Before the
FEDERAL MARITIME COMMISSION
Washington, DC 20573

Docket No. 20-22
Service Contracts

COMMENTS OF THE CARIBBEAN SHIPOWNERS' ASSOCIATION

The Caribbean Shipowners' Association, FMC Agreement No. 010979 ("CSO"), through undersigned counsel, respectfully submits these comments in response to the Federal Maritime Commission's ("FMC" or "Commission") Notice of Proposed Rulemaking ("NRPM") published in the *Federal Register* on January 19, 2021. CSO generally supports the NPRM, but urges the Commission to consider refining one aspect of the NPRM to avoid unintended consequences.

Interest of the CSO

CSO is a discussion agreement of ocean common carriers[1] who serve the trades between the United States and various countries in and bordering on the Caribbean Sea. As ocean common carriers that conduct a significant portion of their business pursuant to the terms of service contracts, the NPRM has a direct and substantial impact on the members of the CSO.

Comments

In April of 2020, the FMC adopted an exemption from the requirement that original service contracts be filed before any cargo is moved, under which such original

[1] The members of the CSO are: Crowley Caribbean Services LLC; Hybur Ltd.; King Ocean Services Limited; Seaboard Marine, Ltd.; and Tropical Shipping & Construction Company Limited, LLC.

contracts could be filed up to thirty (30) days after the contract effective date. The NPRM, if adopted, would codify the temporary exemption previously granted to service contracts. However, it appears to more restrictive than the status quo when it comes to the filing of service contract amendments.

At present, FMC regulations permit ocean common carriers to file service contract amendments no later than thirty (30) days after any cargo moves pursuant to that contract amendment. 46 C.F.R. §530.8(a)(2). As explained in the NPRM, the Commission adopted this regulation at least in part because of the problems that arise when a customer tenders cargo to a carrier before signing the amendment that covers that cargo. 86 Fed. Reg. 5107. In such circumstances, carriers were forced to choose between charging the agreed-upon but as yet unfiled rate (thereby exposing themselves to regulatory risk) or charging the filed rate (which was typically higher than the newly agreed-upon rate) and creating a dispute with their customer. By tying the filing deadline to the receipt of cargo, rather than signature, this problem is avoided.

The NPRM's proposed definition of "effective date" would prohibit service contract amendments from being effective earlier than the date on which all parties have signed the service contract or amendment. By reverting to a system under which effectiveness is tied to signature rather than cargo receipt, the Commission will once again force carriers to choose between honoring commercial understandings that have been reached but not signed and adhering to the their statutory obligations.

In addition to creating regulatory issues, the requirement that the effective date of a service contract or amendment not be earlier than the date on which both parties

sign the contract is ill-suited to today's commercial environment. The requirement that service contracts be signed and filed dates back to 1984. It is difficult to explain to customers, especially smaller customers and those located outside of the U.S., why they cannot have their cargo rated pursuant to an understanding reached via phone, text, or email simply because the carrier does not yet have a signature. In the minds of the customers, most of whom are not subject to or familiar with the type of regulatory filing requirements applicable to ocean carriers, a "deal is a deal" and the carrier needs to adhere to that deal, even if the customer hasn't signed a piece of paper.

The requirement that a service contract or amendment be signed before it can be effective also constitutes an unnecessary intrusion upon and limitation of contract law principles of offer and acceptance. The Restatement (Second) of Contracts, § 30(2), states:

> Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.

Similarly, section 2-206 of the Uniform Commercial Code provides that an offer to make a contract is to be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances. It is not clear to the CSO members why the tendering of cargo is not a reasonable means of accepting an offer, and why their customers should be subject to contract acceptance formalities beyond those applicable in other industries.

Requiring that a service contract or amendment be signed before it can be

implemented also has the effect of treating service contracts differently than other types of contractual arrangements subject to FMC jurisdiction. For example, in the context of negotiated rate agreements, the Commission has recognized that the tender of cargo can constitute acceptance. 46 C.F.R. §532.5(c)(3)). Similarly, the Commission does not require a signature as a prerequisite to the implementation of a NVOCC Service Arrangement. 46 C.F.R. §531.3(f).

Conclusion

CSO urges the Commission to adopt the NRPM, but to revise the definition of "effective date" so that it is consistent with applicable contract law principles, avoids unnecessary regulatory issues, and permits all parties concerned to do business efficiently and effectively. Such a revision could also make clear that the parties to service contracts are authorized to use electronic signatures.

CSO believes all of the foregoing would be achieved by adopting the World Shipping Council's proposed revision to the last sentence of the definition of "effective date," so that it reads:

> The effective date may not be earlier than the date on which all parties have taken such actions as manifest their mutual agreement to the terms of the service contract or amendment, or the date on which performance documentable as associated with that service contract or amendment begins.

The foregoing revision would allow the parties to a service contract to implement the contract or amendment without having to first obtain physical signatures, or any signature at all. This would afford ocean common carriers flexibility in structuring their contracting practices and avoid the difficulties outlined above. At the same time, this revised definition also would avoid the potential for parties agreeing to retroactive service contracts and amendments, since the Commission would always be able to

obtain the service contract records necessary to determine the date on which performance began or the contract/amendment was signed by the parties.

Respectfully submitted,

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