

(S E R V E D)  
( October 24, 1988 )  
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

46 CFR PART 571

INTERPRETATIONS AND STATEMENTS OF POLICY

[Docket No. 88-17]

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: This Final Rule states that common carriers or conferences may not require a shippers' association to obtain or apply for a Department of Justice Business Review Letter prior to or as part of a service contract negotiation process. The rule is intended to help eliminate unnecessary impediments to the operation of shippers' associations and the negotiation of service contracts.

DATE: Effective upon publication in the Federal Register.

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SUPPLEMENTARY INFORMATION:

The Federal Maritime Commission ("Commission" or "FMC") initiated this proceeding by publication in the Federal Register of a Proposed Rule stating that common carriers or conferences may not require the production of a Business Review Letter ("BRL") from the Department of Justice

("DOJ")<sup>1</sup> prior to or as part of a service contract negotiation process with a shippers' association. 53 FR 27178, July 19, 1988. Comments on the Proposed Rule were solicited, and the Commission received seven responses. Upon review of those comments, the Commission has determined to adopt an amended version of the Proposed Rule.

As stated in the Supplementary Information section of the Proposed Rule, there have been several Commission pronouncements, as well as advice contained in speeches and BRLs from the Department of Justice, to the effect that there is no reason for a carrier or conference to require, as part of the service contract negotiation process, a shippers' association to obtain a BRL. It has been noted that carriers and conferences do not risk antitrust exposure by negotiating in good faith with parties representing themselves as shippers' associations, provided that the conference agreement authorizes such negotiations. DOJ, however, has indicated that despite these assurances, shippers' associations continue to request BRLs, allegedly because conferences refuse to negotiate with them unless they have one.

Thus, DOJ, in order to abate what it considers the unnecessary expenditure of its resources inherent in preparing repetitive letters, requested the Commission to

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<sup>1</sup> BRLs are documents, issued on request by DOJ's Antitrust Division, which review proposed business conduct and state DOJ's enforcement intentions with respect to that conduct. See 28 CFR 50.6.

initiate a proceeding to clarify its views on the matter. The Commission accordingly proposed the instant interpretive rule. The Proposed Rule was also intended to eliminate unnecessary impediments to the operation of shippers' associations and to discourage violations of section 10(b)(13) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1709(b)(13), which prohibits carriers and conferences from refusing to negotiate with a shippers' association. To this end, the Proposed Rule states in relevant part that:

a common carrier or conference may not require a shippers' association to obtain or produce a Business Review Letter from the Department of Justice prior to or as part of a service contract negotiation process.

#### COMMENTS

Five of the comments received in response to the Proposed Rule are from shipper or shippers' association interests. The National Federation of Export Associations ("NFEA"), the North American Shippers Association, Inc. ("NASA"), and the National Association of Export Companies ("NEXCO") all support the Proposed Rule as written. NASA and NEXCO state that the rule should serve to strengthen and develop shippers' associations. NFEA opines that requiring BRLs prior to negotiating with shippers' associations "results not from apprehension regarding possible antitrust violation, but rather a desire to construct artificial impediments to good faith negotiations."

The First National Shippers Association ("FISA") states that while the Proposed Rule would serve a useful purpose, it does not go far enough. FISA contends that carriers frequently refuse to negotiate with shippers' associations in many, sometimes subtle, ways, of which the "delaying tactics" of requesting BRLs are but one.<sup>2</sup> FISA proposes that the Commission finalize the Proposed Rule with an additional provision cautioning that individual carrier activities or patterns of behavior may constitute tacit refusals to deal, in contravention of sections 10(b)(13) and 10(c)(1) of the 1984 Act. FISA also would have the Final Rule state that the Commission shall therefore "establish procedures whereby shippers' associations can bring to the Commission's attention such patterns of behavior and the Commission will review such patterns" to determine whether enforcement actions are necessary.

FISA's suggestions have not been adopted herein. FISA's comments address broad issues concerning shippers' association-conference relationships which are not encompassed in the Proposed Rule and which are therefore outside the scope of this proceeding. The Proposed Rule is narrow in scope, and the parties were invited to comment

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<sup>2</sup> FISA contends that carriers also insist on: dealing only with individual members rather than the designated association negotiator; claiming logistical problems in meeting to consider association proposals; rejecting reasonable association contracts, sometimes while instituting even lower rate decreases; or establishing attractive volume incentive plans for shippers which render association participation unnecessary.

only on the narrow issue presented. Moreover, there would seem to be little purpose served or guidance provided in issuing a statement acknowledging that some Shipping Act violations may be performed in subtle ways. This is not a phenomenon peculiar to conferences and the service contract negotiation process; it is likely to be equally true of any statutory violation.

