FEDERAL MARITIME COMMISSION

46 CFR Part 545

Docket No. 18-06

RIN: 3072-AC71

Interpretive Rule, Shipping Act of 1984

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission (FMC or Commission) is revising its interpretation of the scope of the Shipping Act prohibition against failing to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property. Specifically, the Commission is clarifying that the proper scope of that prohibition in the Shipping Act of 1984 and the conduct covered by it is guided by the Commission's interpretation and precedent articulated in several earlier Commission cases, which require that a regulated entity engage in a practice or regulation on a *normal*, *customary*, and *continuous* basis and that such practice or regulation is unjust or unreasonable in order to violate that section of the Shipping Act.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Rachel E. Dickon, Secretary; Phone: (202) 523-5725; Email: secretary@fmc.gov.

SUPPLEMENTARY INFORMATION:

I. INTRODUCTION

Through this interpretive rule, the Federal Maritime Commission is clarifying its interpretation of the scope of 46 U.S.C. 41102(c) (section 10(d)(1) of the Shipping Act of 1984).[1] Section 41102(c) provides that regulated entities "may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." This interpretive rule clarifies that in order to violate § 41102(c), a regulated entity must engage in an unjust or unreasonable practice or regulation on a *normal*, *customary*, and *continuous* basis.

II. NPRM AND SUMMARY OF COMMENTS

On September 7, 2018, the Commission issued a Notice of Proposed Rulemaking (NPRM) seeking public comment on its proposed interpretation.[2] Five comments were received in response to the NPRM, which may be found at the Electronic Reading Room on the Commission's website at https://www.fmc.gov/18-06/. Comments were received from the American Association of Port Authorities (AAPA), New York New Jersey Foreign Freight Forwarders and Brokers Association (NYNJFFF&BA), World Shipping Council (WSC), International Trade Surety Association (ITSA) and National Customs Brokers and Forwarders Association of America (NCBFAA). All five comments received by the Commission were in support of the rulemaking.

In their submission, AAPA affirms that the rule would bring the Commission's interpretation of the Shipping Act's prohibition on unjust and unreasonable practices and regulations in line with the plain language meaning of the word "practice," Commission precedent and the intent of Congress. AAPA does not believe that the rule would leave potential claimants without remedies, but that the rule would stop individual instances better suited for resolution under the Carriage of Goods by Sea Act (COGSA) or other venue from being brought

[1] Some authorities cited herein refer to § 41102(c) while others refer to section 10(d)(1). For ease of reading, we will generally refer to § 41102(c) in analyzing these authorities.
[2] NPRM: Interpretive Rule, Shipping Act of 1984, 83 FR 45367 (Sept. 7, 2018).

to the Commission.

NYNJFFF&BA also agrees that the intent of Congress and the plain language reading of § 41102(c) support this rulemaking. NYNJFFF&BA believes that without this rule, ocean transportation intermediaries (OTIs) are at risk of violating the Shipping Act over a single disagreement or accidental misstep, and this risk hinders resolutions through settlement. NYNJFFF&BA argues that this rule would limit the risk of frivolous claims being brought and allow OTIs to operate and settle claims more fairly and cost effectively. NYNJFFF&BA contends that claims that cannot be settled can still be brought through other venues.[3]

In its comment, WSC notes that from 1935 to 2001, the Commission precedent was in line with the interpretation presented by this rule, but the Commission departed from this interpretation between 2010 and 2013. WSC believes that this rule will remove the uncertainty in the Commission's precedent and interpretation of § 41102(c). WSC argues that the rule will also meet the appropriate balance of encouraging meritorious Shipping Act cases and discourage matters that should be heard in other forums. WSC also does not believe that this interpretation will prevent would-be litigants from bringing meritorious claims and that parties will still be able to take advantage of the other forums that were used prior to the 2010 change in the Commission's interpretation.

