

(S E R V E D)  
( DECEMBER 2, 1987 )  
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR PART 586

[DOCKET NO. 87-6]

ACTIONS TO ADJUST OR MEET CONDITIONS UNFAVORABLE TO SHIPPING  
IN THE UNITED STATES/PERU TRADE

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission finds that there exist unfavorable conditions to shipping in the foreign oceanborne trade between the United States and Peru. This final rule suspends the tariffs of certain Peruvian-flag carriers in that trade unless certification is received ensuring that these conditions no longer exist. The effect of the rule will be to adjust or meet unfavorable conditions by imposing burdens on Peruvian-flag carriers which approximate those imposed on non-Peruvian-flag carriers by Peruvian laws and regulations.

DATE: Effective [Insert date 90 days after date of publication in the Federal Register].

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**SUPPLEMENTARY INFORMATION:**

**BACKGROUND INFORMATION**

The Federal Maritime Commission ("Commission" or "FMC") instituted this proceeding by Notice of Proposed Rulemaking ("Proposed Rule") published in the Federal Register on April 13, 1987 (52 FR 11832), to address apparent conditions unfavorable to shipping in the United States/Peru oceanborne trade (the "Trade"), pursuant to the authority of section 19(1)(b) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(1)(b) ("Section 19"). Comments on the Proposed Rule were originally due on May 13, 1987. However, by further notices in the Federal Register, this period was extended to July 3, 1987 (52 FR 18408), July 31, 1987 (52 FR 26027), and finally August 10, 1987 (52 FR 28578). These extensions were granted at the request of the Peruvian-flag carriers to accommodate ongoing negotiations between the U.S. Government ("USG") and the Government of Peru ("GOP").

The Proposed Rule was issued after consideration of a number of complaints received from shippers, shippers' associations, freight forwarders and third-flag carriers regarding conditions in the Trade. In addition, certain comments filed in connection with a proposed equal access agreement<sup>1</sup> among U.S. and Peruvian-flag carriers cited certain potential adverse conditions in the Trade.

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<sup>1</sup> The U.S./Peru Equal Access Agreement, Agreement No. 204-010986, was filed with the Commission on August 24, 1986. The parties responded to a Commission request for further information on May 21, 1987, and the agreement became effective on July 3, 1987.

These complaints arose out of the enactment, implementation and enforcement by the GOP of Supreme Decree No. 009-86-TC<sup>2</sup> ("Supreme Decree"), which became effective on February 28, 1986, and which reserves for Peruvian-flag carriers 100 percent of all imported and exported ocean freight generated by Peru's foreign trade. The amount of cargo reserved by the Supreme Decree for Peruvian-flag carriers may be reduced as follows: (1) on the basis of strict reciprocity;<sup>3</sup> (2) pursuant to government or commercial agreements<sup>4</sup> among non-Peruvian and Peruvian-flag carriers, preferably including Compania Peruana de Vapores, the Peruvian state shipping line; or (3) when the Peruvian Director General of Maritime Transportation or Peruvian Consuls grant non-Peruvian-flag or non-associate carriers permission to carry Peruvian export or import cargoes. Pursuant to the Supreme Decree, permission for the use of non-Peruvian-flag or non-associate carriers may be

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<sup>2</sup> Supreme Decree No. 009-86-TC amended Supreme Decree No. 036-82-TC, which reserves Peruvian import and export cargoes for Peruvian-flag vessels and sets out waiver and cargo manifest certification requirements. While Supreme Decree No. 036-82-TC has been in place since September, 1982, apparently, non-associate and non-Peruvian-flag carriers were allowed to operate freely in the Trade.

<sup>3</sup> E.g., U.S.-flag carriers' access to Peruvian cargoes will be proportional to Peruvian-flag carriers' access to U.S. cargoes.

<sup>4</sup> Non-Peruvian-flag carriers which become parties to such commercial agreements may be granted associate status upon approval by the GOP. Associate carriers are generally excepted from cargo manifest certification and waiver requirements under Supreme Decree Nos. 009-86-TC and 036-82-TC.

granted in the form of a waiver or cargo manifest certification when Peruvian-flag or associate carriers are not available and in position within 12 days<sup>5</sup> following the proposed date of shipment of non-perishable products, or within 4 days in the case of perishable products, or when no Peruvian-flag carrier serves the relevant port.<sup>6</sup>

The Proposed Rule recognized the appearance of unfavorable conditions in the Trade, and proposed the suspension of tariffs of Peruvian-flag carriers unless such carriers within 25 days of the issuance of a final rule obtained authorized status by filing with the Commission a certificate from the GOP stating unequivocally that no law, regulation or practice precludes any non-Peruvian-flag vessel from competing in the Trade on the same basis as any other vessel.

Comments on the Proposed Rule were received from the following carriers, shippers and shippers' associations: Compania Peruana de Vapores ("CPV"), Naviera Neptuno, S.A. ("Neptuno") and Empresa Naviera Santa, S.A. ("Santa") - joint comments; Lykes Brothers Steamship Co., Inc. ("Lykes"); Crowley Caribbean Transport, Inc. ("CCT"); the

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<sup>5</sup> Supreme Decree No. 033-86-TC of June 11, 1986, modified Supreme Decree No. 009-86-TC by reducing the number of days a shipment must wait for a Peruvian or associate carrier from 15 days to 12 days.

<sup>6</sup> The waiver and cargo manifest requirements have been replaced with an authorization procedure. This procedure is discussed below.

American Chamber of Commerce of Peru ("Chamber"); Occidental International Exploration and Production Company ("Occidental"); Naviera Amazonica Peruana, S.A. ("NAPSA"); Great Lakes Transcaribbean Line ("GLTL"); Compania Sud Americana de Vapores ("CSAV"); Shippers for Competitive Ocean Transportation ("SCOT") and the Chemical Manufacturers Association ("CMA") - joint comments and individual supplemental comments; and Tidewater Resources, Ltd. ("Tidewater"). During the comment period communications from the U.S. Departments of State and Transportation and the GOP were received by the Commission.

