(S E R V E D)
(AUGUST 31, 1987)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR PART 580

[DOCKET NO. 86-29]

FILING OF SERVICE CONTRACTS AND AVAILABILITY OF ESSENTIAL TERMS

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission is amending its rules governing service contracts to address problems the Commission has experienced in obtaining adequate service contract records. This rule defines service contract records and requires ocean common carriers and conferences to maintain these records in a readily accessible or retrievable manner for a period of five years from the termination of each contract. Further, service contract records must be made available to the Commission within 30 days from the date of a written request. Two additional provisions of the final rule are being held in abeyance until further notice by the Commission. One requires service contract records to be maintained in the United States unless a responsible official of a carrier or conference certifies in writing that they will be supplied to the Commission on request. The other permits the Commission to cancel a carrier's or conference's right to maintain records outside the United States, if service contract records are not made available to the Commission.

DATE: Effective 60 days from publication in the Federal Register, except for those provisions indefinitely stayed.

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SUPPLEMENTARY INFORMATION:

Section 8(c) of the Shipping Act of 1984 ("1984 Act" or "Act"), 46 U.S.C. app. 1707(c), authorizes ocean common carriers or conferences to enter into service contracts with shippers or shippers' associations, subject to the requirements of the Act and the regulations of the Federal Maritime Commission ("Commission"). The Commission's rules governing the use of service contracts presently require, among other things, that ocean common carriers and conferences maintain service contract shipment records for a period of five years from the termination of each contract. 46 CFR 581.10(a). In addition, service contracts are required to include "[a] description of the shipment records which will be maintained to support the contract"; and "[t]he address, telephone number, and title of the person who will respond to a request by making shipment records available to the Commission for inspection under § 581.10." 46 CFR 581.4(a)(2)(ii)(A) and (B).

The Commission's interim rules implementing the 1984 Act, 49 FR 18852, May 3, 1984, 22 S.R.R. 813, required service contract shipment records to be maintained by a resident representative <u>in the United States</u> for a period of five years from the completion of the contract. However, when the Commission adopted final service contract rules, it decided against requiring records to be kept in the United

States, because there appeared to be no compelling necessity to do so at the time. The Commission made it clear, however, that if any difficulties were encountered in obtaining service contract information in the future, it would consider reimposing a United States recordkeeping requirement. Docket No. 84-21, Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States - Service Contracts and Time/Volume Contracts, 49 FR 45370, November 15, 1984, 22 S.R.R. 1424.

The Commission initiated this rulemaking proceeding on November 13, 1986, 51 FR 41132, to address problems experienced by the Commission in obtaining service contract records. Approximately twenty-five percent of the service contract audits scheduled by the Commission's Bureau of Investigations had been delayed for varying periods of time. In some cases, the Commission had to wait over eight months to receive the requested information from carriers or conferences. Moreover, the fact that some service contract records were located overseas resulted in additional delays caused by foreign government involvement in the process of producing requested records. In addition, the kinds of records maintained by carriers have not always proven to be sufficient to enable the Commission to verify compliance with a contract.

The proposed rule would define "service contract records" and require that ocean common carriers and conferences: 1) maintain service contract records in the

United States in an organized, readily accessible manner; 2) identify the location of records and recordkeeper(s); and 3) produce service contract records within 15 days from the date of a written Commission request.

Comments to the proposed rule were submitted by: (1) U.S. Atlantic - North Europe Conference, North Europe - U.S. Atlantic Conference, Gulf-European Freight Association, and North Europe - U.S. Gulf Freight Association ("North Europe Conferences" or "NEC"); (2) Asia North America Eastbound Rate Agreement, Australia/Eastern U.S.A. Shipping Conference, and Mediterranean - U.S.A. Freight Conference ("Asia/Australia/Med Conferences"); (3) Trans-Pacific Freight Conference of Japan and Japan-Atlantic and Gulf Freight Conference ("Japanese Conferences"); (4) North Europe - U.S. Pacific Freight Conference ("NEUSPFC"); (5) Sea-Land Service, Inc. ("Sea-Land"); (6) United States Lines, Inc. ("USL"); (7) American President Lines, Ltd. ("APL");[1] (8) Council of European and Japanese National Shipowners' Associations ("CENSA"); and (9) U.S. Department of Transportation ("DOT"). In addition, the Commission received a copy of a Note Verbale from the U.S. Department of State that had been presented to it by the Embassy of Japan.[2]

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[1] Sea-Land, USL and APL are members of one or more of the above-referenced conferences, but filed individual comments to the proposed rule.

