

FEDERAL MARITIME COMMISSION

PETITION NO. P3-89

PETITION OF SOUTH EUROPE/U.S.A FREIGHT
CONFERENCE, AMERICAN TRUCKING ASSOCIATIONS
AND ATA INTERMODAL COUNCIL FOR RULEMAKING
TO PRESCRIBE MAXIMUM CONTAINER WEIGHTS

PETITION NO. P4-89

PETITION OF TRANSPACIFIC WESTBOUND RATE AGREEMENT,
AMERICAN TRUCKING ASSOCIATIONS AND ATA
INTERMODAL COUNCIL FOR RULEMAKING TO
ELIMINATE CERTAIN "PER CONTAINER" RATES
CONFERRING PREFERENCES ON SHIPPERS WHO
OVERLOAD CONTAINERS

ORDER DENYING PETITIONS

The Federal Maritime Commission ("Commission" or "FMC") has before it two petitions requesting the initiation of rulemaking proceedings on the subject of "overweight containers"¹ (hereinafter, the "Petitions"). One was filed jointly by the South Europe/U.S.A. Freight Conference ("SEUSA"), American Trucking Associations ("ATA") and ATA Intermodal Council (hereinafter, the "SEUSA Petition" or "P3-89"). It requests a rulemaking proceeding to prescribe maximum container weights for various size containers. The other was filed jointly by the Transpacific Westbound Rate Agreement ("TWRA"), ATA and ATA Intermodal Council (hereinafter,

¹ As used in these Petitions, the term "overweight container" appears to mean a container loaded with cargo that, when mounted on a chassis and pulled by a tractor, would result in the vehicle exceeding federal or state highway weight restrictions.

the "TWRA Petition" or "P4-89"). It proposes a rulemaking proceeding to eliminate "per container" rates on specific commodities which have been identified as being prone to overloading.

Notices of the Petitions were published in the Federal Register, 54 Fed. Reg. 35,246 (August 23, 1989), and interested persons were invited to submit comments.

THE PETITIONS

The basis for both Petitions is a Federal Highway Administration ("FHWA") study on overweight containers issued in March 1989, entitled "Analysis of Port Import/Export Reporting Service (PIERS) Data to Reveal Potentially Overweight Container Movements on America's Highways" ("FHWA Study"). Prepared by the FHWA Transportation Studies Division, Office of Policy Development, the FHWA Study sought to quantify the overweight container problem based on PIERS data. Among its findings were:

- 40% of 20-foot containers were potentially overweight (i.e., would violate federal vehicle weight laws in the "Federal Bridge Formula," 23 U.S.C. § 127), in both import and export trades.
- 38% of 40-foot containers in the export trades and 17% in the import trades were potentially overweight.
- The commodities most frequently carried in potentially overweight containers were paper, plastic resins, chemicals, logs/lumber and animal feed among exports, and beer, paper,

ceramic tiles, non-alcoholic beverages and coffee among imports.

The Petitions, though they share partial common sponsorship, present alternative approaches to the issue of overweight containers.

Petition No. P3-89

The SEUSA Petition states that while overweight containers have been a problem for some time, concerns are now heightened because "Bridge Formula" exemptions expired in September 1989 (23 U.S.C. § 127(a)), and governmental enforcement of weight limitations has increased. It cites the FHWA Study's statement that containers loaded with cargoes at weights which cause highway vehicles transporting them to exceed highway weight limits damage highway pavements and bridges, increase the potential for impaired vehicle safety, and result in fines to truckers. Only the FMC, vis-a-vis other federal agencies such as the Department of Transportation ("DOT") and the Interstate Commerce Commission ("ICC"), is said to have "the ability to impose requirements which can address this matter on an international level" (P3-89, at 7), by promulgating rules as to tariffs and service contracts which can deter overloading by domestic and foreign shippers.

Petitioners in P3-89 argue that while an individual conference may take action to combat overweight containers, such action will not be effective unless the problem is addressed uniformly on an industry-wide basis. They cite several provisions of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. §§ 1701-1720, which

allegedly authorize FMC rulemaking on this issue. These include: sections 10(b)(6)(A), 46 U.S.C. app. § 1709(b)(6)(A) (prohibiting unfairly or unjustly discriminatory practices in the matter of rates); 10(b)(11), 46 U.S.C. app. § 1709(b)(11) (prohibiting undue or unreasonable preference or advantage); 10(b)(12), 46 U.S.C. app. § 1709(b)(12) (prohibiting undue or unreasonable prejudice or disadvantage); 10(c)(2), 46 U.S.C. app. § 1709(c)(2) (prohibiting carriers from unreasonably restricting the use of intermodal services or technological innovations); and 10(d)(1), 46 U.S.C. app. § 1709(d)(1) (requiring common carriers to establish reasonable regulations and practices relating to receiving, handling, storing or delivering property).