#### DIPLOMATIC ACTIVITIES

##### A. Memorandum of Understanding ("MOU")

On May 1, 1987, the USG and the GOP signed a MOU which relates to access by third-flag vessels to the Trade. In their transmittal of the MOU to the Commission, the U.S. Executive Agencies noted that they intend this agreement to lead to greater opportunities for third-flag carriers to compete in the Trade.

The MOU committed the GOP to promulgate regulations ("Regulations") within 45 days to implement provisions of the MOU dealing with third-flag carrier access to the Trade. Due to delays in the drafting of these Regulations and discussions between the USG and GOP on the terms of the Regulations, they did not become effective until July 29, 1987.

On August 7, 1987, the Commission issued in the Federal Register a notice of availability at the Federal Maritime Commission of Peruvian Resolution No. 027-87-TC/AC ("Resolution") (52 FR 29396) which contains the Regulations. Subsequently, Vance Fort, Deputy Assistant Secretary for Policy and International Affairs, U.S. Department of Transportation, transmitted a copy of the Resolution, with a letter requesting that the Commission terminate this proceeding and withdraw the Proposed Rule. Mr. Fort states that an interagency review of the Regulations contained in the Resolution "found that they substantially meet the requirements of paragraphs 1 and 2 of the MOU."<sup>7</sup> He advises that the Executive Agencies' initial concerns over certain ambiguities in the Regulations, relating to nationality determination and service, had been resolved through assurances from the GOP. Mr. Fort explains that the USG's main interest is in maintaining a trade open to third-flag

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<sup>7</sup> Paragraphs 1 and 2 of the MOU read as follows:

The parties have agreed to the following:

1. Upon application by operators of third-flag vessels, relevant Peruvian authorities will issue expeditiously renewable two-year authorizations to participate with free access in the United States-Peru trade. Consistent with the principle of reciprocity, such authorizations may be denied to third-flag vessel operators whose countries are denying Peruvian operators access to their trades as cross-traders.

2. Within forty-five (45) days of the signing of this Memorandum of Understanding, the Ministry of Transport and Communications of Peru will implement the previous paragraph by promulgating pertinent regulations.

carriers and that the Executive Agencies will monitor developments in the Trade and actions taken by the GOP with regard to its authorization process. Finally, Mr. Fort advises that the Executive Agencies will call for consultations with the GOP if the Executive Agencies believe that operators from third countries are being unfairly denied access.

B. The Resolution

The Resolution containing the Regulations which implement the MOU was signed on July 27, 1987, and was published in the Official Gazette, "El Peruano," and became effective on July 29, 1987. The Regulations set forth the requirements and procedures that shipping lines operating third-flag vessels must observe in order to obtain authorizations from the Peruvian Ministry of Transportation and Communications ("Ministry") to participate in the Trade.

Among other things, the Resolution provides that: (1) prior authorization must be obtained by third-flag operators from the Ministry to participate with free access to the Trade; (2) the Ministry may deny authorization if the country of nationality of the third-flag operator bars participation with free access to Peruvian-flag carriers in any of its trade dealings with third countries, based on the principle of reciprocity; (3) any authorization granted will be valid for a period of two years and may be renewed for subsequent two-year periods; (4) the granting of any authorization implies an obligation by the operator

obtaining it to abide by all Peruvian laws and regulations applicable to the activity to be performed; and (5) any authorization granted may be revoked if: the authorization was obtained through false statements, information or documents; the country of the operator's nationality has not maintained the reciprocity required; or, the authorized operator fails to comply with the commitments undertaken.

C. Peruvian Aide-Memoire on the Resolution

The Department of State ("DOS") transmitted to the Commission an Aide-Memoire from the GOP which outlines Peru's plans for implementing the Regulations. The GOP advises that for a 90-day period starting July 27, 1987, the date the Regulations were published, it will continue to adhere to a flexible course of conduct in order to avoid any interruption in the participation of third-flag carriers that have served the Trade during the previous six months. Further, the GOP states that, during this 90-day period, it will consider any applications for authorization submitted. In addition, the GOP clarifies that the "authorization" system under the Resolution has totally replaced the existing "waiver" system for granting third-flag carrier access to the Trade.

**SUMMARY OF COMMENTS**

A. CPV, Neptuno and Santa ("Peruvian Carriers")

Joint comments were submitted to the Commission by CPV, Neptuno and Santa, three Peruvian Carriers. The Peruvian Carriers urge the Commission to discontinue this proceeding.

The Peruvian Carriers explain that Peru's cargo reservation laws, Supreme Decree No. 036-86-TC, issued September 1982, and the Supreme Decree, issued February 1986, provide that, under certain circumstances, cargo reserved to Peruvian-flag vessels may be carried by vessels of its bilateral trading partner. They advise that vessels of Peru's bilateral trading partner may carry reserved cargo if the bilateral trading partner provides Peruvian-flag vessels equal access to its reserved cargo. In addition, it is stated that the Supreme Decree provides that associate status, and the resulting equal access to reserved cargoes, can be obtained by carriers of other countries, if these carriers enter into an agreement which provides Peruvian-flag carriers reciprocal equal access to reserved cargoes. The Peruvian Carriers note that they have entered into such an equal access agreement with two U.S.-flag carriers,<sup>8</sup> and advise that even though this equal access agreement did not become effective until July 3, 1987, the Peruvian authorities had previously granted U.S.-flag carriers associate status.

The Peruvian Carriers state that the Resolution implements the MOU by allowing third-flag vessels to participate with free access to the Trade, subject to specified procedures and policies. The GOP is said to have come to an agreement with the USG that, upon application, Peruvian authorities will expeditiously issue authorizations

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<sup>8</sup> See n. 1.

to third-flag operators to participate with free access to the Trade, on the basis of reciprocity.

