

FEDERAL MARITIME COMMISSION

46 CFR PART 572

[DOCKET NO. 86-16]

CONFERENCE SERVICE CONTRACT AUTHORITY

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission is amending its rules governing agreements with regard to conference service contract authority. The Final Rule requires conferences to state in their agreements their generally applicable rules affecting or implementing conference service contract authority. The Final Rule further requires that conferences file an amendment to their agreements whenever these rules are changed. The Final Rule also requires that conference service contract authority provisions be located in a designated article of the conference agreement.

DATE: Effective 90 days from publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

Robert D. Bourgoin  
General Counsel  
Federal Maritime Commission  
1100 L Street, N.W.  
Washington, D.C. 20573  
(202) 523-5740

Austin L. Schmitt  
Director  
Bureau of Trade Monitoring  
Federal Maritime Commission  
1100 L Street, N.W.  
Washington, D.C. 20573  
(202) 523-5787

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

The Commission instituted this proceeding by Notice of Proposed Rulemaking ("Notice" or "Proposed Rule") published in the Federal Register. The Proposed Rule would amend the Commission's regulations regarding agreements with respect to conference service contract authority. As proposed, the rule would require that a conference specify in its agreement the method for regulating or prohibiting the use of service contracts and file an amendment with the Commission before implementing any significant change in the method of regulating service contracts. The Proposed Rule further provided examples of what would be considered a significant change in the method of regulating service contracts. Finally, the Proposed Rule would require that conference service contract authority be located in a reserved numbered article of the agreement.

Interested persons were invited to comment on the Proposed Rule and twelve comments were filed. Comments were submitted by: (1) the U.S. Department of Justice ("DOJ"); (2) the U.S. Department of Transportation ("DOT"); (3) the Chemical Manufacturers Association ("CMA"); (4) IBP, inc. ("IBP"); (5) Sea-Land Service, Inc. ("Sea-Land"); (6) a group of conferences serving the U.S.-Latin America trade

("Latin American Conferences");<sup>1</sup> (7) a group of conferences serving the U.S.-North Europe Trade ("North Europe Conferences" or "NEC");<sup>2</sup> (8) a group of conferences serving the U.S. trades with the Far East, Australia-New Zealand, and Mediterranean ("ANERA et al.");<sup>3</sup> (9) a group of conferences serving the U.S.-Japan trade ("Trans-Pacific Conferences");<sup>4</sup> (10) the Pacific/Australia-New Zealand Conference ("PANCON"); (11) the Trans-Pacific Westbound Rate Agreement ("TWRA"); and (12) the Council of European & Japanese National Shipowners' Associations ("CENSA").

The comments represented a broad spectrum of views on the Proposed Rule ranging from those that fully supported the proposal, to those who supported the rule with reservations, to those who urged that this rulemaking

---

<sup>1</sup> This group consists of: the Atlantic and Gulf/West Coast of South America Conference; the United States Colombia Conference; the United States Atlantic and Gulf/Ecuador Conference; the United States Atlantic and Gulf/Hispaniola Steamship Freight Association; the United States Atlantic and Gulf/Southeastern Caribbean Steamship Freight Association; and the United States Atlantic and Gulf/Venezuela Conference.

<sup>2</sup> This group consists of: the U.S. Atlantic-North Europe Conference; the North Europe-U.S. Atlantic Conference; the Gulf-European Freight Association; and the North Europe-U.S. Gulf Freight Association.

<sup>3</sup> This group consists of: the Asia North America Eastbound Rate Agreement ("ANERA"); the Greece/U.S. Atlantic & Gulf Conference; the Mediterranean North Pacific Coast Freight Conference; the Mediterranean/U.S.A. Freight Conference; and the U.S. Atlantic & Gulf/Australia-New Zealand Conference.

<sup>4</sup> This group consists of: the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic and Gulf Freight Conference.

proceeding be discontinued. The Commission has carefully considered these comments and has determined to issue a Final Rule. The Final Rule retains the basic requirements of the Proposed Rule but makes a number of modifications in order to incorporate certain suggested improvements and to accommodate, to the extent possible, concerns expressed in the comments. A discussion of the comments and the specific changes in the Proposed Rule follows.<sup>5</sup>

## II. DISCUSSION

### A. Pre-Implementation Review of Conference Agreements.

The Notice initiating this proceeding discussed the Commission's responsibility and authority under the Shipping Act of 1984, 46 U.S.C. app. 1701-1720 (the "Act" or the "1984 Act"), to review agreements prior to their becoming effective. A number of comments contend that the Notice overstates the Commission's pre-implementation review authority. They generally argue that the Commission's role is limited and that the discussion in the Notice exaggerates the Commission's review authority as well as the function of the 1984 Act's public notice requirement.

---

<sup>5</sup> In the following discussion, reference is made to the basis and purpose of the Proposed Rule. Those objectives which are discussed here and which were also set forth in the Notice apply equally to the Final Rule. Although a number of changes have been made in the language of the Final Rule, its basis and purpose remain the same as that set forth for the Proposed Rule.

