, rule or note that reduces the shipper's cost of transportation and may also file on one day's notice any new tariff regulation, rule or note that does not increase the shipper's cost of transportation. Provisions of the Intercoastal Shipping Act, 1933, and the Commission's regulations that pertain to any "general decrease in rates" are not affected by this amendment and carriers must continue to comply with those provisions.

DATE: This action is effective upon publication in the Federal Register.

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SUPPLEMENTARY INFORMATION:

Trailer Marine Transport Corporation ("TMT") has filed an Application for Exemption ("Application") under section 35 of the Shipping Act, 1916 ("1916 Act"), 46 U.S.C. app. 833a, that seeks relief from the 30-day tariff filing requirement of section 2 of the Intercoastal Shipping Act, 1933 ("1933 Act"), *id.* 844. The exemption would permit carriers in the trade between the U.S. and Puerto Rico and the U.S. Virgin Islands that are regulated by the Federal Maritime Commission ("FMC" or "Commission") to file on one day's notice any changes in tariff rules, regulations or notes that would reduce the shipper's cost of transportation. In addition, the exemption would permit the filing on one day's notice of new rules, regulations and notes that would either reduce the shipper's cost of transportation, or result in no change to the shipper's cost.

A notice of the filing of the Application was published in the Federal Register (56 FR 28757) and comments supporting the Application were submitted by Matson Navigation Company ("Matson"),

Puerto Rico Maritime Shipping Authority ("PRMSA"), Tropical Shipping & Construction Co. Ltd. ("Tropical"), and Sea-Land Service, Inc. ("Sea-Land"). A comment opposing the Application was filed by the Caribbean Shippers Association, Inc. ("CSA").<sup>1</sup>

#### THE APPLICATION

TMT states that it provides direct, all water service between the mainland United States and Puerto Rico ("Puerto Rico Trade").<sup>2</sup> It also offers service between the mainland United States and the U.S. Virgin Islands and between Puerto Rico and the U.S. Virgin Islands ("U.S. Virgin Islands Trade").<sup>3</sup> TMT also files tariffs with the Interstate Commerce Commission ("ICC") for joint through motor-water service between the mainland United States and Puerto Rico and the U.S. Virgin Islands.

TMT states that Tropical is a major competitor in the trade between the mainland United States and the U.S. Virgin Islands. Although Tropical has both FMC and ICC tariffs, TMT believes that over 90 percent of Tropical's traffic moves under its ICC tariff.

TMT states that PRMSA provides service in the Puerto Rico Trade and service between the mainland United States and the U.S. Virgin Islands via Puerto Rico. PRMSA is said to have four tariffs

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<sup>1</sup> The Caribbean Shippers Association, Inc. states that it represents a number of shippers and receivers involved in the Caribbean trades, both to Puerto Rico and the U.S. Virgin Islands.

<sup>2</sup> TMT Freight Tariff No. 13, Tariff FMC-F No. 9.

<sup>3</sup> TMT Freight Tariff No. 11, Tariff FMC-F No. 7.

on file with the ICC covering these services.<sup>4</sup> Although PRMSA has filed a tariff with the FMC, TMT estimates that 45 percent of PRMSA's traffic is ICC-regulated. TMT states that PRMSA files no tariff with the FMC covering the U.S. Virgin Islands. Allegedly, it applies a Puerto Rico-U.S. Virgin Islands arbitrary to the rates shown in its ICC-regulated tariffs in the Puerto Rico Trade in order to construct a rate applicable between the mainland United States and the U.S. Virgin Islands.

TMT claims that Sea-Land is also a principal competitor in the Puerto Rico Trade. Sea-Land is said to operate primarily under two joint through motor-water tariffs that are filed with the ICC.<sup>5</sup> Id. TMT states that Sea-Land offers only a limited port-to-port service pursuant to its FMC tariff.<sup>6</sup> TMT allegedly competes with other smaller carriers, both vessel operators and non-vessel-operating common carriers, that file joint through motor-water tariffs at the ICC.