The Peruvian Carriers contend that the ability of Peruvian authorities to deny authorization to third-flag operators whose countries deny Peruvian-flag operators access to their trades as cross-traders, is an equitable policy and one that is recognized by the MOU. They further submit that such a policy is recognized by the laws of the United States, specifically, section 13(b)(5) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1712(b)(5). The Peruvian Carriers point out that under section 13(b)(5) the Commission may ban vessels of a country from the U.S. foreign trade, if the Commission finds that the government of that country has unduly impaired the access of a U.S.-flag carrier to trade between foreign ports.

The Peruvian Carriers take the position that the Proposed Rule should not be adopted because the Peruvian laws and regulations which the Proposed Rule addresses have been materially changed by reason of the MOU and Resolution. They maintain that Peru's current laws and regulations do not create conditions that are unfavorable to shipping the Trade. They, therefore, request that the Commission discontinue the proceeding.

**B. Lykes**

Lykes, a U.S.-flag carrier, supports termination of this proceeding. It advises that, since March 1987, it has

and will continue to provide the Trade with the same level of service described in earlier comments. Lykes maintains that its Atlantic and Gulf services, combined with the Peruvian-flag carriers' services, provide substantial shipping opportunities for the Trade.

Lykes expresses concern that the adoption of the Proposed Rule could ultimately prove to be more detrimental than beneficial to the Trade. Lykes fears the entire Trade could be shut down, thus adversely affecting carriers participating in the Trade, as well as shippers, consignees and consumers.

C. CCT

CCT, another U.S.-flag carrier, also urges that the proceeding be terminated.<sup>9</sup> It explains that since June 1981, it has maintained a regular fortnightly service from Miami to/from Peru, via the port of Paita, servicing the cities of Lima/Callao and other inland points in Peru. CCT reports that it has had no difficulties or interruption of its service to Peru. Further, CCT notes that despite growth in the volume of cargoes from last year, it is unaware of any case where cargo has been shut out for lack of space. Thus, CCT contends that the Trade is adequately serviced.

D. Chamber of Commerce of Peru

The Chamber advises that it opposes the implementation of the proposed FMC sanction against Peruvian-flag vessels.

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<sup>9</sup> The Commission interprets CCT's request for "suspension" to mean discontinuance.

It states that such action would inflict serious damage on U.S. commercial interests in Peru and on U.S. exporters.

The Chamber contends that current rates, frequencies and quality of maritime service in the Trade are acceptable, and that the service offered by private Peruvian carriers is improving. The Chamber reports that, with the exception of Chilean-flag carriers, its members have not encountered problems in obtaining waivers to use third-flag vessels. The loss of access to Chilean-flag carriers is not perceived by Chamber members as a significant disruption in the Trade.

The Chamber views retaliation by the GOP as a likely response to the implementation of the Proposed Rule. It believes that such a response may lead to the destabilizing of U.S. investments in Peru. The closing of Peruvian ports to U.S.-flag carriers would allegedly cause Peruvian state-owned firms and even U.S. companies in Peru to shift to non-U.S. sources of supply, thus injuring U.S. exporters.

E. Occidental

Occidental argues that the Proposed Rule threatens United States' economic interests. In particular, it opposes the suspension of FMC Tariff No. 3. Occidental explains that, under this tariff, NAPSA, a Peruvian-flag carrier, transports critical oil exploration, drilling and operating equipment and supplies up the Amazon River to the port of Iquitos, Peru, for use by Occidental's operations in that area.

Occidental advises that the majority of its cargo has been transported by NAPSA, the only regularly scheduled service on this route. It states that NAPSA provides reliable service at reasonable rates. To Occidental's knowledge, no third-flag carrier currently provides regular service to Iquitos. Occidental explains that alternative methods of transportation to Iquitos would be extremely expensive and impracticable. If FMC Tariff No. 3 were suspended, Occidental would allegedly be forced to consider obtaining supplies from sources which would not require movement through U.S. ports. Occidental, therefore, requests that the Commission not suspend FMC Tariff No. 3.

F. NAPSA

NAPSA opposes implementation of the Proposed Rule. It contends that the Supreme Decree is in no way directed against United States' carriers or United States' interests generally. NAPSA submits that the Supreme Decree is simply one aspect of a longstanding dispute between the GOP and Chile. Any adverse effects allegedly suffered by United States shippers are said to have been transitory and have been largely corrected. NAPSA, therefore, urges that the Commission not suspend the Peruvian-flag carriers' tariffs unless it finds that the Peruvian actions will actually cause substantial and continuing harm to United States interests. NAPSA believes that the suspension of all Peruvian-flag carriers' tariffs would constitute an arbitrary and capricious action. It cautions that U.S. shippers and carriers will experience ill-effects if Commission sanctions are imposed.

NAPSA further contends that the Commission does not have the statutory authority to proceed, given the circumstances of this case, and that the rulemaking is procedurally deficient. It maintains that both the language and history of the Merchant Marine Act, 1920, as well as considerations of sound policy, militate against undue intervention in disputes that neither directly target U.S. interests nor harm U.S.-flag carriers.

If the Commission does decide to impose sanctions on Peruvian-flag carriers, NAPSA urges that NAPSA's tariff covering the U.S./Iquitos, Peru, trade, FMC Tariff No. 3, not be suspended because: (1) the tariff applies to a route unrelated to Peru's Pacific trade which has been the subject of the shipper and third-flag carrier complaints filed with the Commission; and (2) U.S. interests would be harmed. NAPSA advises that it only offers service to/from Iquitos. NAPSA states that no third-flag carrier has ever provided a regular service to Iquitos and that, currently, it is the only carrier in that trade. It contends that, given these facts, U.S. shippers in the Iquitos trade have not even been allegedly injured by the Supreme Decree.

G. GLTL

GLTL requests that the Commission suspend this proceeding for a period of 90 to 120 days in order to determine whether the GOP's implementation of the Regulations will resolve the issues raised in this proceeding. The record currently before the Commission is

said to be more than adequate for the Commission to determine that Peru's cargo reservation regime has created conditions unfavorable to shipping in the Trade. GLTL contends that unless these unfavorable conditions are substantially mitigated by the GOP Regulations, implementation of the Commission's Proposed Rule would be warranted.