Aside from general assertions that the Commission's review function has been overstated, these comments are not persuasive that the Proposed Rule exceeds the Commission's statutory authority. Briefly stated, the 1984 Act requires that every agreement within the scope of the Act, including conference agreements, be filed with the Commission prior to implementation. An agreement must observe a brief waiting period before it becomes effective, during which time the Commission reviews the agreement to determine whether it meets the filing requirements of section 5, is consistent with the general standard set forth in section 6(g), and does not violate the specific prohibitions of section 10. During this pre-implementation review period, the Commission may reject an agreement that fails to meet section 5 requirements, seek to enjoin the operation of an agreement, or request additional information and thereby suspend the running of the waiting period. In addition, the 1984 Act requires that notice of the filing of an agreement be published in the Federal Register, thereby affording the shipping public an opportunity to comment on an agreement before it becomes effective.

The Proposed Rule would require each conference agreement to set forth the basic rules established by the members regarding the use of service contracts by the conference or by individual members, and to file changes in those rules with the Commission prior to implementation. A major purpose of the Proposed Rule is to assure that each

conference agreement reflects the complete understanding among the parties regarding a conference's control over the use of service contracts so that the Commission is able to conduct a meaningful review of the agreement and the shipping public is apprised of the rules which a conference has established regarding the use of service contracts. As the Notice indicated, meaningful review by the Commission and public notice of the agreement are thwarted where conference authority over service contracts is set forth only in the most general terms or where a conference can change the rules governing the use of service contracts without first filing an amendment with the Commission.

The Proposed Rule is based upon the Commission's regulatory need to know, at least in broad outline, how the members of a conference have agreed to regulate their competitive relationships, as well as the rules for dealing with shippers, and the need to know when those basic provisions have changed. Without this minimum essential information, meaningful pre-implementation review would be frustrated.

The Proposed Rule also ensures that the shipping public is adequately informed of the conference's general policies regarding the use of service contracts. The Proposed Rule thus fulfills the purpose that is inherent in the 1984 Act's requirement that notice of the filing of an agreement be published in the Federal Register. Without a sufficiently detailed statement of agreement authority, the shipping

public would be disadvantaged in commenting on an agreement or providing relevant information to the Commission during the period prior to an agreement's becoming effective.

In addition, it should be noted that agreements are public documents that are intended to reflect the current conference policies with respect to the exercise of service contract authority. Thus, the shipping public should be able to determine a conference's general policies by consulting the agreement language.

Although some comments contended that the Proposed Rule is contrary to the 1984 Act's stated policy of establishing a regulatory process "with a minimum of government intervention," the Proposed Rule requires only that minimum level of specificity needed to ensure meaningful review and adequate public notice.

The Proposed Rule does not re-establish a prior approval type of review as existed under the Shipping Act, 1916 ("1916 Act"). Nor does it expand or overstate the role of non-parties under the 1984 Act. It merely ensures that the basic rules which a conference establishes for the use of service contracts be reflected in the terms of the agreement.<sup>6</sup>

---

<sup>6</sup> A clear statement of conference service contract authority, which the Proposed Rule would require, is also necessary in order to fulfill the Commission's monitoring and enforcement responsibilities over agreements that are in effect. In order to assure that conference operations are conducted in accordance with the terms of the agreement, the Commission must have some idea of what the terms of the agreement are.

B. Guidelines For Specificity in Conference Service Contract Authority.

The Notice discussed, in the context of conference service contract authority, certain guidelines that may be applied in determining the degree of specificity that may be required in a conference agreement and in determining whether a specific activity is covered by existing agreement authority. In this discussion, a number of cases decided under the 1916 Act were mentioned. Some commenters object that the guidelines enunciated in these 1916 Act cases are not applicable in the regulatory scheme established by the 1984 Act. The Commission is not persuaded that reference to these guidelines is unsound under the 1984 Act.

The 1916 Act cases were cited in the Notice in connection with two concerns. The first concern is the degree of specificity that may be required in an agreement. In Joint Agreement Between Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference, 8 F.M.C. 553 (1965), aff'd in part, rev'd in part, Pacific Westbound Conference v. Federal Maritime Commission, 440 F.2d 1303 (5th Cir.), cert. denied, 404 U.S. 881 (1971) ("Joint Agreement"), the Commission formulated the following test regarding the degree of detail required in an agreement:

. . . the applicable test here is whether or not the agreement as filed with the Commission and as approved sets out in adequate detail the procedures and arrangements under which the concerted activity permitted by the agreement is to take place.

Joint Agreement, supra, 8 F.M.C. at 558. In Agreement 9448 - N. Atlantic Outbound/European Trade, 10 F.M.C. 299, 307 (1967), the Commission stated that agreements which were so broadly worded that they failed to ". . . set forth clearly, and in sufficient detail to apprise the public just what activities will be undertaken . . ." would be subject to disapproval under section 15 of the 1916 Act.