Under the rule proposed in P3-89 (at Appendix A of that petition), carriers would be able to refuse to accept containers which were in excess of specified weights -- e.g., 38,000 lbs. per 20-foot container, 45,000 lbs. per 40-foot container, etc. Any expenses involved with refusal of such containers would be charged against the shipper. The shipper would also assume responsibility for ensuring that containers it tendered complied with local, state, federal and foreign laws, regardless of the weight limitations prescribed in the proposal.

Under the SEUSA proposal, if a carrier were to accept an overloaded container, it would be able to release it to the consignee at the discharge port, or to reload it in compliance with applicable law, and then transport it at the shipper's expense and responsibility, with excess cargo to be assessed a rate of \$7.25

cwt. Shippers, consignees and cargo owners would be jointly and severally liable and would indemnify carriers from any loss, damage or penalty arising from the shipper's failure to comply with any law or regulation, including the weight limits established in the SEUSA proposal. The ocean and motor carriers would have "no duty to resist, dispute, or otherwise oppose the levy of" any fines imposed for said violations. The carrier would be required to refuse to release a container to a consignee until all liabilities, fines and penalties were satisfied.²

Petition P4-89

The TWRA Petition focuses on the list of commodities identified in the FHWA Study, which allegedly "constitute a disproportionately large part of the total problem." P4-89, at 6. It seeks to lessen the economic incentive for shippers to overload containers by prohibiting the "per container" form of stating rates on certain high density cargoes. TWRA, like SEUSA, indicates that its individual efforts cannot solve the problem, because shippers can always select carriers who will permit overloading.³

The TWRA Petition cites several of the statutory provisions relied upon in the SEUSA Petition -- i.e., sections 10(b)(6), (11) and (12) and 10(d)(1) of the 1984 Act -- as well as several other

² ATA and the Intermodal Council state that they have joined SEUSA's Petition because "the proposed rule should be considered as part of the overall effort to eliminate the overweight container problem." P3-89, at 11, fn. 3.

³ TWRA contends that its conversion of per container rates to weight measure rates "usually involved a small decrease [in rates] because of the conversion factor used." P4-89, at 8, fn. 1.

provisions in that Act: section 10(a)(1), 46 U.S.C. app. § 1709(a)(1) (prohibiting by false report of weight or other unfair means the obtaining of ocean transportation at less than the applicable rates) and sections 10(b)(1), (3), (4), (6)(B)-(D), and (10), 46 U.S.C. app. §§ 1709(b)(1), (3), (4), (6)(B)-(D), and (10) (all addressing various unreasonably preferential or discriminatory practices); and the Commission's rules at 46 C.F.R. §§ 580.6(a) and 581.5(a)(1), which require that rates be "clear and definite" and not "uncertain, vague or ambiguous." Like the SEUSA Petition, the TWRA Petition also cites the highway fines allegedly unfairly imposed on truckers as a result of overloaded containers, and argues that the Commission is the appropriate agency to address the "rate format aspect" of the problem, which is said to be "plainly within its jurisdiction." P4-89, at 12.

Under the rule proposed in P4-89, per container rates would be prohibited for certain commodities. These commodities would be determined, and ultimately listed in the rule, starting with the commodities identified in the FHWA Study, with additions or deletions pursuant to a later "second phase" of the rulemaking proceeding. Petitioners emphasize that they are not proposing eliminating per container rates altogether, because such rates are safe and useful with respect to low density cargo, which does not result in overweight containers.⁴

⁴ They also explain that they had considered an alternate proposal involving listing all commodities exceeding a "standard density," but did not pursue this because it was impractical, would be burdensome to carriers and non-uniform in application, and would
(continued...)

COMMENTS

Comments were received from 77 parties (see Appendix). Some filed separate comments for each Petition; most filed a single comment covering both Petitions. A few commenters referenced only one or the other petition in their submissions. Comments generally either supported both Petitions or opposed both Petitions; only a few favored or partially favored P3-89 while opposing P4-89.

