

FEDERAL MARITIME COMMISSION

PETITION OF EXPEDITORS
INTERNATIONAL OF WASHINGTON,
INC. FOR A TEMPORARY EXEMPTION
FROM STATUTORY TARIFF
PUBLICATION REQUIREMENTS

Petition No. P1-22

Served: March 8, 2022

BY THE COMMISSION: Daniel B. MAFFEI, Chairman,
Rebecca F. DYE, Louis E. SOLA, Carl W. BENTZEL, Max M.
VEKICH, Commissioners.

Order Granting Petition for Exemption

Expeditors International of Washington, Inc. (Expeditors) filed a petition with the Commission seeking a 90-day exemption from the statutory and regulatory tariff publication requirements due to a recent cyberattack on their information technology systems. For the reasons described below, the Commission grants the request for exemption from the relevant tariff publishing requirements, subject to certain conditions, with respect to cargo received on or after the date of this order. The 90-day exemption expires on June 6, 2022.

I. BACKGROUND

The petitioner is a non-vessel-operating common carrier under the Shipping Act of 1984, 46 U.S.C. § 40101 *et seq.* (Shipping Act). *See* 46 U.S.C. § 40102(17). Expeditors announced on February 20, 2022, that it suffered targeted cyber-attack that caused it to shut down most of its operating systems globally in protection of its systems, including its ability to access and update its electronic ocean transportation rate tariffs. Pet. at 1-2.

Expeditors states that it has a limited ability to conduct operations, including but not limited to arranging for shipments of freight or managing customs and distribution activities for shipments. Pet. at 2. The petitioner further says that NVOCC shipment documents it issues are directly affected because they are linked to its tariff to ensure that rates charged conform to those in the published tariff. Without access to the tariff, those documents and related freight bills must be issued by other means, based on available rate information not affected by the cyber-attack. *Id.*

On February 25, 2022, Expeditors petitioned the Commission for an exemption from tariff publication requirements. Expeditors requests exemption from 46 C.F.R. §§ 520.7(c), 520.8(a)(1), and 520.8(a)(4) to apply tariff rates, charges, and rules communicated to customers but not yet published. *Id.* at 3.

Expeditors states that the requested exemption would apply to shipments for which a rate has been quoted in writing to a shipper, and agreed by the shipper, but which cannot be published in the tariff until the operation of the tariff has been restored. Expeditors claims that rates published in the tariff based on these agreed quotations are ordinarily reductions from the general cargo NOS rate that would otherwise apply. Expeditors would use its written internal records of such agreed rate quotations during the tariff interruption period, so that the tariff can be updated to reflect the agreed rates once service is restored. *Id.*

Expeditors asserts that the exemption would not in any way affect competition, that it would benefit shippers by allowing them to have uninterrupted service at agreed rates and that it would avoid further strain on an ocean transportation system already under duress. *Id.*

On February 25, 2022, the Commission issued a notice of Expeditors' petition and requested comments from interested parties. The notice was published in the Federal Register on March 3, 2022. 87 FR 12169.

II. DISCUSSION

The Shipping Act and the Commission's regulations require that common carriers publish tariffs showing all their rates, charges, classifications, rules, and practices between all points or ports on their own routes and on any through transportation route that has been established. *See* 46 U.S.C. § 40501; 46 C.F.R. § 520.3. Changes in rates, charges, rules, regulations, or other tariff provisions that result in a decrease in cost to the shipper may become effective on publication. *See* 46 U.S.C. § 40501(e)(2); 46 C.F.R. § 520.8(a)(4). On the other hand, new or initial rates, charges, or changes in existing rates that result in an increased cost to a shipper may go into effect no earlier than 30 days after publication. 46 U.S.C. § 40501(e)(1); 46 C.F.R. § 520.8(a)(1). Commission regulations also provide that the applicable rates for any given shipment are those in effect on the date the cargo is received by the carrier. 46 C.F.R. § 520.7(c).

Expeditors requests exemption from the tariff publication requirements under these provisions so that it can apply tariff rates, charges, and rules communicated to customers but not yet published, provided that these tariff changes are published by June 6, 2022. The requested exemption would apply to tariff rates, charges, and rules that, but for Expeditors' inability to publish,

would have been effective with respect to cargo received on or after March 8, 2022.