We are also not adopting FISA's suggestion that the Commission use the Final Rule to announce that it "shall establish procedures" for complaints about such practices. Such procedures do exist -- in the Commission's general Rules of Practice and Procedure governing the filing of complaints. Separate, specialized complaint procedures for allegations of violations of section 10(b)(13) have not been shown to be necessary. Finally, the Interpretive Rule mechanism is intended to advise of statutory interpretations, not to serve as a forum for public announcements of future Commission actions.

The American Institute for Shippers' Associations, Inc. ("AISA") claims that conferences impose many "conditions precedent" to negotiations which constitute unnecessary burdens and impediments to the formation and operation of shippers' associations. AISA argues that there is no valid purpose that could be served by conferences requesting to see a BRL, and that such actions should be reviewed simply as a matter of discrimination and refusal to negotiate. Although AISA notes and concurs with the Commission's

admonishment that comments on the Proposed Rule be limited to the narrow issue presented, it nevertheless suggests that the Proposed Rule be broadened to include: (1) negotiations on all matters -- e.g., independent action, time-volume rates, or loyalty contracts -- not just service contracts; and (2) all forms of legal clearances -- e.g., Federal Trade Commission advisory opinions and export trade certificates -- not just BRLs.

AISA's proposal that the rule be broadened to include other types of negotiations and other types of legal clearances is, like FISA's suggestions, outside the scope of this proceeding. The amendments urged by AISA could involve facts and considerations beyond those discussed in the Proposed Rule and commented upon in the responses received. Should the Commission determine that conference requirements for other documents are impeding service contract negotiation processes, or that similarly burdensome requirements have become prevalent in negotiations other than for service contracts, such matters could be addressed at that time as necessary. In the meantime, nothing precludes shippers' associations from filing formal complaints alleging section 10(b)(13) violations, or from informally bringing to the Commission's attention any difficulties they are having in this regard.

The remaining two comments are from conference interests. The Trans-Pacific Freight Conference of Japan and the Japan-Atlantic and Gulf Freight Conference ("the

Conferences") note that they publish a rule in their tariffs that requires shippers' associations to provide them a copy of any BRL already obtained. The Conferences emphasize that they do not attempt to require shippers' associations to apply for such a letter. But BRLs are said to "contain a source of relevant basic information concerning the association, its status and its intentions to function as a proper statutory entity." They claim that if "qualified or unfavorable" letters have been issued, the Conferences have a legitimate interest in knowing about them so as to avoid "Shipping Act or antitrust exposure." They therefore object to that part of the Proposed Rule which would prohibit carriers from requiring the production of BRLs, and suggest an amendment to the rule which would permit a conference requirement that shippers' associations provide copies of such letters which they may have already voluntarily secured. The Transpacific Westbound Rate Agreement ("TWRA") also states that although it does not require shippers' associations to apply for BRLs, it requests that the Commission permit the production of such documents already issued.<sup>3</sup>

The Conferences' argument that seeing an already-obtained BRL "is of utmost relevance to conferences" in ascertaining the holder's "identity and statutory

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<sup>3</sup> Unlike the Conferences, however, TWRA does not read the Proposed Rule as prohibiting this practice, and requests no amendment to the Proposed Rule in this regard.

qualifications" is not wholly persuasive. It is not clear how such a letter would provide assistance to a conference in this regard.<sup>4</sup> Also, the point of this interpretive rule is that a shippers' association's bona fides has no impact on a carrier's or conference's antitrust exposure.

However, given that a major purpose of this rulemaking is to prevent impediments to the negotiation process, it does not appear that, as a general matter, providing a copy of a letter already in one's possession would impede or delay that process. Nor would production of a letter generally cause any breach of confidentiality. BRLs are routinely made publicly available by the Department of Justice.