About half the responses to the Petitions were from shippers or shipper-related interests, and these generally opposed the Petitions. Other criticisms of the Petitions were submitted by forwarders, shippers' associations, and non-vessel-operating common carriers. Favoring the Petitions were most vessel-operating common carriers, conferences and trucker interests. Governmental entities responding were on the whole supportive, although they were generally more enthusiastic about the FMC's taking some action in principle than about the specific proposals themselves. Because the comments were numerous, often quite general, and largely duplicative, they are summarized collectively without reference to specific parties except in a few instances.

Comments in support of the Petitions largely emphasize that there is indeed an overweight container problem and that something needs to be done about it. Among the aspects of the problem which call for corrective action, these commenters cite: the danger of overweight vehicles moving on the highways; the physical damage to

⁴(...continued)
affect cargoes not necessarily part of the overloaded container problem.

the highways themselves; the unfairness of truckers having to bear the burden of paying fines and risking bodily injury, when it is the shipper, consignee and cargo owner who overload containers; the unfair consequences to law-abiding truckers who refuse to transport overweight containers; the unfairness to ports or localities who insist on high safety standards when some ports actually advertise lenient weight limits as a marketing tool to attract cargo; the increased costs to states of enforcement efforts and inspections; that individual carriers' or conferences' efforts to prevent overloading will not be effective as long as competitors are permitted to allow it; and the loss of work suffered by the International Longshoremen's Association ("ILA"), carrier, stevedore and trucking labor who would be handling a greater number of containers but for overloading.

The supporters of the Petitions generally do not make detailed arguments regarding the Commission's jurisdiction or the appropriateness of the Commission as the forum for this controversy. Some state merely that they adopt the Petitions' arguments on jurisdiction. Others state that in light of the many efforts made to date to address the problem -- education, state legislation, inter-industry discussions, studies, etc. -- it is now apparent that this is an international problem and that the FMC is the appropriate forum.

Most of the supporters of the Petitions endorse both proposals, although several indicate a preference for one over the other. Advantages of P3-89 cited are its uniformity and clarity,

and the likelihood that it will be easier to administer and enforce. Those preferring P4-89 cite its targeting the commodities most likely to cause problems, and its attack on the mechanism -- per container rates -- which many regard as the primary incentive for overloading.

Some supporters of the Petitions suggest amendments of various kinds. Several advocate making exceptions in the proposals to accommodate those who obtain state permits and use specialized equipment to transport safely and legally containers which otherwise would cause a conventional highway vehicle to be "overweight." One party, the City of New York, conditions its support of the Petitions "if it can be shown that U.S. trade patterns will not be negatively impacted." Another suggests twelve additions to the list of commodities which should be disqualified from per container rates. Some suggest that the P3-89 proposal be amended to account for more kinds of tractor-container-chassis combinations. The International Association of NVOCCs supports the Petitions "so long as . . . they do not provide or permit the elimination of per container rates for 'FAK' or Mixed Commodities." One shipper requests an exception for "single, nondivisible, overweight pieces" of machinery which are allowed on U.S. highways by special state permits.

Comments in opposition to the Petitions make several common arguments applicable to both Petitions. Many question the Commission's jurisdiction or the appropriateness of FMC action. They state that this is an area over which DOT, the ICC, the

states, and local jurisdictions have authority, and the Commission none. Some commenters argue that the specific proposals in the Petitions constitute a type of ratemaking or regulation not intended to be exercised by the FMC. The National Industrial Transportation League argues:

The FMC's authority over maritime pricing should not be used to intervene in what is a complex non-pricing and a non-maritime issue.

Opponents of the Petitions maintain that Petitioners, particularly those promoting P4-89, are straining in pretending that the proposals will address Shipping Act concerns and remedy or prevent Shipping Act violations. Per container rates are not facially discriminatory nor was such their objective, they argue.

Many comments attack the Petitions' motives. They state that adoption of the rules proposed would result in more containers being transported and/or transportation based on weight rates. Several parties advise that lump-sum per container rates are substantially lower than rates based on weight. Some particularly criticize TWRA for trying to get the Commission to reduce TWRA's competition by restricting the rate practices of independent ocean carriers.