GLTL is encouraged by the tenor of the Regulations and the concept therein of continued third-flag carrier participation in the Trade. It expresses concern, however, that certain provisions of the Regulations may be interpreted and applied by the GOP in such a way as to vitiate the Regulations' potentially favorable impact.

GLTL advises that until the ambiguities regarding the interpretation and implementation of the Peruvian Regulations are clarified, it is premature to discontinue the proceeding. GLTL contends that the brief suspension it proposes will not adversely impact or burden any interested party. It urges, however, that any suspension period be subject to earlier reopening upon application establishing any interim action by the GOP excluding any third-flag carrier from continuing its present access to and participation in the Trade.

#### H. CSAV

CSAV, a Chilean-flag carrier, submits that, despite the MOU and Peruvian Regulations, unfavorable conditions in the Trade continue to exist. The exclusion of CSAV and other third-flag carriers over a period of more than a year by

Peruvian decrees and regulations allegedly have created conditions which are detrimental to U.S. and South American shippers, as well as to carriers in the Trade.

CSAV takes the position that while the MOU is of interest to the proceeding, it does not alter the governing principles for the Commission's mandate to adjust or meet conditions unfavorable to U.S. commerce. It suggests that considerable problems with serious implications for U.S. law and policy arise from the terms of the MOU and the Regulations. One such problem allegedly arises from the requirement that third-flag carriers obtain authorizations from the GOP to serve the Trade. CSAV maintains that such a requirement is inconsistent with the premise of "free access" to the Trade and defeats the purpose of Section 19, which is to guarantee open access. Further, CSAV maintains that the threat of revocation of the authorization would constantly exist for third-flag carriers.

CSAV submits that problems also arise from the two-year limitation on authorizations. It believes that many shippers, knowing in advance that a carrier's right to operate is only temporary, will not offer cargoes to that carrier because they look to carriers for long-term stability of service. Further, CSAV contends that long before the authorization expires, shippers will refuse to risk giving cargoes to a carrier that may not be able to transport them if its authorization is not renewed. In addition, CSAV submits that carriers will have little

incentive to devote capital expenditures and marketing efforts to a service where the authority to operate may be terminated or not renewed. Therefore, any time limitation on the authorization period allegedly is, in itself, a condition unfavorable to shipping and is contrary to Section 19.

CSAV contends that additional problems arise from the fact that authorizations may be denied if the country of nationality of the third-flag carrier denies Peruvian-flag carriers access to its trades. It submits that this will nullify the intent of Congress underlying Section 19. Further, U.S. shippers and consignees will allegedly bear the cost, through lost service and higher rates, for a dispute between two foreign governments which has no relation to U.S. commerce.

CSAV asserts that the notion that Peruvian authorities may deny certain carriers authorization to participate in the Trade pursuant to the MOU, cannot be justified on grounds that section 13(b)(5) of the 1984 Act grants the Commission similar authority. CSAV states that nowhere has Congress or the Commission suggested that section 13(b)(5) sanctions would be applied to trades completely unrelated to the dispute in question.

CSAV believes that Peruvian authorities will probably deny Chilean carriers' application for authorization on the basis of alleged restrictions on the operations of Peruvian

carriers in Chile's trade with Brazil and Argentina.<sup>10</sup> It explains that the Chilean Government has suggested on several occasions to the GOP a mutual opening of trade with Brazil.<sup>11</sup>

CSAV suggests that even if it were granted an authorization, it would still be subject to the waiver requirement of the Supreme Decree.<sup>12</sup> It maintains that the waiver system of the Supreme Decree makes it nearly impossible for third-flag carriers to operate in the Trade.

If Peru is allowed to settle disputes with foreign nations by imposing burdens on U.S. commerce, CSAV maintains that other nations may follow suit. It is concerned that other nations may generate external disputes so as to create protected markets for their national carriers in their trade with the United States. If this occurs, CSAV believes that the U.S. trades could become bilateralized. CSAV submits

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<sup>10</sup> Peruvian Resolution No. 044-86-TC/AC, which excludes Chilean carriers from certain Peruvian/third-country trades, remains in effect. Chilean Resolution No. 2, which excluded Peruvian carriers from certain Chile/third-country trades, was suspended on March 31, 1987, for six months. Resolution No. 2 will be revoked if Peru withdraws its restrictions on Chilean-flag carriers.

<sup>11</sup> CSAV states that Chile and Peru have identical agreements with Brazil.

<sup>12</sup> CSAV interprets Article 9 of the Resolution which states that the granting of the authorization implies an obligation by the operator obtaining it to abide by all Peruvian laws and regulations applicable to the activity to be performed, to mean that the Supreme Decree's waiver requirement would apply to authorized third-flag carriers. However, the GOP states in its Aide-Memoire that waivers will not be required by authorized third-flag carriers.

that it is not the role of the Commission to involve itself in disputes between foreign nations, and to do so would have undesirable results.

CSAV concludes that the Peruvian Regulations do not reduce the unfavorable conditions in the Trade and, in fact, worsen the problem. It, therefore, recommends that the Commission pursue its proceeding until such time as all carriers wishing to serve the Trade have genuine access to cargoes.

I. SCOT/CMA

SCOT/CMA submitted joint comments prior to the issuance of the Peruvian Regulations and individual supplemental comments after the Regulations were issued. They assert that the facts in the instant case show that unfavorable conditions do exist and will continue to exist as long as the GOP restricts the participation of third-flag carriers in the Trade. SCOT/CMA urges the Commission to implement its proposed sanctions unless: (1) all carriers willing to serve the Trade are granted authorized status; and (2) no other law, rule or practice inhibits the ability of any carrier to operate in the Trade or any shipper or consignee to select the carrier of its choice.

