

FEDERAL MARITIME COMMISSION

PETITION OF CMA CGM S.A.,
AMERICAN PRESIDENT LINES, LLC,
APL Co. PTE. LTD. AND ANL
SINGAPORE PTE LTD FOR A
TEMPORARY EXEMPTION FROM
STANDARD TARIFF & SERVICE
CONTRACT FILING REQUIREMENTS

Petition No. P2-20

Served: October 20, 2020

BY THE COMMISSION: Michael A. KHOURI, Chairman,
Rebecca F. DYE, Daniel B. MAFFEI, Louis E. SOLA, Carl W.
BENTZEL, Commissioners.

Order Granting in Part and Denying in Part Petition for Exemption

The CMA Group¹ filed a petition with the Commission seeking an exemption from certain service contract filing and tariff publishing requirements because of a recent cyberattack on their information technology systems. For the reasons described below, the Commission grants the request for exemption from the relevant service contract filing requirements subject to certain conditions. The Commission also grants the request for exemption from the

¹ The petitioners include CMA CGM S.A., American President Lines, LLC, APL Co. Pte. Ltd., and ANL Singapore Pte Ltd, collectively referred to as “the CMA Group.”

relevant tariff publishing requirements, subject to certain conditions, with respect to cargo received on or after the date of this order. But because the Commission's exemption authority is limited to prospective relief, the Commission denies the request for exemption from the relevant tariff publishing requirements for cargo received prior to the date of this order. Instead, the CMA Group may use other procedures provided by the Shipping Act that allow them to refund or waive collection of freight charges for these shipments due to failure to publish a tariff.

I. BACKGROUND

The petitioners are all ocean common carriers under the Shipping Act of 1984, 46 U.S.C. § 40101 *et seq.* (Shipping Act). *See* 46 U.S.C. § 40102(18). The CMA Group states that it suffered a malicious cyberattack that began affecting its information systems on September 27, 2020. *Pet.* at 2. The CMA Group discovered the attack on September 28, 2020. *Id.* The attack has impacted the CMA Group's ability to timely file service contracts and amendments and to timely publish tariff rates and rules. *Id.* The CMA Group provided several examples of these impacts. Specifically, American President Lines, LLC and APL Co. Pte. Ltd. (collectively "APL") and CMA CGM S.A. have new service contracts and amendments effective October 1, 2020. *Id.* at 3. In addition, APL has been unable to update the rates and rules in its self-published tariff,² and although CMA CGM S.A. and ANL Singapore Pte Ltd use a third-party tariff publisher that was not impacted by the cyberattack, the carriers are unable to access quotes given to customers in order to convert them into tariff line items so that customers can book shipments under the quoted rates. *Id.* at 2-3.

² As an example, the CMA Group describes how APL wanted to revise the effective date of a general rate increase (GRI) from October 1, 2020, to November 1, 2020, but was unable to do so because it could not access its tariff. According to the CMA Group, once access is obtained, withdrawing the October 1 GRI would result in APL not being able to apply a November 1 GRI due to the 30-day notice requirement for tariff rate increases.

On October 7, 2020, the CMA Group petitioned the Commission for an exemption from the service contract filing and tariff publishing requirements. With respect to service contracts, the CMA Group requests exemption from 46 C.F.R. §§ 530.3(i), 530.8(a), and 530.14(a) to allow them to apply service contract rates and terms agreed to with their customers but not yet filed with the Commission, provided those service contracts and amendments are filed by November 26.³ *Id.* at 1, 3.

With respect to tariffs, the CMA Group requests exemption from 46 C.F.R. §§ 520.7(c), 520.8(a)(1), and 520.8(a)(4)⁴ to apply tariff rates, charges, and rules communicated to customers but not yet published, provided that these tariff changes are published by November 26, 2020. *Id.* at 1-3. The CMA Group states that they would not implement any increases to tariff rates or charges under the exemption absent an alternate form of written 30-day notice clearly communicated to customers. *Id.* at 2.