A substantial number of parties question several aspects of the FHWA Study. Many note that the FHWA Study refers to "potentially" overweight containers. They submit that the FHWA Study disregards the fact that axle configuration and innovative technology with respect to chassis construction may render both safe and legal what the Study nevertheless calls "potentially"

overweight. It is argued that the FHWA Study may have based its conclusions on movements which occurred in industrial free zones or other areas in which state governments have relaxed weight limitations in the interest of promoting trade, or on cargoes which moved by rail or barge and not on public highways. The FHWA Study is also said to assume incorrectly a lower weight limit than that imposed in many states. These errors resulted, according to these commenters, in an overstated, exaggerated and inaccurate presentation of the overweight container problem.

Another common general complaint is that the proposals attempt to simplify what is a very complex issue, involving a myriad of factors which are within the control of various parties, both in the U.S. and abroad. Many suggest that consignees of import cargo would, under the proposals, bear the cost of overloading even though they are the least culpable and the least in control of the causes. Several shippers contend that they themselves do not overload containers and take all necessary precautions, including weighing, and that it would be unfair to penalize them for the carriers' inability to enforce weight limitations.

One commenter asserts that P3-89 in particular will have limited effect on overloaded containers because it will only affect containers moving on through rates. Inland transportation connecting to a port-to-port movement would not be within the FMC's jurisdiction, it argues, and would not therefore be reached by these proposals. Most commenters, however, object that the proposals would have too great an effect on commerce, and would

constitute "overkill" or "throwing out the baby with the bathwater." They argue that P3-89 would affect shipments never touching public highways, and that P4-89 would abolish per container rates for commodities on the basis of how only some shippers of those commodities overload the containers.

Many commenters submit that deleterious effects would result from adoption of the proposals. Several state that if unreasonably or meaninglessly low weight limitations were established or per container rates were abolished, their costs of transportation would increase and their profitability and ability to compete in world markets would decrease. The SEUSA proposal, many argue, would destroy the advantage gained by some shippers who have devised innovative but legal and safe ways of transporting heavy loads - e.g., through chassis extenders and specialized axle configurations. The TWRA proposal allegedly would prevent them from utilizing per container rates, which are said to be simple, economical (they don't require weighing of the commodities for rating purposes), easy to quote and predictable. One party maintains that under P4-89, inaccurate commodity descriptions could be designed to escape any per container rate ban. Both Petitions, it is argued, would interfere with intermodal movements and stifle innovative technology, directly contradicting legislative mandates. And, some maintain, they would cause under-utilization of container capacity, at a time in which there is already a shortage of containers.

Some shippers emphasize special hardships the proposals would cause to them. Several object to the targeting of certain commodities under P4-89, which they argue is discriminatory. A half-dozen alcoholic beverage shippers commenting cite the likelihood of damage and pilferage from breaking down containers to meet weight requirements. Hides and skins shippers argue that per container rates are especially useful for those commodities, partly because hides tend to lose weight during shipment and per container rates allow this factor to be accommodated. Forest product shippers and the United States Department of Agriculture (concerned about agricultural interests) also contend that those industries would be particularly hard hit by increased transportation costs, which would result from adoption of either proposal. Shippers of forest products also maintain that the FMC cannot or should not include exempt commodities in any ban on per container rates or in any new weight limit scheme, as this would contravene the intent of those exemptions.

As alternative solutions, several opponents suggest voluntary carrier programs for weight limits on containers; increased enforcement of existing highway safety laws; education and training efforts aimed at overseas suppliers; leaving the burden with the motor carrier, who is best able to remedy the problem, and then charging the shipper for any attendant expenses; or establishing uniform highway weight standards. One commenter advocates doing nothing, claiming there are no overloaded containers on the highways these days. Another alternative approach suggested was

that of Tropical Shipping & Construction Co., Ltd., which proposes that, instead of identical weight limits for certain size containers, every container be inspected and certified by an independent organization which would affix a seal showing the limit on the container. This would allegedly ensure that shippers are aware of weight limits.