The fact that this principle was enunciated in cases decided under the 1916 Act does not detract from its relevance to the question of the degree of specificity that may be required in an agreement filed pursuant to the 1984 Act. Adequate detail regarding concerted activity is as relevant to antitrust immunity under the 1984 Act as to antitrust immunity under the 1916 Act. Nor does the reliance upon these cases in any way resuscitate the Svenska standard,<sup>7</sup> as some commenters fear. Clearly, the Commission no longer "approves" agreements under a "public interest" standard. It does, however, conduct a substantive review of

---

<sup>7</sup> The Svenska doctrine is the proposition affirmed in Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien, 390 U.S. 238 (1968), whereby agreements filed pursuant to section 15 of the 1916 Act which interfere with the policies of the antitrust laws will be disapproved as "contrary to the public interest" unless justified by evidence establishing that the agreement, if approved, will meet a serious transportation need, secure an important public benefit or further a valid regulatory purpose of the Shipping Act, 1916. The burden is on the proponents of such agreements to come forward with the necessary evidence. The 1984 Act legislatively overruled Svenska with respect to agreements among carriers in the foreign commerce of the United States. The Svenska doctrine is now limited to agreements in the domestic commerce of the United States which are subject to section 15 of the 1916 Act.

an agreement to determine its conformity with the requirements of sections 5, 6 and 10 of the 1984 Act. The requirement that an agreement be filed and reviewed is more than a formality, as some comments seem to imply. That review function only has meaning if an agreement is clear and definite and reasonably specific.

Furthermore, agreements filed under the 1984 Act are not filed on a confidential basis. They are public documents and should provide sufficient detail to apprise the public of the scope and kind of activities that will be conducted under the agreement. With regard to service contract authority, this means more than a general statement that does not inform the shipping public of such basic matters as whether or not individual service contracts are permitted. Service contracts are one of the major elements of the legislative bargain that resulted in the 1984 Act. It is in keeping with the Act's scheme to assure that the shipping public has adequate knowledge of conference policies on the use of service contracts.

A second concern is when an agreed to change in operations may be made pursuant to existing authority and when an agreement amendment is necessary. The Notice cited two cases which enunciated general principles for determining whether a further agreement is interstitial to existing authority: Agreement 7770 - Establishment of a Rate Structure, 10 F.M.C. 61, 66 (1966), aff'd sub nom., Persian Gulf Outward Freight Conference v. Federal Maritime

Commission, 375 F.2d 335 (D.C. Cir. 1967) ("Agreement 7770" or "Persian Gulf"); and Tariff FMC 6, Rule 22 of the Continental North Atlantic Westbound Freight Conference, 21 F.M.C. 594, 597 (1978), vacated and remanded, Interpool Ltd. v. Federal Maritime Commission, 663 F.2d 142 (D.C. Cir. 1980).

In Agreement 7770, the Commission stated that further agreements are not interstitial when they: (1) introduce an entirely new scheme of rate combination and discrimination not embodied in the basic agreement; (2) represent a new course of conduct; (3) provide new means of regulating and controlling competition; (4) are not limited to the pure regulation of intraconference competition; or (5) constitute an activity the nature and manner of effectuation of which cannot be ascertained by a mere reading of the basic agreement. Agreement 7770, supra, 10 F.M.C. at 65.

The changes wrought by the 1984 Act do not appear to make these principles obsolete or remove their statutory underpinnings. Rather they would appear to be relevant to the Commission's review of an agreement to determine conformity to sections 5, 6 and 10 of the Act. If these 1916 cases did not exist, we would be obliged to establish the principles embodied in them anew.

The Commission understands the concern which some conference commenters have expressed with regard to the question of antitrust immunity. The Commission recognizes that the 1984 Act was intended to remove uncertainty about

antitrust immunity. The Commission's rule is not intended to intrude upon that policy. Nor would it appear to do so since section 7(a)(2) grants antitrust immunity for . . .

any activity or agreement within the scope of this Act . . . undertaken or entered into with a reasonable basis to conclude that (A) it is pursuant to an agreement on file with the Commission and in effect when the activity took place . . . .

46 U.S.C. app. 1706(a)(2). This would appear to be a sufficiently broad grant of antitrust immunity which is not jeopardized by the rule at issue here. Those who act on service contracts in a way arguably not covered by a conference provision would still be governed by the "reasonable basis to conclude" language of the Act. Finally, the Final Rule should provide adequate guidance as to when an agreement amendment should be filed.

C. Conference Authority To Control the Use of Service Contracts.

The Proposed Rule would require that service contract authority be stated in the conference agreement with a reasonable degree of specificity and that changes in that authority be filed with the Commission prior to implementation. Some comments object that the Proposed Rule is contrary to the 1984 Act because it unduly interferes with the authority of a conference to control the use of service contracts. According to one commenter, Congress did not intend any rule that limits a conference's ability to regulate service contracts or requires a conference to explain why or how it intends to do so. Another commenter

argues that conferences have absolute authority over service contracts and are to be given wide latitude in the regulation of these contracts. Finally, some commenters object that the Proposed Rule interferes with a conference's commercial flexibility and disadvantages a conference competing with independent carriers. These comments suggest that a conference should have the same degree of flexibility and discretion with regard to service contracts as an individual independent carrier.

The basic authority of an individual ocean common carrier or conference of carriers to enter into service contracts is provided for by section 8(c), which states:

An ocean common carrier or conference may enter into a service contract with a shipper or shippers' association subject to the requirements of this Act.

Section 4(a)(7) authorizes a conference to ". . . regulate or prohibit their use of service contracts."

The Proposed Rule would not "interfere with" conference authority to control the use of service contracts. Conferences would be free to establish conditions for their use or to prohibit their use entirely. The Proposed Rule would not limit this authority. It merely states that once a conference has exercised its authority to establish conference rules regarding service contracts, that it file an amendment to its agreement with the Commission. The Proposed Rule does not require conferences to explain why they have chosen a particular course of action or to justify

that choice.<sup>8</sup> Nor does the Proposed Rule interfere with the terms of a service contract negotiated with a shipper.<sup>9</sup> Rather, it would require that the general rules for use of service contracts, to the extent that they have been collectively determined, be reflected in the agreement.

