(S E R V E D)
(January 10, 1989)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR PART 581

[DOCKET NO. 88-16]

SERVICE CONTRACTS

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission is adopting a Final Rule that will allow parties to service contracts filed with the Commission to correct clerical or administrative errors in the essential terms of such contracts. Parties seeking this relief must file their requests within 45 days of the contract's initial filing with the Commission and must include a supporting affidavit and other relevant documents. This procedure will enable contract parties to correct legitimate errors, something which had been previously precluded by Commission rule.

DATE: Effective 15 days after publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

The Federal Maritime Commission ("Commission" or "FMC") initiated this proceeding by publishing a Proposed Rule in the Federal Register on June 24, 1988 (53 FR 23776). The Proposed Rule would have amended section 581.7 of the Commission's existing service contract regulations (46 CFR Part 581) to allow corrections to the essential terms of a service contract in the event of a clearly demonstrated

clerical or administrative error. Both parties to the service contract could request relief within 30 days of a contract being filed with the Commission. Such requests would have to include, inter alia, (1) a transmittal letter, (2) a corrected copy of the essential terms, (3) relevant documents, and (4) notarized affidavits from each party attesting with specificity to the circumstances giving rise to the clerical or administrative error. In addition, the Proposed Rule would have required that essential terms corrected pursuant to this procedure be made available to similarly situated shippers for a period of 30 days from the date the Commission approved a request.

Comments on the Proposed Rule were received from: (1) Sea-Land Service, Inc.; (2) U.S. Atlantic-North Europe Conference, North Europe-U.S. Atlantic Conference, Gulf-European Freight Association, and North Europe-U.S. Gulf Freight Association ("NEC"); (3) Trans-Pacific Freight Conference of Japan and Japan-Atlantic and Gulf Freight Conference ("Japan Conferences"); (4) Asia North America Eastbound Rate Agreement ("ANERA"), Mediterranean North Pacific Coast Freight Conference, and U.S. Atlantic & Gulf/Australia-New Zealand Conference ("Conferences"); (5) American President Lines, Ltd. ("APL"); (6) Atlantic & Gulf/West Coast of South America Conference ("AG/WCSAC"); (7) E. I. du Pont de Nemours & Company ("Du Pont"); (8) EAC Transport Pacific Centre Ltd. A/S; (9) EAC Transpacific Service; and (10) Johnson ScanStar.

SUMMARY OF COMMENTS

Most commenters generally support the Proposed Rule, although several do so on the condition that certain changes be made. One carrier, Sea-Land, contends that the Proposed Rule is unnecessary, but also suggests certain changes, if the Commission decides to go forward and issue a final rule. Specific comments are addressed below.

Sea-Land's primary objection to the Proposed Rule is its alleged potential susceptibility to abuse. Sea-Land believes that there are too few clerical errors in service contracts to warrant a procedure that could be misused. Sea-Land questions the need for the Proposed Rule based upon its experience as a member of ANERA. It notes that out of approximately 600 ANERA service contracts, "only six involved problematic technical errors . . . ." Sea-Land also expresses reservations about the Commission's ability to distinguish between genuine technical errors and disguised, commercially-motivated essential terms modifications.

The Japan Conferences, while recognizing the need for the Proposed Rule, express similar concerns. They suggest therefore that the final rule should contain sufficient safeguards to protect against its misuse. At a minimum, they propose that a copy of all requests for service contract corrections be directed to the Commission's Bureau of Trade Monitoring ("BTM") for review and, if warranted,

investigation. In addition, they suggest that BTM should maintain a record of all requests so that it can monitor trends and patterns in such filings which might indicate misuse of the correction process.

NEC contends that the provision of the Proposed Rule affording similarly situated shippers an opportunity to avail themselves of corrected essential terms not previously available to them should be deleted because it presents too great a potential for misuse of the service contract process. NEC argues that it could force conferences and carriers to offer shipping terms in a potentially different commercial context than when the contract terms were originally offered.