Finally, some comments are not easily categorized as for or against the Petitions. The Maritime Administration ("MARAD"), for example, states that it "supports both petitions, in principle" and that they "have merit." MARAD concludes, however, that additional study is warranted and other alternatives should be considered. MARAD cites the following problems with the proposals: (1) some ports and truckers charge per container rates for container handling, so the petitions will not eliminate all incentive to overload; (2) forest products are frequently loaded in containers for export at the terminals, and do not move over highways; (3) it is not clear that P3-89 will have any effect on exports, as when carriers accept overloaded containers for export, there is by then no threat to the highways; (4) the proposals place a heavy burden and responsibility on carriers to enforce shipper compliance with the rules; and (5) restricting cargo weight significantly below design capacity for the purpose of highway safety will introduce economic inefficiencies into both the maritime and rail modes of transportation. MARAD suggests shipper bonding as an alternative worth consideration.

DISCUSSION

Jurisdiction

A threshold issue is that of the Commission's jurisdiction over the subject matter of the Petitions. Petitioners cite a number of sections of the 1984 Act as authority for the Commission to issue the proposed rules. Among these are sections 10(b)(6), (11) and (12) of the 1984 Act, which prohibit various forms of discriminatory or unfair practices, and 10(d)(1) of the Act, which requires reasonable practices relating to the receiving, handling, storing or delivery of property. Many comments opposing the Petitions challenge the reliance on these provisions as authority for the Commission to resolve what they consider essentially a highway safety problem. Several of the comments contending that the Commission lacks jurisdiction to entertain or proceed with these Petitions actually argue not that the Commission lacks the necessary authority to act, but that policy considerations dictate that other government agencies are the more appropriate forums. These concerns, which are relevant to the merits of the proposals rather than jurisdiction, are addressed infra.

Because both the underlying overweight container issue and the proposed resolutions involve practices related to rates and cargo classifications of carriers, and the resolutions would seek to correct potentially unfair or unjustly discriminatory practices with respect to those rates and classifications, the Commission finds that it has jurisdiction to consider acting upon these Petitions at least under section 10(b)(6) of the 1984 Act. Section

10(b)(6) prohibits common carriers from engaging in any unfair or unjustly discriminatory practice in the matter of, inter alia, (A) rates and (B) cargo classifications.

The overweight container situation sought to be remedied by the Petitions concerns rate practices of carriers in intermodal movements and the cargo classification practices as contained in the rate structures. The carriers' tariffs and rate mechanisms ultimately reflect the allocation among carriers, shippers and truckers of the economic burden on the intermodal movement of containerized cargo occasioned by the fines currently being assessed by state enforcement authorities. Petitioners argue that to the extent motor or ocean carriers absorb the costs of size and weight limit penalties, those costs are often passed on to shippers in the form of higher rates. TWRA indicates that it "has sought to restate its 'per container' commodity rates applicable to 'weight' items involving 'tariff exempt' commodities in a weight or measure commodity rate format." P4-89, at 8. Thus, the overweight container problem is allegedly affecting the form in which carriers construct rates, thereby creating new competitive factors in ocean commerce to the extent competing carriers do or do not offer per container rates for high-weight commodities.

Also, the Petitions themselves raise issues under sections 10(b)(6)(A) and (B), as would any proposal seeking to limit the amount of cargo that may be placed in a single container. Both P3-89 and P4-89 would address the problem through the mechanism of "tariff rules," prescribing new restrictions and responsibilities

directly affecting the rates and cargo classifications carriers may provide in their tariffs.

Inasmuch as the Commission finds jurisdiction under section 10(b)(6) of the 1984 Act to entertain the Petitions, it is unnecessary to reach the issue of whether other provisions of the 1984 Act may provide additional bases for FMC jurisdiction.

The Merits of the Petitions

Notwithstanding the Commission's finding of jurisdiction, the appropriateness of exercising that jurisdiction is an entirely separate matter. The Commission's analysis of the nature of the controversy, the proposed solutions, and the current balance of rights and responsibilities regarding highway weight limits dictates that it not attempt an FMC-imposed resolution of the issue.

The Petitions themselves indicate that they are based on the FHWA Study and analysis, and that the purpose of the Petitions is to avoid the movement over the highways of containers which cause highway vehicles to exceed the weight limits of the interstate highway system. The Petitions take as a "given" the existence of the problem outlined in the FHWA Study: marine containers and associated equipment moving over the interstate highway system which, by reason of their combined weight, violate the "Bridge Formula" established in the federal highway statutes.⁵ The FHWA

⁵ The Study does not separately consider potential violations of federal axle weight or gross vehicle weight restrictions.

Study sought to identify the sources of what FHWA identifies as the major portion of all containerloads which may potentially create an overweight container movement over interstate highways, based on the assumption that all such overweight movements have an increased destructive impact on the roads.