The Proposed Rule was not intended to deal with the terms that may be negotiated with an individual shipper. Moreover, those matters that would be subject to filing with the Commission can be processed and become effective in as few as 14 days after notice in the Federal Register. Conferences will thus have considerable flexibility even in those matters that would require an amendment filing.

Nevertheless, some comments suggest that a conference should have the same degree of flexibility and discretion with regard to service contracts as an individual independent carrier. Conference action, however, is different from action by a single independent carrier. When it acts on service contracts, a conference acts collectively under the protection of antitrust immunity. The quid pro

---

<sup>8</sup> Although the Proposed Rule does not require this, this is not to say that the Commission could not, under certain circumstances, require a conference to explain its policy for controlling the use of service contracts and to justify that policy.

<sup>9</sup> On this point, there is some uncertainty regarding the meaning of the reference to "terms and conditions" in the Proposed Rule. This reference was not intended to mean that the terms which would be bargained for in a service contract with a shipper must be included in the agreement. This is addressed below in the specific discussion of that aspect of the Proposed Rule.

quo for this immunity is that a conference's rules for governing its members' commercial relationships, at least in broad outline, must be included in its organic agreement. A conference does not have absolute authority to alter the terms of that relationship without filing an appropriate amendment with the Commission. Accordingly, the Commission is not persuaded that the basic requirements of the Proposed Rule unduly interfere with a conference's authority to control the use of service contracts.

D. Section-by-section Discussion of the Proposed Rule.

The comments advance a number of concerns, objections and suggestions regarding particular aspects of the Proposed Rule. Most of these comments address three terms used in the Proposed Rule: "method," "significant change," and "terms and conditions." Some comments pointed out alleged ambiguities in the Proposed Rule. Others offered drafting suggestions to improve a Final Rule.

1. Section 572.502(a)(5)(i) - Specification of the Method for Regulating Service Contracts.

Subparagraph (i) of the Proposed Rule would require that a conference agreement that contains service contract authority specify the method for regulating the use of service contracts. The Proposed Rule states:

(i) Each conference agreement that contains service contract authority shall specify the method for regulating or prohibiting the use of service contracts by the conference or by individual members.

CMA suggests that the word "contains" be deleted and replaced by the words "regulates or prohibits" in order to clarify that a conference member may enter into a service contract on its own, unless explicitly prohibited or limited by the conference.

This suggested clarification has merit. A member of a conference does retain the authority under section 8(c) to enter into service contracts unless the conference takes some collective action to control that authority. This principle is implicit in the language of the Proposed Rule which states that a conference agreement that "contains" service contract authority must state the method by which it controls the use of service contracts. The change suggested by CMA removes any uncertainty and is adopted in the Final Rule.

The other suggested change to subparagraph (i) concerns the term "method." Sea-Land states that the term "method" ". . . could be read so broadly as to embrace literally everything the conference does with respect to service contracts, whether generically, as to a particular class of cargo, or as to a particular shipper's cargo." (Sea-Land Comment at p. 2). In place of the reference to "method," Sea-Land offers a revised rule which would require a conference to state whether it permits or prohibits: (1) conference service contracts; (2) individual member service contracts; and (3) independent action on service contracts.

NEC points out that the term "method" is never defined in the Proposed Rule. NEC states that, undefined, the term is so general as to embrace everything from routine operational matters to "an entirely new scheme of combination and discrimination not embodied in an effective Agreement." (NEC Comment at p. 4).

IBP, on the other hand, fears that the Proposed Rule, by focusing on "method," creates an ambiguity as to when an agreement modification must be filed. This is because IBP believes that the Proposed Rule may be read as requiring a conference to inform the Commission of the procedure by which it makes decisions regarding the use of service contracts, i.e., the "method," but not the "results" of such deliberations, i.e., conference guidelines governing service contracts. IBP also suggests a revised rule that in some respects is similar to that suggested by Sea-Land and NEC.

The term "method" was not intended to embrace everything a conference does with regard to service contracts. Nor was it intended to include routine operational matters or the procedures by which a conference reached a decision on service contract matters.<sup>10</sup> The term "method" was intended to apply to the general scheme established by the conference for regulating the use of service contracts. Where the members of the conference agree upon certain rules which will govern the use of

---

<sup>10</sup> Voting procedures would, however, be required to be stated in the conference agreement.

service contracts, those rules must be filed with the Commission. Inasmuch as the word "rules" is more precise than the vaguer term "method" which may be interpreted to apply to strictly operational details, it shall be substituted for the term "method" in the Final Rule.

As proposed, subparagraph (i) sets forth a requirement that conference rules governing service contracts be stated in the agreement. A number of comments suggest that this general requirement be replaced by a list of specific agreement provisions which must be stated in an agreement if adopted by a conference. NEC, for example, offers the following alternative to the Proposed Rule:

Conference agreements shall state whether the parties thereto have agreed to (i) permit all or any of them, collectively or individually, to enter into service contracts; (ii) prohibit all or any of them, collectively or individually, from entering into service contracts; and (iii) permit or prohibit independent action on service contracts by all or any of them and if and to the extent such independent action is so permitted, any notice or other procedural requirements upon which its exercise may be contained.

