



This document is scheduled to be published in the Federal Register on 03/07/2012 and available online at <http://federalregister.gov/a/2012-05461>, and on FDsys.gov

Billing Code: 6730-01-P

FEDERAL MARITIME COMMISSION

46 CFR Parts 530 and 531

DOCKET NO. 11-17

RIN 3072-AC47

CERTAINTY OF TERMS OF SERVICE CONTRACTS AND NVOCC SERVICE ARRANGEMENTS

AGENCY: Federal Maritime Commission.

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission amends its rules regarding certainty of terms of service contracts and non-vessel-operating common carrier service arrangements. The rule provides common carriers and shippers with certainty and flexibility by facilitating their use of long-term contracts that adjust based upon an index reflecting changes in market conditions.

DATES: The Final Rule is effective March 7, 2012.

FOR FURTHER INFORMATION CONTACT: Karen V. Gregory, Secretary, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, D.C. 20573-0001, Phone: (202) 523-5725

SUPPLEMENTARY INFORMATION:

Background

By Notice of Proposed Rulemaking (NPR) published on October 13, 2011, 76 FR 63581, the Federal Maritime Commission (FMC or Commission) proposed to amend its rules for terms of service contracts and Non-Vessel-Operating Common Carrier service arrangements (NSA). The NPR was intended to remove uncertainty in the use of freight rate or other indices in service contracts and NSAs, while also assisting common carriers and shippers in pursuing stability and flexibility through long-term contracts.

The Commission found that an increasing number of service contracts filed with the Commission reference indices. The ocean freight rates in those service contracts adjust in increments based upon the changes in the referenced index levels or their annual or quarterly averages. The Commission believes that this trend has started to appear because carriers and shippers in the ocean transportation industry are seeking

stability through long-term contracts, while trying to preserve flexibility to adjust contract rates reflecting changes in market conditions.

The Commission's current regulation with respect to terms of service contracts and NSAs require that the terms, if they are not explicitly contained in the contracts, must be "contained in a publication widely available to the public and well known within the industry." 46 CFR 530.8(c)(2), 531.6(c)(2). The Commission has received inquiries from the industry as to whether certain freight rate indices meet the Commission's requirement. For example, until August 2011, the Transpacific Stabilization Agreement (TSA) index was not available to the public, even though some service contracts referenced the TSA index before its publication. In addition, although many index publishers' current index levels are available to the public mostly without charge, access to their historical data often requires payment of subscription fees that can reach up to several thousand dollars per year.

While the Commission began to consider whether the service contracts referencing indices comport with its regulation, the Commission also sought to revise its regulations so that they are not unnecessarily burdensome and do not impede innovation and flexibility in commercial arrangements between common carriers and shippers.

The final rule would facilitate references to indices in service contracts and NSAs so that contracting parties can pursue long-term contracts with rates that adjust through an agreed and ascertainable manner.

Comments

The Commission received five public comments responding to the NPR. The comments were submitted by TSA, Westbound Transpacific Stabilization Agreement (WTSA), World Shipping Counsel (WSC), carrier parties to the World Liner Data Agreement (WLDA), and TSC Container Freight (TSC).¹ TSA, WTSA, WSC, and TSC support the Commission's proposed change. Although not explicitly stated, WLDA does not oppose the proposed change.

TSA and WTSA support "the Commission's effort to expand flexibility in service contracting and welcome[s] the Commission's support of the option to use rate indices." TSA and WTSA believe that the ability to reference a price index in service contracts will not only enable the parties to a service contract to allocate risks, but also relieve the parties of the administrative burden of preparing and filing numerous contract amendments in response to changes in market conditions. Eliminating contentious negotiations over numerous contract amendments may help improve relations between shippers and carriers. TSA and WTSA stated that the Commission's rule change "may also contribute to greater stability and predictability in ocean freight rates, a benefit consistently sought by carriers and shippers alike," and welcome and applaud the Commission's clarification of its regulations for service contracts and NSAs. Stating that the parties should be able to refer to the index of their choosing, TSA and WTSA indicated that the Commission's regulation should promote maximum flexibility, including by not favoring or promoting any particular index.

Responding to the Commission's request for comments on the means to ensure that the referenced indices are readily available to the Commission, TSA and

¹ The Commission determined to accept TSC's late-filed comment.