SCOT/CMA detail problems which they allege exist in the Trade. These problems include inadequate service and the

requirement that third-flag carriers obtain waivers to operate.<sup>13</sup>

SCOT/CMA submit that the MOU does not relieve the Commission of its Congressionally-mandated duty to enforce Section 19 to adjust or meet conditions unfavorable to shipping in the U.S. foreign trade. They express concern with certain provisions of the MOU which they contend may perpetuate unfavorable conditions in the Trade. Cited, for example, is the provision in the MOU which enables the Peruvian authorities to deny authorized status to certain third-flag carriers. SCOT/CMA maintain that this provision was intended to allow Peruvian authorities to exclude Chilean-flag carriers from the Trade as long as Chile is denying Peruvian-flag carriers access to the Chile/Brazil or Chile/Argentina trade. Under this provision, U.S. shippers allegedly could be denied their right to use Chilean-flag service if the GOP convinces U.S. authorities that Chile is restricting Peruvian-flag access to the Chile/Brazil or Chile/Argentina trade.

If the GOP has a maritime dispute with Chile, SCOT/CMA contend that Peru should limit its retaliation to restrictions on Chilean carrier access to the Peru/Chile trade or to comparable "disputes trades," i.e., Peru/Brazil or Peru/Argentina. They assert that the Commission should not allow U.S. trades to be the stakes in a dispute between

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<sup>13</sup> See n. 12.

Peru and Chile, nor allow the resolution of disputes between two foreign nations to be a necessary predicate to Section 19 action.

SCOT/CMA believe that allowing Peru to restrict Chilean-flag carriers access to U.S. trades because of restrictions placed on Peruvian carriers in the Chile/Brazil trade could set a dangerous precedent. They maintain that such a precedent could be used to justify the exclusion of U.S. carriers in a particular trade on the basis of a bilateral cargo reservation agreement that the U.S. has with a foreign country.

SCOT/CMA concur with CSAV that the GOP's denial of Chilean-flag carrier access to U.S. trades, under the circumstances proffered by the GOP, cannot be compared to actions the Commission can take under section 13(b)(5) of the 1984 Act. They argue that sanctions should not be applied in unrelated trades and would not be so applied under section 13(b)(5).

SCOT/CMA state that they recognize that the foreign policy developed by the Executive Branch pursuant to the MOU, may override the Commission's decision to impose sanctions. They recommend, however, that until such time as the President informs the Commission that the sanctions should be postponed, discontinued or suspended, pursuant to 46 CFR 585.13, the Commission should implement its proposed sanctions.

In CMA's individual supplemental comments it continues to support the Commission's proposed Section 19 sanctions against Peruvian-flag carriers on the basis that the Peruvian Regulations do not permit all third-flag carriers to operate in the Trade. In SCOT's individual supplemental comments it states that the denial of Chilean-flag carriers' access to the Trade is significant because these are the only third-flag carriers that have offered service from the U.S. Atlantic and Gulf Coasts to Peru.

J. Tidewater

Tidewater, a U.S. exporter, suggests that discontinuance of the proceeding would be premature. It advises that, prior to the GOP restrictions placed on Chilean-flag carriers, it had preferred to employ such a carrier in the Trade. It expresses hope that Chilean-flag carriers would be granted the authorization cited in the MOU. Tidewater believes that Chilean-flag carriers are entitled to such authorization because Chilean Resolution No. 2, excluding Peruvian-flag carriers from certain Chilean trades, was rescinded.<sup>14</sup>

Tidewater describes current service in the Trade without Chilean-flag carriers as usually acceptable but reliably late. Further, Tidewater alleges a shortage of readily available container space in the Trade. It explains that as a small exporter it distinguishes itself from larger

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<sup>14</sup> See n. 10.

exporters by superior service, and, as a result, unreliable transportation greatly reduces its effectiveness.

#### DISCUSSION

On the basis of all the information received, the Commission finds that "conditions unfavorable to shipping," within the meaning of Section 19, exist in the foreign oceanborne trade between the United States and Peru. The GOP, through its laws and regulations, has imposed burdens on non-Peruvian-flag carriers which are not experienced by Peruvian-flag carriers. Further, shippers have been deterred or restricted from employing the carrier of their choice. Thus, the restrictions imposed by the GOP have had an injurious effect on carriers, shippers and the Trade, generally.

While the Commission recognizes the good faith efforts made by the USG and GOP to address the situation in the Trade through diplomatic means, the resultant Peruvian Resolution which implements the MOU does not, in our opinion, satisfactorily resolve that situation. In fact, it in effect continues in place the very types of restrictions and impediments which prompted this proceeding in the first instance. Although third-flag carriers are no longer required to obtain "waivers" for individual shipments, they must now obtain "authorizations" to participate in the Trade. The Commission finds this authorization process as inconsistent with free access to trade concepts, as was the "waiver" system it replaces.

The Resolution puts third-flag carriers in a position where it is unlawful for them to carry cargoes in the Trade without obtaining an authorization. Although U.S.-flag carriers, unlike third-flag carriers, have been able to participate in the Trade, they nevertheless are technically required under the Supreme Decree to become associate carriers to gain free access to the Trade. On the other hand, Peruvian-flag carriers which compete for U.S. export and import cargoes are subjected to none of the impediments imposed on non-Peruvian-flag carriers by Peruvian cargo reservation laws.

Further, the authorization system, in itself, could deter potential competitors from entering the Trade. The fact that the authorization would be effective only for a two-year period and may be terminated during that time by the GOP could also have a similar effect. The uncertainty present in any limited grant of trade access authority could discourage carriers from entering the Trade and could influence a shipper not to select third-flag carriers operating under such limited authority.

It is therefore difficult for the Commission to view the GOP's authorization system as substantially different from the waiver system under the Supreme Decree. By establishing, at the very minimum, condition precedent procedural requirements, it imposes artificial impediments to free and open trade access not dissimilar to those imposed by the challenged waiver system.