The virtue in drafting a rule as proposed by NEC is that its application is definite and requires little, if any, interpretation. It sets forth a specific list of possible conference rules, affecting the use of service contracts, that would be subject to filing. Such an approach, however, has two drawbacks. First, it would not cover a provision that might restrict or control service contract use in a significant way but not be specifically mentioned in the rule. Second, such a proposal would not

address provisions which would allow a conference to change its rules for regulating service contracts by a vote of the parties and without filing an amendment with the Commission. Under the NEC proposal, for example, conference authority which determined whether to permit or prohibit individual service contracts by a conference vote would be acceptable. All the NEC proposal would mandate is that the procedural requirements be stated in the agreement. Thus, a conference could take virtually any action it wished without the filing of an amendment with the Commission. The 1984 Act does not authorize, nor can the Commission sanction, such unfettered discretion.

However, the rule, as proposed, is not intended to interfere with the flexibility of a conference to negotiate with shippers. A conference would be free, for example, to agree upon its negotiating position with a shipper. It would not be required to make its negotiating position a part of its agreement. However, where the conference decided to agree upon rules of general applicability to all shippers, then such a rule would be required to be filed as part of the conference agreement.

Therefore, subparagraph (i) shall be preserved basically as proposed with some language changes to make it more precise. The revised text of subparagraph (i) of the Final Rule shall read as follows:

(i) Each conference agreement that regulates or prohibits the use of service contracts shall specify its rules governing the use of service contracts by the conference or by individual members.

As revised, subparagraph (i) states the requirement that collectively established rules governing the use of service contracts must be included in a conference agreement.

2. Section 572.502(a)(5)(ii) - Filing of Significant Changes in the Method of Regulating Service Contracts.

Subparagraph (ii) of the Proposed Rule would require the filing of any significant change in the method of regulating service contracts. The text states:

(ii) Any significant change in the method of regulating service contracts, whether accomplished by a vote of the membership or otherwise, shall not be implemented prior to the filing and effectiveness of an agreement modification reflecting that change.

The comments on this subparagraph focus on the meaning of the term "significant change." Sea-Land states that the term "significant change" defies precise definition. NEC also states that the meaning of "significant change" is ambiguous and uncertain. Moreover, NEC points out that the law requires the filing of every modification to an agreement whether or not it is significant whereas the Proposed Rule seems to require a filing only of significant changes.

The point raised by NEC, which has advanced some critical but constructive comments in this proceeding, is well taken. Conferences are required to file all changes in their agreements whether or not they are "significant." The qualifier "significant" therefore shall be deleted from the Final Rule. It should improve the clarity and predictability of the rule to simply refer to "any change"

in place of any "significant change." In addition, the use of the term "method" shall be replaced by a reference to "conference provisions regulating or prohibiting the use of service contracts" for the reasons discussed above.

Subparagraph (ii) as revised reads as follows:

(ii) Any change in conference provisions regulating or prohibiting the use of service contracts, whether accomplished by a vote of the membership or otherwise, shall not be implemented prior to the filing and effectiveness of an agreement modification reflecting that change.

Revised in this manner, subparagraph (ii) should remove the ambiguity surrounding the term "significant", and at the same time retain the key feature of the rule, namely the filing requirement.

3. Section 572.502(a)(5)(iii) - Illustrative Definition of Significant Change.

Subparagraph (iii) of the Proposed Rule provides a definition of "significant change." The text states:

(iii) For the purpose of this section, a significant change includes one which: permits or prohibits conference service contracts; permits or prohibits individual service contracts; establishes terms or conditions under which conference or individual service contracts may be offered; or permits or prohibits independent action on service contracts.

The purpose of this subparagraph was to furnish an illustrative definition of the meaning of the term "significant change" used in subparagraph (ii) and thereby provide some guidance as to when an agreement modification must be filed. However, inasmuch as subparagraph (ii) is revised in the Final Rule to delete the reference to "significant" change and instead require that "any" change

in conference service contract rules be filed, the reference to "significant change" shall also be deleted from subparagraph (iii).

One objection to subparagraph (iii), as proposed, was that the use of the term "includes" would create serious uncertainty because there is no way of knowing what other changes not listed might be regarded as significant. According to TWRA, the practical effect of this and other "catch-all" provisions of the Proposed Rule would be that virtually any change in conference regulation of service contracts would be required to be submitted to the Commission before implementation. "Otherwise the conference will risk being found, after the fact, in violation of its agreement." (TWRA Comment at 11). The catch-all provisions, in TWRA's view, ". . . revive the regulatory uncertainty and retroactive liability which the 1984 Act sought to abolish." (TWRA Comment at 11). TWRA objects to a rule which implies that ". . . every conference policy or practice with regard to service contracts must be spelled out in the agreement." (TWRA Comment at 11). TWRA goes on to state that: "If a proposed rule did no more than require a conference agreement to state the general authority of the conference with respect to service contacts, it would not be objectionable." (TWRA Comment at 11).