The Conferences also express strong opposition to the requirement that a corrected service contract be opened up to the shipping public for any further eligibility period, since the commercial circumstances "within which a contract is negotiated and signed may be radically different 90 or more days later." The Conferences contend that:

> . . . the only "winners" under a rule opening up a contract to a second "me-too" round because of clerical errors would be those shippers who would perceive a windfall by virtue of having an opportunity to "me-too" a contract which, although not originally attractive, becomes so because of changing market conditions.

Such a provision is viewed by the Conferences as a disincentive for carriers to correct errors in a service contract. The Conferences, NEC, and Sea-Land recommend that only those similarly situated shippers that have "me too'd"

a service contract during its initial 30-day period of availability should be permitted to "me too" corrected essential terms during a second availability period.

Sea-Land suggests that, at the same time a technical correction is made in an original service contract, it should be required that it be made in an identical fashion to any "me too" contracts secured in the initial 30-day window. It also would expand the Proposed Rule to give "me too" shippers a unilateral option to terminate within the same period in the event that a "me too" shipper believes itself to be disadvantaged by an inadvertent error in the contract.

The Conferences argue that shipments that moved prior to such a cancellation should not be subject to re-rating or penalty. They propose that such a cancellation be treated as "a mutual termination of contract" rather than a unilateral decision by the shipper. The Conferences further recommend that the rule be generally clarified to address the treatment of "me too" shippers to the original contract.

With the exception of Sea-Land and Du Pont, all of the commenters express concern over the limited period of time allowed for the submission of requests to correct service contracts. Suggested alternative periods in which to submit requests range from 60 days to the duration of the contract. Several commenters cite practical experience with service contracts covering hundreds of points and commodities for which errors may not be detected until specific cargo moves

and reveals an error, and possibly not until an accounting for a shipment is made. The commenters aver that there is a substantial likelihood that service contract errors covered by the Proposed Rule will not be detected within 30 days of the contract filing date and that the limited request period may therefore curtail the usefulness of the modification authority. Moreover, it is argued that the Proposed Rule's requirement of "extensive supporting documentation," combined with geographic and possible language problems, may make the 30-day request period even more unrealistic.

NEC contends that materials required to be submitted with a request for relief are "unnecessarily cumulative, overly formalistic, unduly burdensome and otherwise in need of repair." Sea-Land, APL and the Japan Conferences express similar views. Sea-Land suggests that one clear exposition of facts in the form of a detailed affidavit with appended supporting documents necessary to supplement the affidavit, corrected page(s), and a brief transmittal letter should fully satisfy the Commission's needs. APL questions the need for notarized affidavits, arguing that the procedure is "unduly formalistic." Rather than sworn statements from <u>each</u> party to the contract, the Japan Conferences propose that corrections be permitted ". . . upon the sworn statement of the designated official of a conference or carrier with a requirement that the statement be served upon shipper signatory at the time it is filed with the FMC." The Japan Conferences maintain that the difficulty in

obtaining affidavits from foreign shippers coupled with language barriers, may potentially bar requests because a shipper signatory's affidavit may not be received in time. They further state that because the conference/carrier signatory is the responsible repository for the service contract records, it would be in the best position, in consultation with the shipper signatories, to explain the error. NEC also suggests that the requirements "should be overhauled and streamlined," and provides certain detailed suggestions for changes.

The Japan Conferences raise one additional issue that was not specifically contemplated by the Proposed Rule. In framing the Proposed Rule, the Commission assumed that the essential terms that are stated in a service contract would be mirrored in the essential terms publication and that consequently any clerical or administrative error in the essential terms of the service contract would be reflected in the essential terms publication. The Japan Conferences raise the possibility that although the service contract essential terms might contain clerical or administrative errors, the essential terms publication might accurately reflect the intentions of the parties. They suggest that corrections of such errors should be allowed at any time and that similarly situated shippers should not have a right to a new 30-day period of availability under such circumstances.