Upon examining FHWA's methodology and assumptions, many of the commenters identified flaws in the logic of using that Study as the basis for the actions requested of the Commission. The FHWA Study did not purport to deal with all aspects of the overweight container issue. FHWA used PIERS data to identify containers moved in ocean-borne foreign commerce which contained cargo whose weight, along with that of the container, a chassis and a tractor to haul it, would result in a load in excess of "Bridge Formula" limits. Because FHWA relied only on data for foreign, not domestic, commerce, it addressed only a portion of the overweight container issue.

In addition, the FHWA Study did not identify other overweight loads moving over the roads, including trailers and heavy construction equipment. Even with respect to the containers moving in foreign commerce, the Study failed to identify those which move to or from U.S. ports by barge or rail, and therefore do not contribute to the highway safety problem at issue. Similarly, some commenters called attention to their own movements of heavy cargoes, particularly forest products, by trailer or flatbed prior to loading in containers at the marine terminal. The approach to the issue suggested in these Petitions would, therefore, affect

containerloads which do not contribute to the alleged problem, i.e., those containers loaded at a U.S. port, those moved to or from ports by barge or rail, those which moved under state exemptions to the Bridge Formula, or those that moved on highways or roads not subject to the Bridge Formula.

The FHWA analysis of PIERS data also did not fully reflect the degree to which "overweight" containers could be lawfully and safely moved over the roads by equipment with various configurations of axles, as recognized in the "Bridge Formula" itself.^o Accordingly, some "overweight" containers included in the FHWA Study may not be a problem with respect to either safety or legality.

Thus, the FHWA Study does not reveal the full scope of any overweight container problem nor enable the Commission to identify the degree to which proposals based on Shipping Act remedies would resolve such problem. At the direction of Congress, these issues and their potential solutions are under study by the National Academy of Sciences, under contract to the Department of Transportation and the agency most closely concerned, the FHWA. The data relevant to the complex factors mentioned above, as well as the expertise necessary to evaluate it, are not in the

^o The "Bridge Formula" is under study pursuant to the 1987 Federal Aid Highway Amendments, Pub. L. No. 100-17, § 158, 101 Stat. 170, April 2, 1987. This study, being prepared by the Transportation Research Board of the National Academy of Sciences, was due to Congress and the Department of Transportation in March 1990, but has not yet been issued. It is currently in the final stage of review by the National Research Council (of which the Transportation Research Board is a part) and may be released in June 1990.

possession or control of the Commission or of those regulated by the Commission.

In addition to the issues relating to the Petitions discussed above, there are also policy and factual issues raised by each of the Petitions.

The solution suggested by P3-89 -- maximum container weights -- is said to have the advantage of uniformity, necessary because state rules and laws are both inconsistent and inconsistently enforced, in some cases in order to encourage the use of a particular port within the state. This advantage would, however, appear to be offset by the difficulty or impossibility of providing exceptions from the standards for those loads moved by rail or barge, or on specially equipped vehicles. As noted in the MARAD comments, uniform weight standards pegged to the levels identified in the FHWA Study could introduce inefficiencies into maritime, rail, barge and some highway transportation. Also well taken is the concern expressed by some commenters that the uniform weight approach could lock in existing technology for trailers and truck chassis, discouraging new developments which make transport of heavier loads safe.

In comments filed in opposition to the Petitions, the USDA notes that FHWA regulations allow states to issue special permits without regard to weight limits for vehicles and loads which cannot be dismantled or divided without incurring substantial cost or delay. Pursuant to these guidelines, a number of states have ruled that ocean-going containers are non-divisible loads, within the

meaning of the "Bridge Formula." Commission adoption of the rule suggested in P3-89 could serve to reverse these efforts of individual states to facilitate intermodal container movements.

The SEUSA Petition would also have the Commission require carriers to assume a mantle of considerable responsibility and discretion to police the weight limits imposed, including the authority to determine, at the shipper's expense, alternative methods for transporting cargo when a potential violation is perceived. Thus, the Petition could result in far-reaching consequences which would rival the problems sought to be addressed.