While TWRA does not indicate what it believes should be included in a statement of "general authority", it would appear that some of TWRA's concerns might be met by the

language changes suggested above. Deletion of references to "significant change" and "method" improves the precision of the rule. The one additional language modification that would remove any ambiguity from the rule would be the deletion of the word "includes" from subparagraph (iii). This change would result in subparagraph (iii) consisting of a list of those service contract provisions which must be filed in an agreement. The deletion of the word "includes", however, would sacrifice the comprehensiveness of the rule. The rule would then merely list the kinds of service contract provisions that must be filed. If this approach were to be taken, the list could, of course, always be expanded in the future if the Commission found other types of provisions that should be added. There are, however, disadvantages to this approach. First, it would require additional time and resource-consuming rulemakings to add new provisions to the list. More importantly, the Commission might never become aware of significant restrictive service contract provisions that might be imposed. Especially once a rule is made final, the presumption would be that only those listed provisions need be filed. Other provisions might never come to the Commission's attention.

The other aspect of this subparagraph, which attracted considerable comment, is the reference to "terms or conditions." DOT suggests that the Commission either describe the pertinent "terms or conditions" that are viewed

as agreement modifications or otherwise address the ambiguity created by the phrase. Sea-Land objects that this phrase is too vague to permit members to know their legal obligations and could be read so expansively as to intrude on case-by-case contractual negotiations. NEC believes that it is an unnecessary and vague catch-all standard. The Trans-Pacific Conferences object that it could require inclusion of commercial contract terms in agreements. ANERA states that this requirement interferes with commercial flexibility. The Latin American Conferences argue that terms and conditions are negotiated by a conference and shipper on an ad hoc basis and cannot be reduced to a rule of general applicability.

The reference to "terms or conditions" in the Proposed Rule was not intended to include the terms or conditions that would be the subject of service contract negotiations with a shipper. Thus, the Proposed Rule was not intended to interfere with the commercial process of negotiating service contracts or to impede the flexibility of a conference or its members in such negotiations. As with the other items listed in subparagraph (iii), what is intended is that conference rules with regard to the use of service contracts by its members be included in the agreement.

Section 8(c) of the 1984 Act confers authority to enter into service contracts upon all ocean common carriers whether or not they are a member of a conference. A carrier retains that authority when it becomes a member of a

conference, subject only to those restrictions and limitations which the members collectively agree upon pursuant to section 4(a)(7) of the Act. When the members reach agreement on whether to permit or prohibit conference service contracts, or whether to permit or prohibit individual members from entering into service contracts, or whether to permit or prohibit independent action on service contracts, they establish fundamental rules for dealing with the shipping public. Those rules should be reflected in the agreement.

The conference may also impose specific requirements on the members as a whole or on individual members. For example, the conference may determine to permit individual members to enter into service contracts subject to the condition that such contracts be for a minimum term of 12 months. In such a case, the members would as a group have imposed a significant restriction on an individual member's ability to exercise that member's service contract authority.

It is admittedly difficult to define "terms and conditions" in such a way that conference-agreed-to restrictions would be required to be stated in an agreement but conference flexibility to negotiate service contract terms would not be hampered. For example, a conference could adopt a rule that no conference service contract shall be entered into for a term of less than 12 months. The rule might apply to all commodities and all shippers. On the

other hand, the conference could vote to adopt as the conference's negotiating position with a particular shipper that a service contract should be for at least 12 months duration. In the first instance, the rule should be stated in the conference agreement; in the second, it need not.

The difference between the two rules is that the first is a rule that is more or less permanent and has general applicability to all shippers or perhaps to a class of shippers. The second is simply a negotiating position for dealing with a particular shipper. Presumably, it would be subject to change in the negotiating process. What this proceeding is intended to address are those rules of general applicability which are of a more permanent nature and which would not be subject to change during contract negotiations. Conference negotiating positions, on the other hand, should not be affected by the Final Rule and conference flexibility should not be unduly hampered.

A second area of concern is where terms or conditions are imposed upon individual conference members. For example, a conference might adopt a rule that no individual service contract may be for less than a 12-month term. Or it might deny all service contract authority to individual members except upon the vote of the members and subject to such conditions as they may impose. A member should know in advance whether individual service contracts are permitted and what restrictions if any are attached. The Final Rule requires the statement in an agreement of any limitations

placed upon individual members. All members will thus know in advance what rules govern individual service contracts, and all will be treated equally. Finally, subparagraph (iii) shall also be modified to add that opt-out rules should be stated in the agreement. This is discussed below in connection with the PANCON comment.

Finally, some comments suggest that subparagraph (iii) could be deleted entirely without substantive loss. Conferences would then simply be required to state in their agreements any rules collectively agreed upon regarding the use of service contracts and file modifications with the Commission whenever those rules were changed. However, subparagraph (iii) does appear to serve a useful function by providing guidance as to certain conference rules that must be stated in an agreement. Therefore, it shall be retained in the Final Rule with the above modifications. Based on all the foregoing, paragraph (iii) of the Proposed Rule shall be amended to read as follows:

(iii) For the purpose of this section, conference provisions regulating or prohibiting the use of service contracts include, but are not limited to, those which permit or prohibit conference service contracts; permit or prohibit individual service contracts; permit or prohibit independent action on service contracts; permit or prohibit individual members to elect not to participate in conference service contracts; impose restrictions or conditions under which individual service contracts may be offered.