APL, Du Pont, and AG/WCSAC have proposed changes in the Proposed Rule to expand the scope of the proceeding. They suggest that parties to a contract be permitted to add additional commodities, ports and points, or make any other prospective modifications at any time during the contract term.

DISCUSSION

In light of the fact that the essential terms of a service contract cannot generally be amended during the term of the contract,[1] the Commission continues to believe that a procedure which allows the parties to correct inadvertent errors is warranted. The Commission further believes that any such procedure should be structured to enable it to distinguish between legitimate requests and commercially motivated requests. The Commission will, therefore, adopt a Final Rule permitting the correction of clerical or administrative errors in service contracts, but modified as indicated below. These changes should result in an even more workable and efficient procedure for dealing with errors in service contracts.

The Proposed Rule required that the transmittal letter "explain with specificity the modified essential terms and the circumstances giving rise to the clerical or

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[1] Those comments suggesting that the Proposed Rule be expanded to permit prospective modification of any terms of a service contract are beyond the scope of this proceeding.

administrative error." In addition, notarized affidavits were required from each party also attesting to the circumstances surrounding the clerical or administrative error. The Commission agrees with certain commenters that the transmittal letter need not restate information already required to be stated in affidavit form. Instead, it is sufficient for the transmittal letter to identify the purpose of the submission and provide information to identify the service contract in question. The Proposed Rule will be modified accordingly.

The Commission also agrees that notarizing already sworn statements may be legally redundant and unnecessary to the validity of the affidavit. Therefore, the Final Rule deletes any additional notary requirement.

Many commenters contend that 30 days is not a sufficient period within which to detect errors and meet the proposed filing requirements. The Commission notes that it is incumbent on the parties, particularly the contract filer, to ensure that a contract is error free prior to filing. Nevertheless, the Commission also recognizes that, despite the parties diligence, there may be a mistake that is not discovered immediately after filing. Moreover, the complexities of international transactions may delay the discovery of some mistakes. The Commission will therefore extend the filing period from 30 to 45 days. Given today's telecommunication and computer technologies, and particularly improved telefax capabilities, 45 days should

be more than adequate. The more limited than requested 45-day filing period should also serve as an incentive for the parties to carefully review their contracts prior to filing them with the Commission.

Some of the commenters request that they be relieved from filing two affidavits, i.e., one from the carrier and one from the shipper. This requirement had been initially proposed to limit potential abuses. If both shipper and carrier had to swear to the facts supporting the application, there would be less likelihood that one party could file or pressure another to file an application on grounds other than clerical or administrative error. However, after considering the comments, the Commission has determined that two fully detailed affidavits may not be absolutely necessary. The Commission also believes, however, that both parties to the contract, not just the filing party, should support the request. This can be accomplished simply if the non-filing party to the request submits a statement that it concurs in the filing party's application. Accordingly, the Final Rule will permit a single affidavit and a concurring statement from the other party to the contract.

The Proposed Rule would have provided a new, 30-day window for "me too" shippers to take advantage of the corrected service contract's essential terms. This was intended to afford an opportunity for a similarly situated shipper to avail itself of the corrected essential terms

that were not publicly available during the initial 30-day "me too" period. Several commenters have opposed this second, 30-day period on the ground that the economic circumstances existing when the Commission approves a request, may be different than those that existed at the time of the negotiation and execution of the original service contract. Notwithstanding this concern, the Commission believes that the 1984 Act contemplates that the corrected essential terms be made available to shippers who may have availed themselves of the original contract, if its essential terms had been correctly published. However, given the fact that the contract's existence and general terms have already been made known to the public by the time the Commission grants a request for relief, the Commission does not find it necessary to provide the public an additional 30-day availability period. The Final Rule, therefore, provides a more limited 15-day window for "me too" shippers to take advantage of the corrected essential terms, except in the situation described below.[2]

The Japan Conferences have proposed the elimination of the second "me too" period where the clerical or administrative error in the confidentially filed service contract does not also appear in the essential terms' publication. As indicated above, the second "me too" period