The approach taken in P4-89 is narrowly focused on those commodities which most frequently constitute overweight loads. While these products may be identifiable, based on the FHWA Study, numerous concerned commenters point out that several of the offending few are among those least amenable to Commission action. Commenters note that lumber and other forest products and waste paper are among the enumerated items exempt from the tariff-filing requirements of section 8 of the 1984 Act, 46 U.S.C. app. § 1707, and therefore would not be amenable to a Commission ban on per container rates in carrier tariffs. The TWRA Petition is also based on the unsupported assumption that ocean carrier per container rates provide the only incentive for shippers to overload containers. There may in fact be other transportation factors encouraging such practices which would be unaffected by TWRA's proposed ban.

Finally, Commission action on the instant Petitions, or, in fact, any FMC initiative to address these issues, would necessarily involve issues of federalism and could result in the Commission's preemption of the current statutory scheme apportioning rights and responsibilities in the area among local, state and federal governmental entities. The "Bridge Formula" empowers the states and local jurisdictions to determine whether and when there are countervailing reasons for over-the-road movement of heavy loads to outweigh these presumed highway safety factors, by providing for special permits. States may issue permits to exceed the federal limits applicable to the interstate system if the load is deemed "non-divisible." In addition, the states may establish greater maximum weight limits for state highways than those applicable to the federal interstate system.

Action by the Commission to establish maximum weights for containerloads would remove at least some of the flexibility Congress bestowed on state and local jurisdictions. The Commission is being asked in these Petitions not so much to fill a void in the government oversight of this issue but rather to supersede the scheme already established by Congress, and alleged by Petitioners to be inadequate. Indeed, these Petitions appear to have been prompted in part by the fact that the 1987 Federal Aid Highway Amendments included an exception to the weight limits for ocean transport containers which expired, by terms of the statute, on September 1, 1989. In a sense, Petitioners are asking the

Commission to legislate in an area in which they are dissatisfied with the current status of the law as devised by Congress.

CONCLUSION

Petitioners have requested the initiation of a far-reaching regulatory scheme, but have not provided a supportable or appropriate basis for the action.

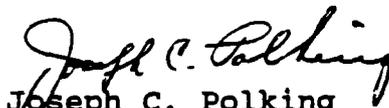
The proposals themselves appear to be substantially flawed. The Petitions are based on a Study which at best provides a preliminary estimate of the problem but does not purport to assess options and alternatives for addressing a solution, least of all a maritime solution. In some respects, the proposals are overbroad in scope, affecting, for example, cargoes and movements which do not even travel on the highways. In other respects, the proposals would appear to be inadequate, disregarding, for example, domestic trailer movements which contribute an as yet undetermined amount to any highway problem. Thus, it is questionable whether the proposals would indeed discourage the very practices sought to be prevented. One petition presumes that per container rates present the sole incentive shippers have to overload containers, and would apply a tariff-based prohibition to commodities which are statutorily exempt from FMC tariff-filing requirements. The other would have this Commission impose arbitrary weight limits for containers without regard to innovations and technologies which render those highway movements both safe and legal. The urgency

of the alleged problem cannot compensate for these inadequacies in the solutions urged.

Moreover, the Commission is essentially being petitioned to interfere in a Congressionally created compact between the federal government and the states, allocating power to impose and enforce highway weight limits. Signs are evident that Congress may reexamine the current scheme in the near future. The National Academy of Sciences study is due to Congress this spring. Also, the House Public Works and Transportation Committee, Subcommittee on Investigations and Oversight has scheduled hearings on the subject later this month.

THEREFORE, IT IS ORDERED, That the Petitions for Rulemaking filed by the South Europe/U.S.A. Freight Conference, Transpacific Westbound Rate Agreement, American Trucking Associations and ATA Intermodal Council in this matter are denied.

By the Commission.*


Joseph C. Polking
Secretary

* Commissioner Quartel's concurring opinion is attached.

CONCURRING OPINION OF COMMISSIONER QUARTEL

While I concur in the denial of the petitions, I reach this decision for reasons somewhat different than those of the majority.

I cannot, of course, disagree that the Commission has jurisdiction over matters falling under section 10(b)(6) of the Act, specifically, as argued here, paragraphs (A) and (B): "...unfair or unjustly discriminatory practice[s] in the matter of (A) rates; [and] (B) cargo classifications." 46 U.S.C. app. section 1709(b)(6).

Nevertheless, I am concerned about the assertion by petitioners that these particular practices at issue somehow violate section 10.