Prior pronouncements by the Commission clearly and unequivocally indicate its position on that system. The Commission in its letter of October 23, 1986, to DOS' Deputy Assistant Secretary, Jeffrey N. Shane, advised that a satisfactory resolution to the problems in the Trade may not be reached until the GOP "suspends any implementation of its waiver system." Further, the Commission stated in its Proposed Rule that:

[t]he very existence of the waiver system and cargo manifest certification requirement appears to deter shippers from using non-Peruvian-flag carriers. Indications are that these requirements, even when made subject to some form of penalty immunity, have a chilling effect on a shipper's selection of the carrier of its choice.<sup>15</sup>

Much the same can be said about the present "authorization" procedure.

It is unknown at this time whether Chilean-flag carriers will be granted authorizations and allowed to operate in the Trade. However, it does not appear likely given the existence of Peruvian Resolution No. 044-86-

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<sup>15</sup> See Proposed Rule, p. 18.

TC/AC<sup>16</sup> which excludes Chilean-flag carriers from certain Peru/third-country trades. Chilean-flag carriers have been denied access to the Trade for more than one year. Shipper comments to the Commission indicate that they wish to employ these carriers and did so prior to the carriers' exclusion from the Trade by the GOP.

In any event, the Commission cannot accept as a satisfactory resolution of this matter an accommodation which would permit the GOP to deny authorization to a third-flag operator in the U.S./Peru trade if the country of nationality of that operator bars participation to Peruvian-flag carriers in any of its third-country trades. To accept the proposition that the GOP can settle disputes with foreign nations by imposing burdens on U.S. commerce, in

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<sup>16</sup> As the Commission stated in issuing its Proposed Rule:

the practical effect of Peruvian Resolution No. 044-86-TC/AC is to deny U.S. shippers the ability to employ Chilean-flag carriers which, prior to the implementation of the Supreme Decree, were the major third-flag carriers in the Trade. Chilean-flag carriers are said to provide efficient, low-cost service in the Trade. The denial of such service, coupled with the fact that Chilean-flag carriers are currently allowed to operate within the Peru/Europe trade, may effectively create conditions unfavorable to shipping in the U.S. trades by discriminating against U.S. shippers in the U.S. trade with Peru vis-a-vis their competitors shipping cargoes between Europe and Peru. The result of these restrictions on shipping service in the Trade may be to put at risk the Peruvian markets of U.S. shippers, and bring about the loss of these markets to European competitors.

effect, would allow the GOP to hold the U.S.-Peru trade hostage to obtaining concessions elsewhere. Allowing this situation would establish a precedent with serious implications. First and foremost, it would abdicate the Commission's statutorily-mandated responsibilities under Section 19 to remedy unfavorable conditions in the United States foreign trade. As a result, the Commission's ability to maintain open trades and prevent interruptions to the flow of U.S. oceangoing commerce would be impaired. Given the number of countries with restrictive maritime policies and practices, many third-flag carriers could be denied access to U.S. trades. The result could be a reduction in competition with increases in rates and decreases in service.

The GOP's denial of authorization and, hence, access to the Trade under the conditions set forth in Article 3 of the Resolution, is not, contrary to the Peruvian Carriers' argument, similar to action the Commission can take pursuant to section 13(b)(5) of the 1984 Act. As explained by the Commission and noted by SCOT/CMA:

Whatever sanctions might be imposed by the Commission [under section 13(b)(5)] will be against those parties which are either directly or indirectly responsible for undue impairment of access of a U.S.-flag vessel.<sup>18</sup>

Because the Commission finds that the Peruvian Resolution implementing the MOU restricts third-flag carrier access to the Trade and does not allow shippers to freely select their preferred carriers, it is denying the request made by the U.S. Executive Agencies, Peruvian-flag carriers and certain other commenters to discontinue the proceeding and withdraw the Proposed Rule.

Further, the Commission will not discontinue the proceeding based on procedural and jurisdictional challenges or contentions that U.S. interests, including carriers and shippers, have not suffered any lasting harm and that, in any event, any difficulties have been cured by the MOU and

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<sup>18</sup> Docket No. 84-22, Actions to Address Conditions Unfavorable to Shipping in the Foreign Trade of the United States and Conditions Unduly Impairing Access of U.S.-Flag Vessels to Ocean Trade between Foreign Ports, 22 S.R.R. 1422 (1984).

Resolution.<sup>19</sup> While U.S.-flag carriers, apparently, have

<sup>19</sup> NAPSA states that the Commission does not have the statutory authority in these circumstances to proceed under Section 19 and that the instant rulemaking is procedurally deficient. NAPSA does not, however, address these statutory and procedural issues, stating that it understands that CPV, Neptuno and Santa, the Peruvian Carriers, will address them. The Peruvian Carriers, however, do not address these issues in their comments on the Proposed Rule. These carriers did raise procedural issues in their "Petition of Peruvian Carriers for Changed Procedure," April 21, 1987. The Commission responded to the procedural issues raised in this petition in its "Order Denying Petition," served June 18, 1987.

NAPSA also urges in its comments that Section 19 should not be invoked, as a matter of policy, to deal with incidental trade problems which result when United States carriers or shippers are not the direct target of foreign state actions. In connection with this argument, NAPSA also urges the Commission to act with circumspection where there is no adverse effect on United States carriers, alleging that the language and history of the Merchant Marine Act of 1920 indicate that the Act's primary -- if not sole -- purpose was to develop, maintain and protect the U.S.-flag merchant marine. While NAPSA does not go so far as to argue that Section 19 and the Commission's authority are so limited as to encompass only those U.S. interests represented by U.S.-flag vessels, its selective reading of the legislative history would restrict our "clear" statutory mandate to such interests, relegating shipper interests to subordinate status. As the Commission on numerous occasions has pointed out, the language of Section 19 and the legislative history of the Merchant Marine Act, 1920, of which it is a part, indicates a far broader purpose. For example, in advocating that the U.S. Shipping Board (now the FMC) be given power in some form to respond to foreign acts like the British Board of Trade's "Orders In Council," the witness before the Senate Committee considering the bill, William L. Clark of the Pacific Steamship Company, noted that the British Orders are "worked out in harmony with British Commerce and British shipping, protective of both." The Committee Chairman responded that the U.S. should "emulate" the British approach. Hearings Before the Senate Committee on Commerce, Establishment of An American Merchant Marine, 66th Cong., 1st and 2nd Sess. 1465-1466 (1919-1920). Thereafter, during consideration of the bill by the Senate, the Committee Chairman described the powers and discretion conferred on the agency which was "to build up American trade, American shipping, and American interests. . . . We are giving them this power and giving them this discretion to use in the interest of American trade and American shipping. . . ." 59 Cong. Rec. 6813 (1920).