[2] This document was received by the Commission after the close of the comment period.

Subsequent to the initiation of this rulemaking proceeding and the submission of comments, the Commission adopted a final rule in Docket No. 86-6, Service Contracts, 52 FR 23989, June 26, 1987, that substantially revised its existing service contract regulations and placed them in a separate part of the Code of Federal Regulations. As a result, many of the provisions addressed by the proposed rule have been renumbered and in some instances modified to accommodate the final rule in Docket No. 86-6.

The following is a section-by-section summary and analysis of the various comments received. Any comment not specifically addressed has nonetheless been fully considered by the Commission and found to be unnecessary to the disposition of this proceeding.

Proposed section 580.7(a)(5)

Section 580.7(a)(5) of the proposed rule defines "service contract records" as:

> . . . such information as will enable the Commission to verify compliance with the terms of a service contract and shall include freighted ocean bills of lading, or equivalent shipping documents, with riders, attachments, invoices, and corrections, and any other documents which establish that the terms of the contract are being or have been met.

Most commenting parties believe the proposed definition is too broad and therefore in need of some modification. The North Europe Conferences have proposed an alternative definition of the term service contract records.

The Asia/Australia/Med Conferences believe that the proposed definition of service contract records is unnecessary, contending that conferences should retain the

discretion and flexibility to maintain the records they believe are necessary, e.g., bills of lading or summaries of shipments under a contract. They further contend that if the Commission needs documents other than those maintained by a conference, it can make a specific request directed to the party in actual possession of such documents.

The Japanese Conferences express concern over the volume of documents the Commission expects contract parties to maintain in support of their contracts, and the storage space that this would require. Similarly, NEUSPFC states that retention of member line shipping and accounting records by the conference would require doubling or tripling the present conference staff. NEUSPFC also claims that additional space would be needed to store records, and argues that additional costs would have to be borne by a depressed liner industry. Additionally, NEUSPFC states that it is not a depository for member line records and does not have underlying documents in the usual course of business.

Sea-Land states that a carrier should preserve the minimum documentation necessary to confirm performance of the contract, which would include a freighted ocean bill of lading. Sea-Land suggests that by deleting some of the documents specified in the proposed definition, the rule would be more workable and effective.

CENSA believes the proposed definition of service contract records may introduce confusion as to whether a conference or its member lines bears the responsibility for

maintaining different types of records. CENSA, therefore, proposes that the final rule only require the maintenance of those records "customarily maintained as business records in the ordinary course of business." CENSA Comments Appendix at 1.

The Commission proposed a broad definition of contract records in view of the apparent diversity of records that are maintained by carriers and conferences. The Commission did not intend to require that all of the records mentioned in the definition be maintained by each conference or carrier. Rather, it intended that a conference or carrier maintain its own "unique set of records," whatever they may be. The Commission is only concerned that the records enable it to verify that the terms of the contract are being or have been met. However, in light of comments received and in order to avoid any misinterpretation of the rule, the definition of service contract records has been modified by deleting the terms "riders," "attachments," "invoices," and "corrections" from the proposed definition. We are retaining, however, reference to "freighted ocean bills of lading," because the Commission considers them to be standard documents involved in the shipment of cargo under service contracts. In addition, because the Commission has recently adopted a final rule in Docket No. 86-6 which revises the general service contract regulations and places them in a new part, the definition of "service contract records" will now appear at 46 CFR 581.1(o).