The CMA Group requests that the exemption apply to cargo received on or after September 27, 2020. *Id.* at 1, 3. The CMA Group asserts that this flexibility will allow them to apply service contract rates agreed upon with customers and tariff terms offered to customers for shipments received before service contract filing or tariff publication can be accomplished, instead of requiring customers to pay higher tariff rates due to the CMA Group's inability to timely file service contracts and publish tariffs. *Id.* The CMA Group states that granting this exemption would support the flow of U.S. commerce by allowing them to honor rates, charges,

³ The CMA Groups requests that the Commission permit them to make all required service contract filings and tariff publications "within 60 days following September 27, 2020," which is November 26, 2020. *See* Pet. at 3.

⁴ The petition requests an exemption from section "520.8(4)." The Commission assumes this is a typo and that the CMA Group is seeking an exemption from § 520.8(a)(4), which permits tariff changes that result in a decrease in cost to shipper to become effective on publication.

and rules offered to their customers. *Id.*

The CMA Group indicates that they are using their currently functional systems to track their commitments to customers and to mitigate any negative impacts of the cyberattack, and the requested exemption is necessary to reduce potential burdens on customers. *Id.* at 3. The CMA Group asserts that the requested exemption will not reduce competition or be detrimental to commerce and would instead have the opposite effect by allowing them to continue offering sustainable transportation to U.S. customers. *Id.*

The Commission issued a notice of the CMA Group's petition and requested comments from interested parties on October 8, 2020. The notice was published in the Federal Register on October 14, 2020. No comments were received.

II. DISCUSSION

A. Service Contract Filing

The Commission's regulations require that carriers file original service contracts (as opposed to amendments) with the Commission "before any cargo moves pursuant to that service contract." 46 C.F.R. § 530.8(a)(1). In addition, § 530.8(b) requires that each original contract include, among other terms, an effective date that is no earlier than the filing date. *See* §§ 530.3(i) (defining "effective date" for original service contracts and amendments); 530.8(b)(8)(i) (requiring every service contract to include its effective date). Similarly, § 530.14(a) provides that "[p]erformance under an original service contract may not begin before the day it is effective and filed with the Commission."

In contrast, the Commission's regulations provide more flexibility to service contract amendments, which can be filed within 30 days after the amendment's effective date. *See* 46 C.F.R. §§ 530.3(i); 530.8(a)(2); 530.8(b)(8)(i); 530.14(a).

On April 27, 2020, the Commission issued a temporary exemption allowing carriers to file original service contracts up to 30 days after they go into effect, mirroring the delayed filing requirements applicable to service contract amendments. *Temporary Exemption from Certain Service Contract Requirements*, 2 F.M.C.2d 65 (FMC 2020). The exemption was originally set to expire December 31, 2020, but the Commission recently extended the exemption until June 1, 2021. *Temporary Exemption from Certain Service Contract Requirements*, Docket No. 20-06, 2020 FMC LEXIS 206 (FMC Oct. 1, 2020).

The CMA Group requests further exemption from §§ 530.3(i), 530.8(a) and 530.14(a) with respect to original service contracts to permit them to be filed more than 30 days after they go into effect, but not later than November 26, 2020. The CMA Group is also requesting a similar exemption from the current regulatory requirements with respect to service contract amendments to permit them to be filed more than 30 days after they go into effect, but not later than November 26, 2020. The requested exemption would extend to service contracts and amendments applicable to cargo received by the CMA Group on or after September 27, 2020.

Exemptions from the requirements of part 530 are governed by 46 U.S.C. § 40103(a) and the Commission's Rules of Practice and Procedure, specifically 46 C.F.R. §§ 502.10 and 502.92. 46 C.F.R. § 530.13(b). Under 46 U.S.C. § 40103(a), 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."