Exemptions from the statutory requirements in 46 U.S.C. § 40501 and the regulatory requirements in 46 C.F.R. part 520 are governed by 46 U.S.C. § 40103 and the Commission's Rules of Practice and Procedure in 46 C.F.R. part 502. *See* 46 C.F.R. §§ 520.13(a), 502.92. As discussed above, § 40103(a) provides that the Commission may grant prospective exemptions from Shipping Act requirements, "if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce."

Expeditors notes that it has more than 100 offices on five continents. It handles a very large volume of ocean cargo, making the rating of shipments and the updating of the tariff a complex undertaking. The 90-day exemption would allow sufficient time to restore operation of the tariff and update it accordingly. Expeditors also states the exemption would only apply to shipments for which a rate has been quoted in writing to a shipper, and agreed by the shipper, but which cannot be published in the tariff until the operation of the tariff has been restored. Expeditors asserts that the requested exemption will not reduce competition or be detrimental to commerce.

We agree. Expeditors seeks permission to apply tariff rates, charges, and rules that have been communicated to shippers but not published due to the cyberattack. Without an exemption, the agreed rates cannot be applied because the rates cannot be published. Further, Expeditors claims that rates published in the tariff based on these agreed quotations are ordinarily reductions from the general cargo NOS rate that would otherwise apply. The Commission believes that Expeditors will try to maintain the status quo had the cyberattack never occurred.

Given the potential harm to shippers that could be charged higher rates without the exemption and the limited duration and

number of shipments subject to the exemption, the Commission finds that the requested exemption will not result in substantial reduction in competition or be detrimental to commerce, subject to certain conditions.

Expeditors must provide written notice to shippers at least 30 days in advance of applying tariff changes that result in increased rates or charges, and such notice must be given in a manner that is likely to be seen by shippers. Acceptable forms of notice include: (1) emails to all of Expeditors' customers; (2) prominent posting on Expeditors' websites; or (3) other forms of notice determined to be acceptable by the Commission's Director of the Bureau of Trade Analysis. Any increases set to go into effect 30 days or more after June 6, 2022, would have to comply with the normal notice and publication requirements.

Although Expeditors' petition does not request retroactive relief for cargo received prior to the date of the exemption, it did mention "[i]f an exemption is granted, Expeditors anticipates that it would follow [the special docket application] procedures for shipments on which rates were quoted and agreed during the period from the date of the attack to the effective date of the exemption." P1-22 at 4. Under § 40103, the Commission may "*exempt for the future* any specified activity of" regulated entities from Shipping Act requirements. The Commission's authority under this provision is therefore limited to prospective relief; the Commission cannot exempt past activities from the requirements of the Shipping Act. The Shipping Act and the Commission's regulations require that carriers apply published tariff rates, charges, and rules in effect on the date cargo is received. *See* 46 U.S.C. § 40501(e); 46 C.F.R. §§ 520.7(c); 520.8. Because the Commission's exemption authority is limited to prospective relief, Expeditors would need to use the special docket application procedures provided by 46 U.S.C. § 40503 and 46 C.F.R. part 502, subpart Q, to seek permission from the Commission to refund or waive collection of freight charges for shipments due to failure to publish a tariff.

III. CONCLUSION

For the reasons discussed above, the Commissions grants the petition, subject to the conditions stated below.

THEREFORE IT IS ORDERED, that Expeditors' request for exemption from the tariff publication requirements at 46 U.S.C. § 40501(e) and 46 C.F.R. §§ 520.7(c), 520.8(a)(1), 520.8(a)(4) is GRANTED with respect to cargo received by Expeditors on or after the date of this order, provided that:

1. All tariff rates, charges, and rules subject to the exemption must be published in accordance with the requirements of 46 C.F.R. part 520 no later than June 6, 2022.
2. Expeditors must provide written notice to shippers at least 30 days in advance before applying any new or initial rate, charge, or change in an existing rate that results in an increased cost to a shipper, and such notice must be given in a manner that is likely to be seen by shippers. Acceptable forms of notice include: (1) emails to all of Expeditors' customers; (2) prominently posting on Expeditors' websites; or (3) other forms of notice determined to be acceptable by the Commission's Director of the Bureau of Trade Analysis. Any increases set to go into effect 30 days or more after June 6, 2022, would have to comply with the normal notice and publication requirements.
3. The exemption from 46 C.F.R. §§ 520.7, 520.8(a)(1), 520.8(a)(4) expires on June 6, 2022. June 6, 2022 is the last day on which the exemption applies.

FINALLY, IT IS ORDERED, that this proceeding be discontinued.

By the Commission.

William Cody
Secretary