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[2] As indicated in the Proposed Rule, the Commission intends to resolve requests for relief within 30 days of their receipt.

is intended to provide notice to shippers of the corrected essential terms that were made available to the original party to the contract but which were unavailable to the general shipping public during the initial, 30-day period because of clerical or administrative error. If the original essential terms publication somehow contains the correct essential terms, the shipping public originally received adequate notice of the essential terms given to the original shipper. Accordingly, there is no reason to provide for a second "me too" period, if the Commission subsequently approves a request to correct the essential terms as stated in the contract. Therefore, the Final Rule eliminates the second "me too" period where the error only appears in the contract and not also in the essential terms publication.

Some commenters also raise the issue of how shippers who previously "me too'd" an erroneous contract should be treated. The Commission believes that, at a minimum, an original, "me too" shipper should have the same opportunity to adopt the corrected essential terms as all other similarly situated shippers. However, if an original "me too" shipper is somehow disadvantaged by the correction, it should be able to elect not to adopt the changes and continue to operate under its original contract. The Proposed Rule will be modified accordingly.

In the interest of clarity, the Final Rule has been reorganized and reworded. In addition, the Commission is

requiring all requests for relief to be submitted in duplicate in order to facilitate and expedite their processing.

The Federal Maritime Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291, 46 FR 12193, February 27, 1981, 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 effect 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 Chairman of the Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., that this Rule will not have a significant economic impact on a substantial number of small organization units, and small governmental jurisdictions.

This Rule will become effective in 15 days rather than 30 days because it relieves a restriction previously contained in the Commission's service contract regulations.

List of subjects in 46 CFR Part 581:

Administrative practice and procedure; Contracts; Maritime carriers; Rates and fares.

Therefore, pursuant to 5 U.S.C. 553 and sections 3, 8 and 17 of the Shipping Act of 1984, Part 581 of Title 46, Code of Federal Regulations, is amended as follows:

1. The Authority Citation to Part 581 continues to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702, 1706, 1707, 1709, 1712, 1714-1716 and 1718.

2. Section 581.7 is amended by redesignating paragraph (b) as (c), and by revising paragraph (a) and adding a new paragraph (b) to read as follows:

§ 581.7 Modification, termination or breach not covered by the contract.

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(a) Modifications. The essential terms originally set forth in a service contract may not be amended but may be corrected pursuant to paragraph (b) of this section.

(b) Corrections. (1) Either party to a filed service contract may request permission to correct clerical or administrative errors in the essential terms of a filed contract. Requests shall be filed, in duplicate, with the Office of the Secretary within 45 days of the contract's filing with the Commission and shall include:

(i) a letter of transmittal explaining the purpose of the submission, and providing specific information to identify the service contract to be corrected;

(ii) a copy of the proposed correct essential terms. Corrections shall be indicated as follows:

(A) matter being deleted shall be struck through; and

(B) matter to be added shall immediately follow the language being deleted and be underscored;

(iii) an affidavit from the filing party attesting with specificity to the factual circumstances surrounding the clerical or administrative error, with reference to any supporting documentation;

(iv) documents supporting the clerical or administrative error; and

(v) a brief statement from the other party to the contract concurring in the request for correction.

(2)(i) If the request is granted, the carrier or conference shall file the corrected contract provisions and a corrected statement of essential terms and those corrected essential terms shall be made available to all other shippers or shippers' associations similarly situated for a specified period of no less than fifteen (15) days from the date of the filing of the corrected contract. The provisions of section 581.6(b)(2)-(4) of this part shall otherwise apply.

(ii) Any shipper or shippers' association that has previously entered into a service contract that is corrected pursuant to this paragraph may elect to continue under that contract with or without the corrected essential terms.

(iii) The provisions of paragraph (b)(2)(i) of this section do not apply to clerical or administrative errors

that appear only in a confidentially filed service contract but not also in the relevant essential terms publication.

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By the Commission.

Joseph C. Polking
Secretary