4. Mandatory Placement of Service Contract Authority In A Designated Article 14.

The Proposed Rule adds a new paragraph (a)(5) to section 572.502 "Organization of conference and

interconference agreements." The new paragraph (a)(5) would require conferences to reserve Article 14 of their agreements as the repository for the conference's statement of its service contract authority.<sup>11</sup>

Only one comment addressed the Article 14 requirement of the Proposed Rule. NEC opposes mandatory placement of service contract authority in Article 14 on the grounds that such placement is costly, cumbersome, and creates legal uncertainties. NEC argues that service contract provisions should be set forth in Article 5 (the basic authorities article) of conference agreements, if necessary in a separately numbered paragraph. NEC also argues that the rule should provide "that (i) except as may be otherwise provided in such Article 5 service contract provisions, all of the other provisions of the Agreement shall be applicable thereto, e.g., voting, delegation of authority, meetings, shippers' requests, etc.) and (ii) the parties may rely on the contents of the entire agreement as authority for their service contract activities." (NEC Comment at p. 43).

The Commission's authority to prescribe "the form and manner in which an agreement shall be filed" is clearly set forth in section 5(a) of the Act. The Commission has exercised that authority in its agreement regulations by requiring that certain numbered articles of conference

---

<sup>11</sup> At present, Subpart E of Part 572 reserves the first 13 articles of a conference agreement for specific subject matter.

agreements be reserved for specific subject matter. See 46 CFR 572.501-502. These existing format regulations, which provide for a clear and logical arrangement of agreement authority, have been of great assistance to the Commission in meeting the statutory deadlines for processing agreements established under the streamlined review procedures of the 1984 Act.

The placement of service contract authority in a reserved Article 14 appears to be of sufficient benefit to the Commission in its review, audit, and monitoring functions as to justify the slight burden that may be placed on conferences by requiring them to locate their service contract authority in Article 14.<sup>12</sup> Such placement, for example, would ease the Commission's administrative burden were it to audit service contract authority in all conferences.<sup>13</sup>

Finally, the question of whether members can rely on their entire agreement as authority for their activities has arisen before. It led to the modification of the agreements

---

<sup>12</sup> The Final Rule, however, does not preclude statements of, or references to, service contract authority in Article 5 or other articles of a conference agreement. Conferences would not be required to delete such references as may appear elsewhere in their agreements provided, of course, that the particular language otherwise conforms to statutory and regulatory requirements.

<sup>13</sup> Such an audit was conducted of conference agreement independent action authority to determine compliance with Docket No. 85-7, Independent Action - Notice and Meeting Provisions in Conference Agreements, 23 S.R.R. 1022 (1986).

rules when they were issued as Final Rules. Section 572.501(b)(5), 46 CFR 572.501(b)(5), states that:

Article 5 is not necessarily definitive of the authority that the parties may collectively exercise pursuant to the agreement and parties may rely on the contents of the entire agreement as authority for their activities.

Thus, the second concern of NEC appears to have been addressed. In addition, NEC is correct in assuming that the agreement provisions such as voting, delegations of authority, meetings, etc. are applicable to service contract matters.

5. Effective Date of Final Rule.

The Proposed Rule did not specify a time period in which any Final Rule would become effective. NEC states that because of reformatting requirements, drafting complexities, and the conference approval process, no less than 90 days should be afforded to parties to file any agreement modifications that might be required by the Final Rule.

The Commission accepts NEC's position and will allow a period of 90 days before the Final Rule becomes effective. This liberal timetable for compliance should substantially alleviate any administrative burdens or costs that might be incurred. This period of time should afford ample time for review of agreements by the parties, for drafting any necessary changes, and for obtaining member approval of agreement modifications. In addition, in many cases, conferences may be able to reduce any costs associated with

filing by submitting service contract modifications in connection with other agreement filings or even in connection with the periodic required republication of agreements.

E. Additional Issues.

A number of comments raised other additional issues related to the Proposed Rule.

1. Information Form Requirement and Service Contract Authority.

NEC contends that service contract provisions are not subject to section 6(g) as a matter of law and that the filing of such provisions and modifications thereto should never be subject to the requirement to file an Information Form. In the Notice the Commission, at least implicitly, rejected the notion that service contract authority is not subject to review under the general standard. The Proposed Rule did not, however, require the Information Form in connection with service contract authority filings and the Commission has not done so in the past. Generally, there does not seem to be any need for the Information Form in connection with service contract filings. Should a particular filing raise possible section 6(g) concerns, then relevant information could be obtained through a formal or informal request. Therefore, the Final Rule does not require that an Information Form be filed with the initial service contract filing or with subsequent modifications of service contract authority.

## 2. Notice and Waiting Period Requirements.

NEC also urges that service contract filings be exempted from the notice and waiting period requirements of the 1984 Act. In NEC's view, the purpose of the Proposed Rule should be simply to insure that appropriate provisions are filed. NEC says that third parties have little or no interest in such filings and have no standing to sue to block them. NEC says that the Commission could still act against improper filings after they become effective.

This proposed exemption from notice and waiting period requirements, whatever might be its merits, cannot be accommodated within the scope of this rulemaking.<sup>14</sup> The Proposed Rule did seek to accomplish the purpose cited by NEC, namely to ensure that appropriate provisions are filed. The Final Rule, however, cannot and does not alter the statutory notice and waiting period requirements with respect to service contract filings. Such an exemption is clearly beyond the scope of this rulemaking and would require a separate exemption proceeding pursuant to section 16 of the 1984 Act.