ITSA also fully supports the Commission's proposed interpretation of § 41102(c). ITSA states that adoption of this interpretation will not cause a barrier to claimants with legitimate disputes. ITSA asserts that this rule still allows claimants to seek resolutions through the claim

[3] In addition to its comments on the current interpretive rule, NYNJFFF&BA also encourages the Commission to review other prohibitions in § 41102 as part of future interpretive rulemakings, alleging that its members have been subject to penalties for technical violations involving no injured parties and that these investigations do not serve the purposes of the Shipping Act of 1984. As NYNJFFF&BA notes, these issues are outside the scope of this rulemaking, but the Commission will consider these comments in determining whether to initiate future rulemakings.

procedures in 46 CFR 515.23, the Commission's ADR services, presenting a claim to an OTI's surety or bringing an action in a proper legal venue.

Finally, NCBFAA also supports the interpretive rule and believes that this rule will bring § 41102(c) back in line with its original purpose. NCBFAA believes that, as originally written, the term practice was not intended to refer to single instances and from 1935 to 2010, Commission precedent supported this interpretation. NCBFAA argues that cargo owners will still possess ample civil remedies to resolve disputes. NCBFAA also emphasizes the importance of § 41102(c) for stopping systemic malpractices and believes that this rule will assist the Commission in returning their focus and priorities to the activities that negatively affect the broader shipping public.

III. FINAL RULE

For the reasons stated in the NPRM and by the commenters, the Commission is adopting the proposed interpretive rule without change. Section 41102(c) provides that regulated entities "may not fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property." Beginning with the *Houben*[4] decision in 2010 and presented in full in the Commission's 2013 decision in *Kobel v. Hapag-Lloyd*,[5] the Commission has held in a line of recent cases that discrete conduct with respect to a single shipment, if determined to be unjust or unreasonable, represents a violation of § 41102(c). As discussed in the NPRM, this recent interpretation runs contrary to the original intent of Congress, the rules of statutory construction, and Commission precedent.[6] This rule restores the Commission's interpretation of § 41102(c) to its pre-2010 understanding and returns the Commission's focus and priorities to the activities of maritime regulated entities that

[4] *Houben v. World Moving Services, Inc.*, 31 S.R.R. 1400 (FMC 2010).
[5] *Kobel* v. *Hapag-Lloyd A.G.*, 32 S.R.R. 1720, 1731 (2013).
[6] *See* 83 FR at 45368–45373.

negatively affect the broader shipping public.

Section 41102(c) was never intended to be a method of resolving every dispute that arises in the receiving, handling, storing or delivering of cargo. In drafting the 1916 Act, and through its revisions and reenactment in 1984, Congress chose the word "practice" and the phrase, "establish, observe, and enforce just and reasonable regulations and practices," to describe actions or omissions engaged in on a normal, customary, and continuous basis. From its origin and as recently as 2001,[7] § 41102(c) was interpreted in line with this understanding. To find a violation of § 41102(c), the Commission consistently required that the unreasonable regulation or practice was the normal,[8] customary, often repeated,[9] systematic,[10] uniform,[11] habitual,[12] and continuous manner[13] in which the regulated common carrier was conducting business. This understanding as to what constitutes "regulations and practice" under the Shipping Act is supported by multiple accepted rules of statutory construction.[14]

Through this rule, the Commission will return to an interpretation consistent with its precedent and consistent with rules of statutory construction. The Commission is aware that the interpretive rule may prevent some claims from being brought under the Shipping Act. Matters that may previously have been brought under § 41102(c) however, can still find resolution in other provisions or regulations of the Shipping Act[15] or be adjudicated as matters of contract law, agency law, or admiralty law. The Commission believes that existing alternative avenues of

---

[7] *Kamara v. Honesty Shipping Service*, 29 S.R.R. 321 (ALJ 2001).
[8] *See European Trade Specialists v. Prudential-Grace Lines*, 19 S.R.R. 59, 63 (FMC 1979).
[9] *See Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400, 432 (1935).
[10] *See Whitam v. Chicago, R.I. & P. Ry. Co.*, 66 F. Supp. 1014 (N.D. Tex. 1946).
[11] *See, e.g., Stockton Elevators*, 3 S.R.R. 605, 618 (FMC 1964); *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. at 432.
[12] *See Stockton Elevators*, 3 S.R.R. at 618.
[13] *See Stockton Elevators*, 3 S.R.R. at 618. *See also, McClure v. Blackshere*, 231 F. Supp. 678, 682 (D. Md. 1964).
[14] *See* 83 FR at 45370–45371.
[15] *See Total Fitness Equipment, Inc. d/b/a/ Professional Gym v. Worldlink Logistics, Inc.*, 28 S.R.R. 45 (ALJ 1997); *Brewer v. Maralan*, 29 S.R.R. 6 (FMC 2001).

redress are sufficient to address those cases. The Commission believes that this rule returns § 41102(c) to its proper purpose and allows the Commission to better meet its mission as intended by Congress.