TMT states that under the regulations issued by the ICC, 49 CFR 1312.39(h)(1),<sup>7</sup> carriers filing joint motor-water rates with

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<sup>4</sup> ICC PRMU 102, ICC PRMU 205, ICC PRMU 209A and ICC PRMU 211A.

<sup>5</sup> ICC SEAU 435 and ICC SEAU 534.

<sup>6</sup> Sea-Land Tariff FMC-F No. 61.

<sup>7</sup> (h) Freight rate tariffs and classifications of railroads, motor common carriers of property and freight forwarders - notice for independent rate changes -- (1) New and reduced rates. Except as otherwise provided in paragraphs (h) (2), (4) and (5) of this section, each independently established new or changed rate, charge, rule or other provision shall be filed with Commission in Washington, D.C. at least 1 day before the date upon which it is to become effective.

the ICC may file any new and reduced "rate, charge, rule or other provision" on one day's notice. Thus, it is claimed that any tariff change that reduces the cost to the shipper may be filed on one day's notice, whether the change is to a rate, a charge, a note or rule.

TMT alleges that it competes for major moving commodities under its FMC-regulated tariff in the U.S. Virgin Islands Trade with PRMSA and Tropical, which offer service pursuant to tariffs filed with the ICC. TMT anticipates that its inability to make changes in tariff rules that result in a reduction in the shipper's cost on less than 30 days' notice will result in the loss of business to PRMSA and Tropical.

Likewise, TMT alleges that its competitors have extensive ICC-regulated tariffs in the Puerto Rico Trade. TMT cites two examples of where it was forced to wait thirty days to make changes in tariff rules that resulted in a savings to the shipper.

TMT points out that the FMC granted relief similar to that requested here in Matson Navigation Co., Inc. - Application for Section 35 Exemption, \_\_\_ F.M.C. \_\_\_, 24 S.R.R. 1518 (1989), Tariff Filing Notice Periods -- Exemption, \_\_\_ F.M.C. \_\_\_, 24 S.R.R. 1604 (1989), Application of Sea-Land Service Inc. For Exemption Under Section 35 of the Shipping Act, 1916, \_\_\_ F.M.C. \_\_\_, 25 S.R.R. 660 (1990), and Tropical Shipping & Construction Co., Ltd. - Application for Section 35 Exemption, \_\_\_ F.M.C. \_\_\_, 25 S.R.R. 1471 (1991) ("Tropical"). TMT alleges that granting the present

Application would not impair effective regulation by the Commission any more than the exemptions which have been previously granted.

COMMENTS

A. Matson

Matson supports TMT's application and requests that the proposed exemption be expanded to include the Hawaii trade.<sup>8</sup> Matson claims that for approximately two years after the Matson Exemption was granted, Matson interpreted the exemption as permitting any tariff change that resulted in a reduction to be filed on one day's notice. Both changes in rates and changes in rules were allegedly filed on one day's notice. Matson states that the Commission's staff originally acquiesced in Matson's interpretation, but has recently construed the exemption more narrowly. According to Matson, the FMC staff no longer permits amendments resulting in reductions which are set forth in rules or notes to items to be filed on one day's notice. Matson believes that the competitive situation described in TMT's application roughly parallels that faced by Matson in the Hawaii trade. Matson

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<sup>8</sup> The question of whether the requested exemption should be extended to cover the Hawaii trade is not properly before the Commission. The Federal Register notice did not indicate that an exemption was being sought for the Hawaii trade. In order to give the public opportunity to comment, it would be necessary to republish notice of the Application together with Matson's request in the Federal Register. Rather than dealing with Matson's request in the context of this Application, the Commission is instituting on its own motion by separate document issued this date a Notice of Proposed Rulemaking to consider an exemption covering all of the domestic offshore trades that would permit the filing on one day's notice of all new or changed rates, regulations, rules and notes that do not increase the shipper's cost of carriage.

requests that the Commission grant TMT's application and extend its application to the Hawaii trade.