Proposed section 580.7(b)(3)(vi)

Section 580.7(b)(3)(vi) of the proposed rule requires that the service contract clearly state "[t]he types of service contract records which will be maintained" by the ocean common carrier or conference.

The North Europe Conferences argue that the Commission should not require such provisions in service contracts, because they are neither "essential terms" as defined by statute and regulation, nor are they commercial terms which contracting parties normally negotiate.

NEUSPFC also maintains that the proposed rule should not be adopted. It argues that a conference may not always receive specific records from member lines and that, in some cases, the records received will consist of copies of relevant bills of lading and, in others, a computerized statement from the member line's accounting department. The other commenters, however, offer no objections to the rule's proposed requirement that the service contract state the type of records which will be maintained.

The Commission continues to believe that information as to the types of records a carrier or conference must maintain and make available should be set forth in the service contract. This procedure ensures that both parties to the contract are aware of the Commission's recordkeeping requirements. A clear statement regarding the types of records that a carrier or conference must maintain and make available will also avoid future misunderstandings and

confusion and should allow records to be produced more conveniently and expeditiously. Therefore, the Commission will continue the requirement it recently adopted in Docket No. 86-6, i.e. that service contracts contain "[a] description of the shipment records which will be maintained to support the contract." 46 CFR 581.4(a)(2)(ii)(A).

Proposed section 580.7(b)(3)(vii)

Section 580.7(b)(3)(vii) of the proposed rule requires service contracts to state:

> The specific location in the United States of service contract records; and the name, title, address and telephone number of the individual who will make records available to the Commission pursuant to § 580.7(j).

In response to comments, the Commission's recently adopted rule in Docket No. 86-6 also contains the requirement that service contracts include "[t]he address, telephone number, and title of the person who will respond to a request by making shipment records available to the Commission for inspection under § 581.10." 46 CFR 581.4(a)(2)(ii)(B). This provision will therefore remain in effect. The only other aspect of proposed section 580.7(b)(3)(vii) that generated comment was its reference to the "specific location in the United States of service contract records." These comments are treated below in the discussion of proposed section 580.7(j)(1).

Proposed section 580.7(j)(1)

Proposed section 580.7(j)(1) states that:

> Every ocean common carrier or conference shall maintain in the United States service contract

records in an organized, readily accessible manner for a period of five years from the termination of each contract.

The North Europe Conferences, Asia/Australia/Med Conferences, the Japanese Conferences, NEUSPFC, Sea-Land, and CENSA object to the requirement of proposed section 580.7(j)(1) that carriers and conferences maintain service contract records in the United States. In general, the conference commenters argue that there are legal problems with a U.S. record location requirement. They assert that such a requirement would interfere with the sovereignty of a foreign nation by requiring removal of documents regarding transactions occurring within the territory of that nation. NEC further states that Congress intended the Commission to administer the 1984 Act with sensitivity to the interest of the United States' trading partners. Many commenters believe that the Commission can utilize its subpoena authority under section 12 of the 1984 Act, 46 U.S.C. app. 1711, to compel the production of documents, if necessary. In addition, NEC, the Asia/Australia/Med Conferences, the Japanese Conferences, NEUSPFC, Sea-Land, and CENSA contend that a U.S. record retention requirement would create immense administrative and economic burdens.

DOT offers an alternative approach to the U.S. record location requirement. DOT proposes that an exemption pursuant to section 16 of the Act, 46 U.S.C. app. 1715, be granted to carriers or conferences that agree to produce the documents requested by the Commission, whether located in the United States or not.

The primary intent of these rules is to ensure the timely availability of service contract records to the Commission. Although the Commission could obtain such records under section 12 and section 15 of the 1984 Act, 46 U.S.C. app. 1711 and 1714, it could also require that such records be maintained within the United States. Imposition of such a requirement would be a proper exercise of the Commission's authority to issue regulations necessary to carry out the 1984 Act.