The CMA Group states that the service contract terms at issue have already been agreed to by the parties, but that the recent cyberattack has affected their ability file these service contracts and amendments with the Commission within 30 days. The CMA Group asserts that the requested exemption will not

reduce competition or be detrimental to commerce and would instead have the opposite effect by allowing them to continue offering sustainable transportation to U.S. customers. *Id.*

We agree. The CMA Group seeks additional time to file certain service contracts and amendments because of their current inability to make such filings. These contracts and amendments have already been agreed to and would normally need to be filed beginning October 27, 2020 (30 days after September 27, 2020), but the CMA Group is requesting an additional 30 days for filing.

This exemption is even more limited than the 2017 exemption granted to another carrier, Maersk, following a cyberattack. *Petition of Maersk Line A/S for an Exemption from 46 C.F.R. § 530.8*, Pet. No. P1-17, slip op. (July 19, 2019). In that case, the Commission granted Maersk's request for an exemption allowing the carrier to agree to service contracts with shippers and apply those terms to cargo received *before* the date agreement was reached on the contractual terms. In this case, the CMA Group and their customers have already agreed on the affected service contract terms, but the CMA Group is currently unable to file the contracts with the Commission, and failure to grant the exemption could result in shippers being charged higher rates or subject to other unfavorable terms. Given these potential harms, the length of the requested filing extension (i.e., an additional 30 days), and the limited number of service contracts that would be affected, the Commission finds that the requested exemption will not result in substantial reduction in competition or be detrimental to commerce.

Based on the foregoing, the Commission is granting the CMA Group's request for exemption from the relevant service contract regulations provided that service contracts and amendments applicable to cargo received on or after September 27, 2020, must be filed by November 26, 2020, or 30 days after

the effective date, whichever is later.⁵

B. Tariff Publication

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.⁶ 46 C.F.R. § 520.7(c).

The CMA Group requests exemption from 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 November 26, 2020. The requested exemption would apply to tariff rates, charges, and rules that, but for the CMA Group's inability to publish, would have been effective with respect to cargo received on or after

⁵ The exemption is not intended to reduce the normal filing deadlines applicable to service contracts and amendments. A service contract that goes into effect after October 27, 2020, may be filed after November 26, 2020, so long as it is filed not later than 30 days after the effective date.

⁶ Although the petition only requests exemption from Commission regulations, because 46 C.F.R. § 520.8(a)(1) and (4) implement the requirements in 46 U.S.C. § 40501(e), the Commission interprets the request to extend to those statutory provisions as well.

September 27, 2020.

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 (46 C.F.R. part 502). *See* 46 C.F.R. § 520.13(a).⁷ 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."

The CMA Group notes that if relief is not granted, shippers making bookings against the quoted rates will instead be invoiced at the higher published rates (e.g., general commodity, N.O.S. or Cargo N.O.S. rates). The CMA Group further states that they will not use this flexibility to apply higher tariff rates or charges absent an alternative form of written 30-day notice clearly communicated to shippers. The CMA Group asserts that the requested exemption will not reduce competition or be detrimental to commerce and would instead have the opposite effect by allowing them to continue offering sustainable transportation to U.S. customers.

We agree. The CMA Group 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, shippers would be invoiced based on the applicable published tariff rates and charges, which could be higher than the quoted terms. And although the CMA Group suggests that they may also use this authority to implement tariff changes that would result in increased rates to shippers prior to or less than 30 days after publication, they have acknowledged the concerns such conduct might raise and committed to providing an

⁷ This regulation incorporates 46 U.S.C. § 40103 as well as "46 C.F.R. § 502.67." Rule 67, however, has been moved twice, first to § 502.74, and now to § 502.92.

alternative form of written 30-day notice to shippers before applying such changes. In short, the CMA Group is trying to approximate the status quo had the cyberattack never occurred.

Given the potential harm to shippers that could be charged higher rates without the exemption, the limited duration and number of shipments subject to the exemption, and the CMA Group's commitment to providing alternative written 30-day notice to shippers before applying any tariff changes that would result in increased rates or charges, the Commission finds that the requested exemption will not result in substantial reduction in competition or be detrimental to commerce, subject to certain conditions.