B. PRMSA

PRMSA contends that having two<sup>7</sup> different notice periods for reductions, one day's notice for rates and thirty days' notice for rules and notes, has the potential for confusing the shipping public. PRMSA believes that the inability of FMC-regulated carriers to make rule changes on one day's notice can work to their disadvantage. As an example, PRMSA points out that ICC-regulated carriers can reduce bunker fuel surcharges on one day's notice while FMC-regulated carriers must wait thirty days.

C. Sea-Land

Sea-Land states that it competes with carriers in the Puerto Rico Trade that operate exclusively under tariffs filed at the ICC, and carriers which operate under both FMC and ICC-regulated tariffs. It contends that the current regulatory scheme places carriers that operate under FMC tariffs at a disadvantage with respect to ICC-regulated carriers. Sea-Land states that the ICC's regulations permit a carrier to file on one day's notice any change in a rule or note that results in a rate reduction to the shipper, while under the regulatory scheme administered by the FMC, such changes must be filed on thirty days' notice. This, it is claimed, inhibits the carrier from taking tariff actions in response to the needs of shippers.

D. Tropical

Tropical supports TMT's Application insofar as it pertains to the U.S. Virgin Islands Trade served by Tropical. Tropical maintains that the Application is both pro-carrier and pro-shipper. Shippers, it is said, will benefit because rule, regulation or note changes that result in a reduction in their costs will go into effect more quickly; carriers will allegedly benefit because they will be able to move more quickly to meet changes filed by ICC-regulated carriers. Tropical believes that TMT's Application, if granted, would not only not cause discrimination, it would have a positive effect on carriers, shippers and the trade and would promote, not be detrimental to, commerce.

In support of its contention that the requested exemption will not impair effective regulation by the Commission, Tropical cites the FMC's decision in Tropical, wherein it is stated:

. . . the U.S.-U.S. Virgin Islands Trade is open to foreign flag competition. Clearly, the Trade represents a contestable market. Carriers can enter and exit the Trade with relative ease, free from governmental interference. Thus, competition, both actual and potential, may be expected to curtail the sort of problems CSA envisions.

25 S.R.R. at 1474-75. The same competitive factors that the Commission recognized in Tropical would prevent the abuse of the exemption pertaining to rates are said to exist with respect to changes in rules, regulations and notes.

Tropical claims that it has already been harmed by the requirement that changes in regulations, rules and notes be filed with the FMC on thirty days' notice. Several examples are provided

where Tropical was precluded from making changes to tariff rules and notes on one day's notice even though they would have resulted in a reduction in the shipper's cost of carriage.

E. CSA

CSA filed the only comment in opposition to TMT's Application. It contends that the carriers can not show any competitive harm that would justify an exemption because they have both ICC and FMC-regulated tariffs. CSA contends that any harm to the carriers should be weighed against the shippers' interest in rate stability and protection from economic coercion.

In regard to the competitive disadvantage allegedly suffered by FMC-regulated carriers, CSA states that: "The concept of 'competitive disadvantage' requires that the carriers actually compete for the same cargo and provide the same or equivalent services." CSA concludes that the record before the Commission is inadequate to make an informed decision. Accordingly, CSA believes that the Commission should either deny the Application or set the matter down for hearing.

DISCUSSION

Section 35 of the 1916 Act provides in pertinent part:

The Federal Maritime Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this Act or any specified activity of such persons from any requirement of the Shipping Act, 1916, or Intercoastal Shipping Act, 1933, where it finds that such exemption will not substantially impair effective regulation by the Federal Maritime Commission, be unjustly discriminatory, or be detrimental to commerce.

The justification for the Application here is similar to that used to support previous applications for exemptions from the requirement that individual rate reductions be filed on thirty days' notice. TMT and the carriers supporting its Application allege that the thirty-day notice requirement for changes in rules, regulations and notes that reduce the shipper's cost of carriage inhibits their ability to compete with carriers operating under ICC-regulated tariffs. In support of this contention, they have provided specific examples of the problems which have been caused by the 30-day notice requirement of the 1933 Act. The Commission is convinced on the basis of this material that TMT's application is justified.