The final rule, therefore, contains a variant of the alternative suggested by DOT - service contract records must be maintained in the United States, but can be kept elsewhere if a responsible official certifies that they will be made available to the Commission upon request. In addition, the rule will provide that if service contract records are not made available, a carrier's or conference's right to maintain such records outside the United States, pursuant to the certification process, can be cancelled by the Commission. The Commission does not, however, wish to impose unnecessary administrative or economic burdens on the ocean transportation industry or on itself. Recent audits of service contract records undertaken by the Commission's staff have not met with significant difficulties. Moreover, no instance of foreign government resistance to the production of such records has been encountered during this period. For these reasons, and based on indications of cooperation provided by commenting conferences and carriers

with respect to the voluntary production of service contract documents, the Commission has decided to impose a U.S. recordkeeping requirement, but not to implement it at this time. The Commission will accordingly stay the effective date of sections 581.10(c) and (d) of the final rule for an indefinite period of time. This will provide the Commission an opportunity to more fully assess the administrative burdens that a certification procedure will place upon it. Moreover, additional experience under a non-U.S. recordkeeping requirement may indicate that the Commission is able to obtain all necessary documents as carriers and conferences improve their recordkeeping processes and follow through on their offers of cooperation. In the event that the Commission decides to terminate the stay of these provisions, it will afford all affected parties ample advance notice.

As for the remainder of the proposed section, commenters generally believe that the five-year recordkeeping requirement is too long. NEC suggests that the five-year recordkeeping provision be reduced to a period of two years. Further, NEC suggests that the rule require the maintenance of relevant records in a "readily retrievable manner," rather than "in an organized and readily accessible manner."

The Commission is adopting the five-year retention requirement. This requirement is consistent with the five-year period within which the Commission can begin a

proceeding to assess a civil penalty for violations under the Act. See 46 U.S.C. app. 1712(f)(2). The maintenance of service contract records for five years will permit the Commission to carry out its regulatory responsibilities and will permit it to assess and collect civil penalties for any violations of the 1984 Act. However, the rule has been amended to provide that the records maintained be either "accessible" or "retrievable" for a period of five years.

Proposed section 580.7(j)(2)

Proposed section 580.7(j)(2) states that:

> Every ocean common carrier or conference shall submit upon written request of the Director, Bureau of Investigations or the Director of any District Office, requested service contract records within 15 days of the date of request of the Commission.

All commenters believe that a 15-day period for the production and submission of service contract records is unreasonable, and suggest that a 30-day period would be more appropriate. In support of the 30-day period, Sea-Land states that additional time is needed because conferences must obtain relevant documents from each of their constituent members in order to present an aggregated record. USL and APL state that similar time problems exist when several offices of a single carrier are involved.

The Commission is enlarging the period for the production of service contract records to 30 days. Allowing additional time to produce such records is particularly appropriate given the Commission's stay of the requirement that service contract records be maintained in the United

States. Carriers and conferences are cautioned, however, that failure to submit the requested documents or information within the prescribed period could result in the Commission issuing compulsory process, invoking the civil penalty procedure, revoking the stay of the U.S. document retention requirement, or taking other appropriate action. In addition, the Commission notes that in the case of a conference service contract, whether or not including all members, the conference has the responsibility to collect and make available requested service contract records. The Commission will look to the conference in such instances.

The Federal Maritime Commission has determined that the final rule adopted 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) a 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.

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the Chairman of the Federal Maritime Commission certifies that the final rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organization units, and small governmental jurisdictions.

The collection of information requirements contained in this rule have been submitted to the Office of Management and Budget ("OMB") for review under section 3504(h) of the Paperwork Reduction Act of 1980, 44 U.S.C. 3504(h). This collection was approved by OMB through April 30, 1987, and later extended to October 31, 1987, under OMB control number 3072-0009. However, in its Notice of Action, dated January 7, 1987, OMB suggested that the Commission submit a new supporting statement in justification of paragraph (j)(1) of the proposed rule. OMB questioned the need to maintain duplicate service contract records in the United States, when paragraph (j)(2) of the proposed rule requires carriers or conferences to produce such records within 15 days of a Commission request. Inasmuch as the Commission's final rule has stayed the requirement that service contract records be maintained in the United States, it is no longer necessary to submit additional justification for this requirement at this time. The Commission's stay action should obviate OMB's concerns. Should the Commission determine to remove the stay in the future, it will resubmit the rule for OMB clearance.