VI. RULEMAKING ANALYSES

Congressional Review Act

The rule is not a "major rule" as defined by the Congressional Review Act, codified at 5 U.S.C. 801 et seq. The rule will not result in: (1) an annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies. 5 U.S.C. 804(2).

Regulatory Flexibility Act

The Regulatory Flexibility Act (codified as amended at 5 U.S.C. 601–612) provides that whenever an agency promulgates a final rule after being required to publish a notice of proposed rulemaking under the Administrative Procedure Act (APA) (5 U.S.C. 553), the agency must prepare and make available for public comment a final regulatory flexibility analysis (FRFA) describing the impact of the rule on small entities. 5 U.S.C. 604. An agency is not required to publish a FRFA, however, for the following types of rules, which are excluded from the APA's notice-and-comment requirement: interpretive rules; general statements of policy; rules of agency organization, procedure, or practice; and rules for which the agency for good cause finds that notice and comment is impracticable, unnecessary, or contrary to public interest. *See* 5 U.S.C. 553(b).

Although the Commission elected to seek public comment, the rule is an interpretive rule. Therefore, the APA did not require publication of a notice of proposed rulemaking in this instance, and the Commission is not required to prepare a FRFA.

National Environmental Policy Act

The Commission's regulations categorically exclude certain rulemakings from any requirement to prepare an environmental assessment or an environmental impact statement because they do not increase or decrease air, water or noise pollution or the use of fossil fuels, recyclables, or energy. 46 CFR 504.4. This rule regards the Commission's interpretation of the scope of 46 U.S.C. 41102(c) and the elements necessary for a successful claim for reparations under that section. This rulemaking thus falls within the categorical exclusion for matters related solely to the issue of Commission jurisdiction and the exclusion for investigatory and adjudicatory proceedings to ascertain past violations of the Shipping Act. *See* 46 CFR 504.4(a)(20), (22). Therefore, no environmental assessment or environmental impact statement is required.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) (PRA) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in proposed rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11. This rule does not contain any collections of information as defined by 44 U.S.C. 3502(3) and 5 CFR 1320.3(c).

Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards in E.O. 12988 titled, "Civil Justice Reform," to

minimize litigation, eliminate ambiguity, and reduce burden.

Regulation Identifier Number

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda, available at http://www.reginfo.gov/public/do/eAgendaMain.

List of Subjects in 46 CFR part 545

Antitrust, Exports, Freight forwarders, Maritime carriers, Non-vessel-operating common carriers, Ocean transportation intermediaries, Licensing requirements, Financial responsibility requirements, Reporting and recordkeeping requirements.

For the reasons set forth above, the Federal Maritime Commission amends 46 CFR part 545 as follows:

PART 545-INTERPRETATIONS AND STATEMENTS OF POLICY

1. The authority citation for part 545 continues to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. 305, 40307, 40501-40503, 41101-41106, and 40901-40904; 46 CFR 515.23.

2. Add § 545.4 to read as follows:

§ 545.4 Interpretation of Shipping Act of 1984–Unjust and unreasonable practices.

46 U.S.C. 41102(c) is interpreted to require the following elements in order to establish a successful claim for reparations:

(a) The respondent is an ocean common carrier, marine terminal operator, or ocean transportation intermediary;

(b) The claimed acts or omissions of the regulated entity are occurring on a normal, customary, and continuous basis;

(c) The practice or regulation relates to or is connected with receiving, handling, storing, or delivering property;

(d) The practice or regulation is unjust or unreasonable; and

(e) The practice or regulation is the proximate cause of the claimed loss.

By the Commission.

Rachel E. Dickon
Secretary

Billing Code: 6731-AA
[FR Doc. 2018-27181 Filed: 12/14/2018 8:45 am; Publication Date: 12/17/2018]