The so-called "overweight container" issue, as described in the petitions, is only tenuously connected to maritime practices, if at all. In the view of this Commissioner, the so-called "overweight container" issue is derived and defined solely from and by activities carried out by truckers engaged in improper or situationally illegal practices, acting alone, and totally within their own discretion to act or remedy. While we may be sympathetic to the plight of small truck operators who feel pressed by market forces to violate the law, the fact remains that Congress and the States made them responsible for violations of vehicle weight restrictions. The weight of cargo in a container is only one of the factors affecting whether or not a truck violates these restrictions. The violation itself is not caused by the container, its contents, or its weight while under maritime carriage or FMC

jurisdiction; but, by the circumstances of its non-maritime carriage by the trucker. And, while petitioners ostensibly complain about fairness and discrimination among shippers, they really seem to be concerned about the legal burdens placed upon them by other laws. It is not the mission of the Commission to rewrite or otherwise affect laws intended to address non-shipping factors such as highway safety or maintenance.

It is likewise not clear that the practices at issue here are either unfair or unjustly discriminatory. Petitioners have shown some creativity in their search for a forum to promote their position. But their approach amounts to regulatory overreaching, not only from the point of view of the plain meaning of the law, but from the perspective of Congressional intent. Quite simply, the solution to a "problem" created elsewhere lies elsewhere.

APPENDIX

The following submitted comments to one or both Petitions:

Agriculture Ocean Transportation Coalition
Akers Wood Products, Inc.
American Institute for Shippers' Associations, Inc.
American Hardboard Association
Appleton Papers Inc.
Asia North America Eastbound Rate Agreement
Atlanta Wholesale Wine
Babcock & Wilcox
California Assembly Committee on Transportation Chairman Richard
Katz
California Department of Transportation
California Grape & Tree Fruit League
California Trucking Association
Central Wholesale Liquor Co.
Chemical Manufacturers Association
City of New York Department of Ports and Trade
Coastal Lumber Company
Committee of Six
David R. Webb Co., Inc.
Federal Highway Administration, U.S. Department of Transportation
First International Shippers Association
Freight Services Improvement Conference
Fritz Transportation International
General Felt Industries
Georgia-Pacific Corporation
Gutchess International, Inc.
Hapag-Lloyd A.G.
Hiram Walker & Sons, Inc.
Institute of Scrap Recycling Industries, Inc.
Intermodal Transportation Association
International Chamber of Shipping
International Longshoremen's Association
Israel Eastbound Conference and U.S. Atlantic & Gulf/Western
Mediterranean Rate Agreement
Kennecott Utah Copper Corporation
Maritime Administration, U.S. Department of Transportation
Medite Corporation
National Forest Products Association
National Particleboard Association
National Distributing Co., Inc.
National Customs Brokers & Forwarders Association of America, Inc.
New York State Department of Transportation
New Jersey Motor Truck Association
North Europe Conferences
Oregon Department of Transportation, State Highway Division
Owner-Operator Independent Drivers Assn., Inc.
Pacific Northwest Asia Shippers Association
Plum Creek Timber Company, Inc.
Ponderosa Products, Inc.
Port Authority of New York and New Jersey

Port Townsend Paper Corporation
PPG Industries, Inc.
Raychem Corporation
Robinson Lumber Company, Inc.
Shannon Lumber International
Simplicity Manufacturing, Inc.
Southern Pacific Transportation Company
Steamship Operators Intermodal Committee
Tanner Lumber Company
Texas Intermodal Truckers Association
The International Association of NVOCCs
The National Industrial Transportation League
The Jaydor Corporation
Toy Manufacturers of America, Inc.
Tradewinds International, Inc.
Trans Freight Lines
Tropical Shipping & Construction Co., Ltd.
Tumac Lumber Co., Inc.
U.S. Department of Agriculture
U.S. House of Representatives Committee on Merchant Marine and
Fisheries Chairman Walter B. Jones, Ranking Minority Member
Robert W. Davis, Member Helen Delich Bentley
Unimin Corporation
United Shipowners of America
United States Hide, Skin & Leather Association
United States Atlantic and Gulf/Hispaniola Steamship Freight
Association; United States Atlantic and Gulf/Southeastern
Caribbean Freight Association; U.S. Central America/Liner
Association; United States/Panama Freight Association
W. M. Cramer Lumber Company
Walter H. Weaber and Sons, Inc.
Westvaco Corporation
Willamette Industries, Inc.
Wine and Spirits Shippers Association, Inc.