List of subjects in 46 CFR Part 580:

Administrative practice and procedure; Antitrust; Automatic data processing; Cargo vessels; Confidential business information; Contracts; Exports; Freight; Imports; Maritime carriers; Penalties; Rates and fares; Reporting and recordkeeping requirements.

Therefore, for the reasons set forth above, 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 581.1 is amended by redesignating paragraphs (o), (p), (q), (r), (s) and (t) as paragraphs (p), (q), (r), (s), (t) and (u) and by adding a new paragraph (o) as follows:

Section 581.1 Definitions.

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(o) Service contract records means such documents and information as will enable the Commission to verify compliance with the terms of a service contract and shall include freighted ocean bills of lading or equivalent shipping documents which establish that the terms of the contract are being or have been met.

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3. Section 581.10 is amended by revising paragraphs (a) and (b) and adding new paragraphs (c) and (d) as follows:

Section 581.10 Record keeping and audit.

(a) Every common carrier or conference shall maintain service contract records in an organized, readily accessible

or retrievable manner for a period of five years from the termination of each contract.

(b) Every common carrier or conference shall, upon written request of the Director, Bureau of Investigations or the Director of any District Office, submit requested service contract records within 30 days from the date of the request.

(c) Service contract records shall be maintained in the United States; provided, however, that service contract records may be maintained outside the United States if the Chairman or Secretary of a conference or President or Chief Executive Officer of a carrier certifies annually by January 1, on a form to be supplied by the Commission, that service contract records will be made available as provided in paragraph (b).

(d) If service contract records are not made available to the Commission as provided in paragraph (b), the Commission may cancel any carrier's or conference's right to maintain records outside the United States pursuant to the certification procedure of paragraph (c).

4. Paragraphs (c) and (d) of section 581.10 are stayed until further notice of the Commission.

By the Commission.

Joseph C. Polking
Joseph C. Polking
Secretary

(S E R V E D)
(January 13, 1988)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-29

FILING OF SERVICE CONTRACTS AND
AVAILABILITY OF ESSENTIAL TERMS

ORDER DENYING PETITIONS FOR
CLARIFICATION AND/OR RECONSIDERATION

On August 31, 1987, the Commission served a Final Rule ("Rule") in the above-referenced proceeding establishing certain requirements concerning the maintenance and availability of records relating to "service contracts" required to be filed with the Commission pursuant to section 8(e) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1707(c). In essence, the Rule: 1) defines "service contract records" (46 CFR 581.1(o)); 2) requires ocean common carriers and conferences to maintain such records in a readily accessible or retrievable manner for 5 years (46 CFR 581.10(a)); 3) requires that service contract records be made available to the Commission within 30 days of a written request (46 CFR 581.10(b)); 4) requires service contract records to be maintained in the United States, but allows them to be maintained elsewhere if a responsible official certifies that they will be made available upon Commission request (46 CFR 581.10(c)); and 5) states that if service

contract records are not made available, the Commission may cancel any carrier's or conference's right to maintain records outside the United States (46 CFR 581.10(d)). However, because the Commission has not recently experienced difficulties in obtaining service contract records, and in light of carrier representations of continued cooperation, the Commission stayed these latter two provisions of the Rule "until further notice."

The Council of European and Japanese National Shipowners' Associations ("CENSA") and the Trans-Pacific Freight Conference of Japan together with the Japan-Atlantic and Gulf Freight Conference ("Japanese Conferences") have now filed petitions for clarification and/or reconsideration ("Petitions") relating to the Commission's indefinite stay action. No replies to the Petitions were received.