WTSA recommend that the Commission require such indices to be made available to the Commission by the carrier party to the contract within thirty (30) days of a written request by the Commission. TSA and WTSA stated that such a requirement, which is based on the Commission's existing requirement at 46 CFR 530.15,² would provide the Commission with adequate assurance that it would have access to such indices.

Finally, with respect to the Commission's concerns about how to reduce any impediments to small shippers having the option of index-linked contracts, TSA and WTSA stated that they are not aware of any impediments to a small shipper using such an index in a service contract with a carrier, although their experience with such index-linked contracts is still relatively limited.

WSC supports the proposed changes. WSC stated that the change will facilitate flexibility and freedom of contract by carriers and shippers. Regarding the Commission's question about how to ensure that the information referenced in service contracts is readily available to the Commission, WSC suggests that the Commission require in the regulations that either the carrier or the shipper provide the rate index information upon request by the Commission.

WLDA has contracted with Container Trade Statistics Ltd. (CTS) to aggregate and publish certain data, and through CTS publishes a price index for containerized dry and reefer cargo. WLDA argues that the Commission's NPR created a misperception by identifying four freight rate indices by name, but not the CTS index. WLDA submitted

² Section 530.15(c) of the Commission's regulation provides that every carrier or agreement shall, upon written request of the FMC's Director, Bureau of Enforcement, any Area Representative or the Director, Bureau of Economics and Agreements Analysis [now BTA], submit copies of requested original service contracts or their associated records within thirty (30) days of the date of the request.

its comments to correct a possible misperception that it would not be lawful to use the CTS index in service contracts, or that the CTS index or other data published by CTS are somewhat less reliable or valuable than the named indices. WLDA asks that the Commission include in the supplementary information of the final rule a statement that the CTS rate index is compliant with the revised regulation.

TSC supports index linked contracts because they will “provide more contracting options for shippers large and small.”

Discussion

Contrary to WLDA’s comments, the NPR named four indices only as examples of freight indices referenced in service contracts that had been submitted to the Commission at the time of the publication of the NPR. The Commission, however, did not intend to imply that those were the only freight indices or that it had any concerns regarding the CTS index. The proposed change was to facilitate, not to limit or impede, long-term contracts between shippers and carriers, while ensuring their compliance with the Shipping Act. As long as the referenced terms comply with the revised regulations, the shippers and carriers are free to use not only any freight indices, but also other indices such as the Bureau of Labor Statistics’s Consumer Price Index that was already referred to in certain service contracts.

With respect to the question about possible methods to ensure that the information referred to in service contracts is readily available to the Commission, the

Commission adopts TSA's and WTSA's suggestions. As some index publishers require annual payment of up to several thousand dollars for historical data, requiring small shippers to provide that data to the Commission may impede their utilization of long-term contracts. Further, many small shippers may enter into a service contract only once a year, whereas common carriers may enter into service contracts with numerous shippers. Requiring those small shippers to provide the historical data appears to be not only prohibitive, but also unfair because the substantial annual subscription fee may disproportionately negate the benefit of long-term contracts with respect to those small shippers. Therefore, the Commission adopts TSA's and WTSA's recommendations that associated records of such indices, including any historical data used to adjust contract rates, must be made available to the Commission by the carrier party to the contract within thirty (30) days of a written request by the Commission.

TSA and WTSA stated that they are not aware of any impediment to a small shipper using a freight index in a service contract with a carrier who is willing to do so. By requiring carrier parties to service contracts to provide the "associated records," the final rule will further minimize possible impediments to small shippers in entering into long-term contracts.

Finally, as already proposed in the NPR, this final rule also makes the same change to the rule for NSAs, which are NVOCCs' contracts with their shippers and analogous to ocean common carriers' service contracts with their shippers.