been allowed to operate in the Trade pursuant to their associate status,<sup>20</sup> it is clear that third-flag carrier access to the Trade has been and continues to be impaired and, in the case of Chilean-flag carriers in particular, denied altogether. The result is that U.S. shippers have not been allowed to freely select the carrier of their choice. Further, there is no indication that the Peruvian Resolution will alleviate this situation.

The restrictions imposed on third-flag carriers call into question the argument made by some commenters that service in the Trade is adequate. Although the issue of service adequacy in the Trade is a matter of considerable dispute among those commenting on the Proposed Rule, "adequacy of service is not necessarily the primary consideration in Section 19 proceedings."<sup>21</sup> But even:

[a] showing that the Peruvian-flag carriers and particularly the Peruvian national carrier, now offer "adequate service" might mean merely that they have been able to increase their share of the market and consolidate their gains during the period when their third-flag competitors were excluded from the market. . . .<sup>22</sup>

As a general matter, however, the diminution of competition in the market for shipping services resulting from the GOP

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<sup>20</sup> Associate status was granted to the U.S.-flag carriers prior to the effectiveness of the U.S./Peru Equal Access Agreement.

<sup>21</sup> See pp. 16-17 of Proposed Rule.

<sup>22</sup> See "Order Denying Petition," served June 18, 1987, p. 13.

Supreme Decree appears to contradict the carriers' claims that U.S. shippers have suffered no lasting or long-term detrimental effects.

The Commission has also determined that suspension of the proceeding for a specified period of time, e.g., 90 or 120 days, to provide an opportunity to determine whether the implementation of the Regulations will resolve the unfavorable conditions in the Trade, is not an acceptable course of action. Such action, just as discontinuance, would imply that the Commission accepts both the GOP's authorization process for third-flag carrier access to the Trade and the practice by the GOP of settling maritime disputes with foreign nations by imposing burdens on U.S. commerce. As noted above, the Commission finds both of these concepts objectionable.

#### FINAL RULE

For the reasons stated above the Commission finds it necessary and appropriate to issue a rule, pursuant to Section 19, to adjust or meet conditions described above which it finds unfavorable to shipping in the Trade ("Final Rule").

The Final Rule will suspend the tariffs of Peruvian-flag carriers operating in the Trade, with the exception of NAPSA's FMC Tariff No. 3 for U.S./Iquitos, Peru, service, unless such carriers obtain authorized status from the Commission. NAPSA's tariff in the U.S./Iquitos trade is not being suspended because the Commission finds this subtrade

distinguishable from the Trade generally, and therefore entitled to different treatment. The Commission has not received any complaints regarding the U.S./Iquitos trade. Moreover, there is no alternative to NAPSA's service in this subtrade.

The Commission recognizes the considerable efforts made by the U.S. Government and GOP to resolve the situation in the Trade through diplomatic channels. The MOU reflects these good faith efforts. Further, the Commission does not intend to preclude, and continues to support, a diplomatic resolution of the situation in the Trade. The Final Rule will, therefore, become effective 90 days from the date of publication in the Federal Register, rather than the usual 30 days, to accommodate any further attempts at a diplomatic accommodation.

The Final Rule therefore allows Peruvian-flag carriers 85 days from the date of publication in the Federal Register in which to act to avoid suspension of their tariffs in the Trade. Such carriers may obtain authorized status by filing with the Commission a certificate from the GOP stating unequivocally that no law, regulation or practice precludes any non-Peruvian-flag vessel from competing in the Trade on the same basis as any other vessel. If a Peruvian-flag carrier fails to submit the required certificate within the prescribed days, its tariffs will be suspended 5 days subsequently. Unless implementation of the Peruvian authorization system is suspended and all carriers wishing

to operate in the Trade are allowed to do so, Peruvian-flag carriers could not obtain FMC authorized status.

**List of subjects in 46 CFR Part 586:**

**Cargo vessels; Exports; Foreign relations; Imports; Maritime carriers; Penalties; Rates and fares; Reporting and recordkeeping requirements.**

Therefore, pursuant to section 19(1)(b) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(1)(b), Reorganization Plan No. 7 of 1961, 75 Stat. 840, and 46 CFR Part 585, Part 586 to Title 46 of the Code of Federal Regulations is added to read as follows:

**Part 586 - Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Peru Trade ("the Trade")**

**Sec.**

**586.1 Conditions unfavorable to shipping in the Trade.**

**586.2 Peruvian-flag carriers without authorized status -- suspension of tariffs.**

**Authority: 46 U.S.C. app. 876(1)(b); 46 CFR Part 585; Reorganization Plan No. 7 of 1961, 26 FR 7315, August 12, 1961.**

**§ 586.1 Conditions unfavorable to shipping in the Trade.**

**(a) The Federal Maritime Commission has determined that the Government of Peru has created conditions unfavorable to shipping in the foreign trade of the United States by enacting, implementing and enforcing laws and regulations which unreasonably restrict non-Peruvian-flag carriers from competing in the Trade on the same basis as Peruvian-flag carriers, and additionally deny to non-Peruvian-flag carriers effective and equal access to cargoes**

in the Trade. Moreover, the laws and regulations at issue unilaterally allocate and reserve export liner cargoes from the United States for carriage by Peruvian-flag carriers.