## 3. PANCON Comment.

PANCON's comment focuses upon the particular service contract provisions in its agreement and offers a defense of

---

<sup>14</sup> To the extent the rationale of the Proposed Rule is based upon the public notice and pre-implementation review provisions of the 1984 Act, an exemption from notice and waiting period requirements might not be consistent with that rationale.

those provisions. PANCON, however, does not consider its comment a "special-exemption application." Rather it believes that its agreement provisions raise issues which are of industry-wide concern.

The PANCON agreement contains a provision which allows one or more members to elect not to participate in a service contract entered into in the conference's name. It provides that such non-participation be expressly noted in the contract. PANCON is concerned that such a case-by-case "opt-out" provision would be prohibited by the Proposed Rule. PANCON apparently believes that the Proposed Rule might be read as precluding all such contemporaneous decisions not to participate in a conference-wide service contract, unless the agreement itself is first amended.

PANCON's concern is misplaced. The Proposed Rule does not prohibit "opt-out" provisions of the type contained in the PANCON agreement. Such provisions clearly state the right of an individual member line to elect not to participate in the contract. Such a right is conferred by existing effective language of the agreement and is not dependent upon the contemporaneous action of the conference. The case would be different if the provision were to state that a member's decision not to participate is subject to express permission granted by the conference. As stated, however, the PANCON provision establishes the member's right to "opt-out."

The PANCON agreement also contains a provision which prohibits a member from entering independently into a service contract, or from taking independent action on a service contract, unless the members expressly permit it by a contemporaneous vote. PANCON characterizes this provision as being merely the "flip-side" of the opt-out provision discussed above and believes that it should not be prohibited.

This provision, however, is quite different from the "opt-out" provision. Unlike the "opt-out" provision which establishes a member's right to elect not to participate, this provision conditions a member's right to offer service contracts on a vote of the membership. Individual service contracts would thus be decided on a case-by-case basis and a member would always require approval from the conference prior to entering into a contract with a shipper. This is precisely the kind of provision that is reached by the Final Rule.

The third PANCON provision provides as follows:

The members may vote to "open" rates on a particular commodity or commodities, with or without authority thereby granted to individual members to enter separately into service contracts respecting such commodities, and/or setting the maximum, term, or successive terms, of any such individual-party service contract, during the period in which the rate is open.

This provision also controls a member's right to enter into service contracts on open rated items by a vote of the membership and would also appear to be prohibited under the Final Rule.

### III. CONCLUSION

Upon review of the comments received, the Commission has determined that issuance of a Final Rule, modified somewhat from that as proposed, will enable the Commission to fulfill its agreement review responsibilities and is well within the Commission's authority under the 1984 Act. In addition, the Final Rule will assure that conference agreements are complete and that the shipping public is adequately informed of conference policies on service contracts. Moreover, the legal precedent established under the 1916 Act, which addresses issues of agreement authority that were not affected by the enactment of the 1984 Act, offers useful guidelines on these questions. Finally, the Final Rule does not appear to interfere in any way with the authority of a conference to control the use of service contracts and does not unduly restrict conference service contract activity.

The Federal Maritime Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291, 46 FR 12193, February 27, 1981, because it will not result in: (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effect on competition, employment, investment, productivity, innovations, or on the ability of

United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Chairman of the Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) that this Rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units, and small governmental jurisdictions.

The collection of information requirements contained in this Final Rule have been approved by the Office of Management and Budget under provisions of the Paperwork Reduction Act of 1980 (P.L. 95-511) and have been assigned OMB Control Number 3072-0044.

List of Subjects in 46 CFR Part 572:

Administrative practice and procedure; Antitrust; Contracts; Maritime carriers; Reporting and recordkeeping requirements.

Therefore, pursuant to 5 U.S.C. 553 and sections 5, 6 and 17 of the Shipping Act of 1984, 46 U.S.C. app. 1704, 1705, 1716, Part 572 of Title 46, Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 572 continues to read as follows

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1701-1707, 1709, 1710, 1712, 1714-1717.

2. Paragraph (a) of section 572.502 is revised to add a new paragraph (a)(5) to read:

§ 572.502 Organization of conference and interconference agreements.

(a) \* \* \*

(5) Article 14 - Service Contracts.

(i) Each conference agreement that regulates or prohibits the use of service contracts shall specify its rules governing the use of service contracts by the conference or by individual members.

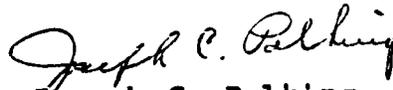
(ii) Any change in conference provisions regulating or prohibiting the use of service contracts, whether accomplished by a vote of the membership or otherwise, shall not be implemented prior to the filing and effectiveness of an agreement modification reflecting that change.

(iii) For the purpose of this section, conference provisions regulating or prohibiting the use of service contracts include, but are not limited to, those which permit or prohibit conference service contracts; permit or prohibit individual service contracts; permit or prohibit independent action on service contracts; permit or prohibit individual members to elect not to participate in conference service contracts;

impose restrictions or conditions under which  
individual service contracts may be offered.

\* \* \* \* \*

By the Commission.

  
Joseph C. Polking  
Secretary