Regulatory Findings

The Regulatory Flexibility Act (RFA) allows the head of an agency after a

threshold analysis, in lieu of preparing an analysis required by 5 U.S.C. 603 and 604, to certify that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” 5 U.S.C. 605(b). Such certification may be published in the Federal Register either at the time of publication of notice of proposed rulemaking or at the time of publication of the final rule. *Id.*

This Final Rule is intended to enhance the flexibility of regulated entities concluding contractual relationships subject to the Shipping Act and the Commission’s regulations. There are two types of regulated entities that this Final Rule may affect: vessel-operating common carriers (VOCCs) and non-vessel-operating common carriers (NVOCCs). The Commission currently has on file registrations (Form FMC-1) for 294 VOCCs. VOCCs are generally not small entities, as defined by North American Industry Classification System’s size standards identified by Small Business Administration. 13 CFR 121.201. While some are large, multi-national corporations, most NVOCCs licensed by the Commission have fewer than 500 employees and are therefore small entities. There are currently 4,652 NVOCCs licensed by or registered with the Commission.

The Commission believes that there are approximately 46,962 effective service contracts on file with the Commission between May 1, 2011 through February 9, 2012. Of those, the Commission has identified 62 service contracts referencing indices, approximately 0.13% of the total, that would become subject to the Final Rule. Complying with the Final Rule with respect to 0.13% of the total service contracts would not appear to result in a “significant economic impact” on VOCCs. Specifically, only

VOCCs whose service contracts refer to indices will be subject to the requirements of 46 CFR 530.8(c)(3) of the Final Rule, and based upon the number of contracts currently on file with the Commission, that number is very small.

Nor will this Final Rule have a “significant economic impact” on NVOCCs. The rule simply provides parties to service contracts and NSAs more freedom and flexibility in their commercial arrangements and will not adversely affect small NVOCCs. Unlike VOCC service contracts, there are no NSAs currently on file with the Commission that reference indices, and, therefore, no NSAs would be impacted by the Final Rule.

In view of the above, the Chairman of the Commission hereby certifies, pursuant to 46 U.S.C. 605(b) of the Regulatory Flexibility Act that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.

This rule is not a “major rule” under 5 U.S.C. 804(2).

As VOCC parties to service contracts and NVOCC parties to NSAs are already required to provide “associated records” to the Commission pursuant to the Commission’s regulations at 46 CFR 530.15(c) and 531.12(b), this Final Rule does not impose any new recordkeeping or reporting requirements on VOCCs or NVOCCs that would be “collection of information” requiring approval under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects

46 CFR Parts 530 and 531

Freight, Maritime carriers, Reporting and recordkeeping requirements.

For the reasons stated in the supplementary information, the Federal Maritime Commission amends 46 CFR parts 530 and 531 as follows.

PART 530—SERVICE CONTRACTS

1. The authority citation for Part 530 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. 305, 40301–40306, 40501–40503, 41307.

2. Revise § 530.8(c) to read as follows:

§ 530.8 Service Contracts.

* * * * *

(c) *Certainty of terms.* The terms described in paragraph (b) of this section may not:

(1) Be uncertain, vague or ambiguous; or

(2) Make reference to terms not explicitly contained in the service contract itself unless those terms are readily available to the parties and the Commission.

(3) Pursuant to § 530.15(c), the carrier party to the service contract must, upon written request by the Commission, provide the Commission with the associated records of the referenced terms. For the purpose of paragraph (c)(2) of this section, the referenced terms will be deemed readily available to the Commission if the carrier party to the service contract provides the Commission with the associated records of the terms

within thirty (30) days of the Commission's written request.

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PART 531—NVOCC SERVICE ARRANGEMENTS

3. The authority citation for Part 531 continues to read as follows:

Authority: 46 U.S.C. 40103.

4. Revise § 531.6(c) to read as follows:

§ 531.6 NVOCC Service Arrangements.

* * * * *

(c) *Certainty of terms.* The terms described in paragraph (b) of this section may not:

(1) Be uncertain, vague or ambiguous; or

(2) Make reference to terms not explicitly contained in the NSA itself unless those terms are readily available to the parties and the Commission. Reference may not be made to a tariff of a common carrier other than the NVOCC acting as carrier party to the NSA.

(3) Pursuant to § 531.12(b), the carrier party to the NSA must, upon written request by the Commission, provide the Commission with the associated records of the referenced terms. For the purpose of paragraph (c)(2) of this section, the referenced terms will be

deemed readily available to the Commission if the carrier party to the NSA provides the Commission with the associated records of the terms within thirty (30) days of the Commission's written request.

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By the Commission.

Karen V. Gregory

Secretary

[FR Doc. 2012-5461 Filed 03/06/2012 at 8:45
am; Publication Date: 03/07/2012]