The Commission has therefore determined to delete the word "produce" from section 571.1(b) of the Proposed Rule, so that the Final Rule does not prohibit a conference from requesting such letters already in the possession of a shippers' association. The basic premise of the Final Rule -- that application for a BRL should not be a condition precedent to service contract negotiation -- has been supported by all parties commenting in this proceeding. To this end, the Final Rule has been limited to providing only that a conference may not require an association to "obtain

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<sup>4</sup> AISA, citing a 1985 BRL to the Beverage Importers' Freight Association, claims that DOJ has "clearly stated that it renders no opinion on whether the association is a 'bona fide' shippers' association within the meaning of the Shipping Act of 1984."

or apply for" a BRL. The addition of the words "apply for" does not broaden the scope of the Proposed Rule, but rather clarifies the type of impositions on shippers' associations which the conference may not require. The deletion from the Proposed Rule of the word "produce" reflects the Commission's determination that no regulatory purpose would be served by extending the rule to prohibit a practice -- i.e., requesting to see letters already in the possession of a shippers' association -- which is not ordinarily burdensome. Although not proscribing this practice as a matter of law, the Final Rule should not be read as approving or even encouraging it.<sup>5</sup> Nor does the Final Rule affirmatively require any particular action on the part of a shippers' association or a conference in the event such a request is made. Issues arising from unusual circumstances concerning a request for an existing BRL can be addressed on a case-by-case basis.

Finally, TWRA objects to language contained in the Supplementary Information to the Proposed Rule which, it says, may be read to constitute standards precluding

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<sup>5</sup> In 1985, the Commission specifically rejected a petition suggesting that shippers' associations be required by FMC rule to produce already-obtained Business Review Letters. See In the Matter of Petition for Rulemaking Concerning Shippers' Associations, Order Denying Petition, 22 S.R.R. 1625 (February 11, 1985). The instant Final Rule does not alter the determination that a commercial practice which is of questionable benefit should not be made mandatory by Commission regulation. Rather, the instant Final Rule reflects, in part, the complementary principle that a commercial practice which is not as a general matter burdensome will not ordinarily be enjoined.

conferences from obtaining legitimate commercial and legal status information concerning shippers' associations. TWRA explains that it sometimes requests information such as the list of an association's officers. TWRA fears that such practices may be attacked by those reading too broadly the FMC statement in the Supplementary Information that:

Regardless of a conference's motive, a refusal to negotiate with a shippers' association pending receipt of documentation which has been established to be clearly unnecessary or immaterial constitutes a section 10(b)(13) violation.

The "unnecessary or immaterial" language is so subjective, TWRA contends, that, if treated as a standard for future ad hoc determinations, it would generate controversy, fail to provide adequate guidance, and preclude such relevant considerations as motive and the de minimis burdensomeness of the request. Therefore, it argues, the Commission should amend this language to clarify that it is not intended to serve as a standard for any prospective conference practices which the Commission has not specifically addressed.

TWRA is correct that the narrow rule proposed should not be interpreted as attempting to establish whether prospective, previously unaddressed requests for documents are lawful. However, TWRA's fears of a misinterpretation or misapplication of the rule do not appear to be well founded. The provision it objects to already refers to "documentation which has been established to be clearly unnecessary or immaterial . . . ." (Emphasis added.) It is unlikely, therefore, to be interpreted to refer to requests which have

not been addressed by the Commission, as feared by TWRA. Moreover, the provision is not part of the Proposed Rule, but is merely meant to explain the necessity of the rule, which in turn clearly refers only to requests for BRLs, and in the context of service contract negotiations. We, therefore, do not find it necessary to amend any language in the Proposed Rule.

List of subjects in 46 CFR: Antitrust, Contracts, Maritime carriers, Shippers' associations.

Therefore, pursuant to 5 U.S.C. 553, and secs. 7, 8, 10, and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1706, 1707, 1709 and 1716) the Federal Maritime Commission adds a new Part 571 to Subchapter D of Title 46 of the Code of Federal Regulations as follows:

Part 571 - Interpretations and Statements of Policy

Authority: 5 U.S.C. 553, 46 U.S.C. app. 1706, 1707, 1709, and 1716.

§ 571.1 Interpretation of Shipping Act of 1984-Refusal to negotiate with shippers' associations.

(a) Section 8(c) of the Shipping Act of 1984 ("1984 Act") authorizes ocean common carriers and conferences to enter into a service contract with a shippers' association, subject to the requirements of the 1984 Act. Section 10(b)(13) of the 1984 Act prohibits carriers from refusing to negotiate with a shippers' association. Section 7(a)(2) of the 1984 Act exempts from the antitrust laws any activity within the scope of that Act, undertaken with a reasonable

basis to conclude that it is pursuant to a filed and effective agreement.

(b) The Federal Maritime Commission interprets these provisions to establish that a common carrier or conference may not require a shippers' association to obtain or apply for a Business Review Letter from the Department of Justice prior to or as part of a service contract negotiation process.

By the Commission.

  
Joseph C. Polking  
Secretary