CENSA contends that a U.S.-recordkeeping requirement would raise "serious legal issues" and interprets the Commission's resolution of the recordkeeping issue as a determination that a U.S.-recordkeeping requirement was not justified under the current record. CENSA also notes that the Commission's treatment of this matter has avoided any possible conflict with the Office of Management and Budget ("OMB"), and made it unnecessary for the Commission to specifically address certain substantive legal issues raised by the parties.

While recognizing that the Commission stated that it would supply "ample advance notice" if it were to remove the

stay, CENSA believes that the preamble to the Rule is unclear as to whether there would be any opportunity for additional public comment before such a change occurred. CENSA therefore requests that the Rule be clarified to indicate that, in the event the stay will be revoked, the Commission will afford the public the right to comment on then existing facts and applicable law.

Like CENSA, the Japanese Conferences are concerned that, unless modified, the Rule might be read to preclude further consideration by the Commission or further comment on legal and factual issues relating to a U.S.-recordkeeping requirement for service contract records. They also refer to various arguments that they made in their prior comments, and contend that none was addressed by the Commission. The Japanese Conferences contend that a reasonable interpretation of the language in the Supplementary Information to the Rule relating to notice in the event the stay is terminated is that interested parties will be given an opportunity to address all relevant issues of fact and law. They further assert that such a conclusion is supported by the Commission's failure to address various substantive arguments raised.

DISCUSSION

In staying the effective date of the U.S.-recordkeeping requirement imposed by the Final Rule in this proceeding, the Commission stated:

> In the event that the Commission decides to terminate the stay of these provisions, it will afford all affected parties ample advance notice.

This language is the subject of the instant Petitions. CENSA and the Japanese Conferences contend that the Commission should clarify that, if it terminates the stay, the Commission will also provide all interested parties an opportunity to address all relevant issues of fact and law. If this was not the Commission's intention, Petitioners argue that the Commission should then reconsider its intention.

In its statement of basis and purpose accompanying a final rule, an agency need not address every comment received. See Hiatt Grain & Feed, Inc. v. Bergland, 446 F. Supp. 457, 484 (D. Kan. 1978); Community Nutrition Institute v. Bergland, 493 F. Supp. 488, 492 (D.D.C. 1980). Rather, an agency is required to "generally consider" the major comments received. Action on Smoking and Health v. C.A.B., 699 F.2d 1209, 1216 (D.C. Cir. 1983). The Commission fully considered all major comments, especially in light of its disposition of this proceeding. Nonetheless, the Commission determined that requiring records to be kept in the United States would be a proper exercise of its authority to issue regulations necessary to carry out the 1984 Act. It further concluded that the benefits of a U.S.-recordkeeping requirement would outweigh any burdens it may impose on the affected parties. The language concerning "ample advance notice" in the event the stay is terminated merely informs

parties that the Commission will give affected parties advance notice of that fact.

The original proposed rule contained a U.S.-recordkeeping requirement for service contract records and all parties had an opportunity to address it. The Commission considered these arguments but rejected them in arriving at its Final Rule. Any determination as to whether some further opportunity for comment will be provided will depend on the circumstances existing at that time and will take into account all necessary due process requirements.* Accordingly, to the extent that the Petitions request that the Commission commit itself at this time to giving interested persons an opportunity to comment on all legal and factual issues relating to a U.S.-recordkeeping requirement should it be put into effect at a later date, they are denied.

THEREFORE, IT IS ORDERED, That the Petition for Clarification of the Council of European and Japanese National Shipowners' Associations and the Petition of Trans-Pacific Freight Conference of Japan and Japan-Atlantic and

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* As the Commission indicated in reaching its disposition in this proceeding, the facts of the present situation were particularly relevant to its decision to stay the recordkeeping requirement, i.e., it is experiencing no present problems in obtaining records. Any decision to alter the status quo would be based on the Commission's perception that the situation had somehow changed, and comments by interested persons might help the Commission in this regard.

Gulf Freight Conference for Clarification and/or Reconsideration of the Final Rule are denied.

By the Commission.

Joseph C. Polking
Secretary