The arguments raised by CSA in opposition to the Application are similar to those raised by CSA in previous exemption proceedings. Although CSA appears correct when it states that most carriers have both ICC and FMC-regulated tariffs, it does not necessarily follow that carriers can suffer no harm as a result of the 30-day notice requirement of the 1933 Act. The carrier's ability to shift cargo from one tariff to another may be limited by the needs and desires of the shippers served by the carrier. For example, the shipper may prefer to move its cargo under a port-to-port rate rather than a joint-through intermodal rate. In sum, there is no clear indication that carriers are misusing the exemptions that have been previously granted by the Commission and will misuse the exemption requested here. Contrary to CSA's view, the Commission is satisfied that the exemption will not

substantially impair effective regulation by the Commission, be unjustly discriminatory, or detrimental to commerce.

The Commission concludes that TMT's Application meets the standards of section 35 of the 1916<sup>7</sup> Act. Accordingly, subject to the limitation described below, the Commission will grant TMT's Application for exemption.

Although the exemption will permit a carrier to make a change to a tariff rule, regulation or note affecting a large number of rate items, a carrier may not use the exemption to institute a general decrease in rates on one day's notice.<sup>9</sup> TMT has not requested an exemption from any of the provisions of the 1933 Act and the Commission's regulations that pertain to a general decrease in rates. The provisions in the 1933 Act that apply to a general decrease in rates include a requirement that any general decrease in rates be filed on sixty days' notice and time limits for disposition of the case if the matter is set down for hearing. Rule 67 of the Commission's Rules of Practice and Procedure requires the carrier to accompany any general decrease in rates with testimony and exhibits of such composition, scope and format that they will serve as the carrier's entire direct case in the

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<sup>9</sup> Section 1 of the 1933 Act, 46 U.S.C. app. 843, defines a "general decrease in rates" as:

. . . any change in rates, fares, or charges which will (A) result in a decrease in not less than 50 per centum of the total rate, fare, or charge items in the tariffs per trade of any common carrier by water in intercoastal commerce; and (B) directly result in a decrease in gross revenue of such carrier for the particular trade of not less than 3 per centum.

event the matter is set down for hearing. The exemption does not relieve carriers from complying with those provisions.

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

- (1) an annual effect on the economy of \$100 million or more;
- (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- (3) significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Federal Maritime Commission certifies, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small government jurisdictions.

List of Subjects in 46 CFR Part 550:

Maritime carriers; Reporting and recordkeeping requirements.

Therefore, pursuant to 5 U.S.C. 553, sections 18, 35 and 43 of the Shipping Act, 1916, 46 U.S.C. app. 817, 833a and 841a, and section 2 of the Intercoastal Shipping Act, 1933, 46 U.S.C. app.

844, Part 550 of Title 46, Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 550 continues to read as follows:

AUTHORITY: 5 U.S.C. 553, 46 U.S.C. app. 812, 814, 815, 817, 820, 833a, 841a, 843, 844, 845, 845a, 845b, and 847.

2. In section 550.1, a new paragraph (e) is added reading as follows:

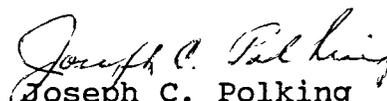
550.1 Exemptions

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(e) Carriers providing port-to-port transportation between the United States and Puerto Rico or the U.S. Virgin Islands, or between Puerto Rico and the U.S. Virgin Islands, may change on one day's notice any tariff regulation, rule or note that reduces the shipper's cost of transportation and may also file on one day's notice any new tariff regulation, rule or note that does not increase the shipper's cost of transportation; provided, however, that such carriers must comply with those provisions of the Intercoastal Shipping Act, 1933, and the Commission's regulations that pertain to any "general decrease in rates".

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By the Commission.

  
Joseph C. Polking  
Secretary