(b) Peruvian law provides that non-Peruvian-flag carriers must become associate carriers or obtain authorizations to operate in the Trade. The enforcement of an authorization system and the ability of the Government of Peru to deny an authorization if the country of nationality of the carrier denies access to Peruvian carriers in any of its trade dealings with third-countries discriminate against U.S. shippers and exporters, restrict their opportunities to select a carrier of their own choice, and hamper their ability to compete in international markets.

§ 586.2 Peruvian-flag carriers without authorized status  
-- suspension of tariffs.

(a) (1) On a date 90 calendar days from the date of publication of this final rule in the Federal Register, the following tariffs and all amendments thereto, insofar as they relate to the Trade, shall be suspended, unless the enumerated Peruvian-flag carriers first obtain authorized status pursuant to paragraph (b) of this section:

Compania Peruana de Vapores (CPV)

- FMC No. 14 - Applicable BETWEEN United States Atlantic and Gulf Ports AND Ports in South America, Trinidad, and the Leeward and Windward Islands.
- FMC No. 15 - Applicable FROM United States West Coast Ports and Hawaii TO Ports in Chile, Peru, Mexico, Panama and the West Coast of Central America.
- FMC No. 16 - Applicable FROM Ports in Chile, Peru,

Mexico, Panama and the West Coast of  
Central America TO United States West  
Coast Ports and Hawaii.

Empresa Naviera Santa, S.A.

- FMC No. 3 - Applicable FROM Rail Container Terminals at United States Pacific Coast Ports TO Ports in South America.
- FMC No. 5 - Applicable FROM Rail Terminals at United States Interior Ports and Points TO Peru and Chile.
- FMC No. 7 - Applicable BETWEEN United States Atlantic and Gulf Ports AND Ports in Peru.

Naviera Neptuno, S.A.

- FMC No. 1 - Applicable BETWEEN United States Atlantic and Gulf Ports AND Ports in the Caribbean, Ports on the North, East and West Coast of South America (Including Brazil), Ports on the East and West Coast of Central America, and all Ports in Mexico.
- FMC No. 2 - Applicable BETWEEN United States Atlantic Coast Ports AND Ports on the West Coast of South America.
- FMC No. 4 - Applicable BETWEEN Ports in Florida AND Ports in Peru.
- FMC No. 5 - Applicable BETWEEN United States Pacific Ports AND Peru and Pacific Coast Ports in Chile, Colombia and Ecuador.
- FMC No. 6 - Applicable BETWEEN United States Gulf Ports AND Ports in Peru, Chile and Ecuador.

Naviera Universal, S.A. (Uniline)

- FMC No. 2 - Applicable BETWEEN United States Ports and Points AND Ports and Points in Central America, South America, Mexico, and the Caribbean.

(2) Other tariffs which may be filed by or on behalf of the carriers listed in paragraph (a)(1) of this section

or other Peruvian-flag carriers in the Trade shall also be suspended if the conditions of paragraph (b) of this section are not met.

(3) The right of the carriers listed in paragraph (a)(1) of this section, or any other Peruvian-flag carrier in the Trade to use the following conference tariffs, or any other conference tariff covering the Trade, including intermodal tariffs covering service from interior U.S. points, will, absent compliance with paragraph (b) of this section, be suspended:

Atlantic & Gulf/West Coast of South America Conference

- FMC No. 2 - Applicable FROM United States Atlantic and Gulf Ports TO West Coast Ports in Peru and Chile via the Panama Canal.
- FMC No. 3 - Applicable FROM Points in the United States TO Points and Ports in Chile, Peru, and Bolivia moving through United States Atlantic and Gulf Ports of Interchange.
- FMC No. 5 - Applicable FROM Points and Ports in Chile, Peru and Bolivia TO Points and Ports in the United States, moving through United States Atlantic and Gulf Ports of Interchange.
- FMC No. 6 - Applicable FROM Chilean and Peruvian Ports of Call via the Panama Canal TO Ports of Call on the Atlantic and Gulf Coasts of the United States.

(4) In the event of suspension of tariffs pursuant to this paragraph, all affected conference or rate agreement tariffs shall be amended to reflect said suspensions. Operation by any carrier under suspended, cancelled or rejected tariffs shall subject said carrier to all applicable remedies and penalties provided by law.

(b)(1) In order to avoid suspension of its tariffs pursuant to paragraph (a) of this section, or to reinstate tariffs suspended for previous failure to follow the procedures prescribed herein, each Peruvian-flag carrier enumerated in paragraph (a)(1) of this section must secure authorized status from the Federal Maritime Commission.

(2) Authorized status shall be conferred upon a Peruvian-flag carrier upon that carrier's submission to the Commission within 85 calendar days of the date of publication of this final rule in the Federal Register of a certificate from the Government of Peru stating unequivocally that no law, regulation or policy of the Government of Peru will:

(i) Preclude any non-Peruvian-flag carrier from competing in the Trade on the same basis as any other carrier;

(ii) Result in less than meaningful and competitive access by any non-Peruvian-flag carrier, to cargo designated as reserved under Supreme Decree No. 009-86-TC; and

(iii) Impose any administrative burden, including but not limited to, the necessity to secure an authorization based on the national status of the carrier, or otherwise discriminate against any non-Peruvian-flag carrier in the Trade.

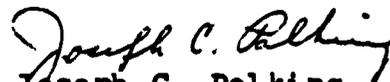
(3) If no such submission is made, the tariffs identified in paragraph (a) of this section shall be

suspended effective 5 calendar days after the expiration of the 85-day period.

(c) When the tariff of a Peruvian-flag carrier has been suspended for failure to secure authorized status, that carrier may apply for authorized status by submitting to the Commission the certification described in paragraph (b)(2) of this section. Reinstatement of the tariff will occur upon Commission review and approval of the certification.

(d) Upon conferment of authorized status, the Commission may require periodic reports from the Peruvian-flag carriers in order to monitor conditions in the Trade.

By the Commission.

  
Joseph C. Polking  
Secretary