Specifically, the CMA Group 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 the CMA Group member's customers; (2) prominent posting on the CMA Group's websites; or (3) other forms of notice determined to be acceptable by the Director of the Bureau of Trade Analysis. In addition, given that the CMA Group intends to publish all affected tariff changes by November 26, 2020, the exemption is limited to unpublished increases that are set to go into effect on or before December 25, 2020 (i.e., less than 30 days after November 26, 2020). Any increases set to go into effect on or after December 26, 2020, must comply with the publication and 30-day notice requirements in 46 U.S.C. § 40501(e) and 46 C.F.R. § 520.8(a).

Despite the determination that the requested exemption meets the standard set forth in § 40103, the Commission lacks the authority to provide the CMA Group with all the relief requested. 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. The CMA Group is seeking not only a prospective exemption that would allow them to apply unpublished tariff rates, charges, and rules to future shipments, but also an exemption that would permit them to apply unpublished tariff rates, charges, and rules retroactively to cargo that has already been received. Section 40103 does not permit the latter type of relief. Accordingly, the Commission is granting an exemption from the relevant tariff requirements only with respect to cargo that is received on or after the date of this order.

For cargo received prior to the date of this order, the Shipping Act provides an alternative process by which carriers may seek permission from the Commission to refund or waive collection of freight charges if “there is an error in a tariff, a failure to publish a new tariff, or an error in quoting a tariff, . . . the refund or waiver will not result in discrimination among shippers, ports, or carriers,” and the carrier has published a new tariff setting forth the rate on which the refund or waiver would be based.” 46 U.S.C. § 40503. The Commission's regulations at 46 C.F.R. part 502, subpart Q, describe the application requirements and the decision-making process. Such applications must be filed within 180 days from the date of sailing of the vessel from the port at which the cargo was loaded. 46 U.S.C. § 40503(3); 46 C.F.R. § 502.271(b).

The situation described by the CMA Group appears to be the type § 40503 is intended to address. The CMA Group has communicated tariff rate, charge, and rule changes to shippers but failed to publish those changes in its tariffs due to the cyberattack. Providing refunds or waiving charges in these circumstances would not appear to result in discrimination among shippers, ports, or carriers. Accordingly, for cargo

received prior to the date of this order, the CMA Group may use the process in § 40503 and the Commission's regulations in order to refund or waive collection of freight charges to reflect the tariff rates, charges, and rules previously communicated to shippers once it is able to publish those tariff items.⁸ To the extent that flexibility is needed with respect to the procedural requirements in 46 C.F.R. part 502, subpart Q, the Commission is willing to consider requests for waiver in accordance with 46 C.F.R. § 502.10.

III. CONCLUSION

For the reasons discussed above, the Commission grants in part and denies in part the petition, subject to the conditions stated below.

THEREFORE IT IS ORDERED, that the CMA Group's request for an exemption from 46 C.F.R. §§ 530.3(i), 530.8(a) and 530.14(a) is GRANTED provided that:

1. All service contracts and amendments applicable to cargo received by the carrier on or after September 27, 2020, must be filed with the Commission in the manner set forth in 46 C.F.R. part 530 by November 26, 2020, or 30 days after the effective date of the service contract or amendment, whichever is later; and
2. The exemption expires November 26, 2020.⁹

IT IS FURTHER ORDERED, that the CMA Group's request for exemption from 46 U.S.C. § 40501(e) and 46 C.F.R. §§ 520.7(c),

⁸ Relief under § 40503 is limited to refunding or waiving collection of freight charges. Section 40503 does not allow the CMA Group to apply unpublished increases retroactively.

⁹ November 26, 2020, is the last day on which the exemption applies. *See* 46 C.F.R. § 502.101.

520.8(a)(1), and 520.8(a)(4) is GRANTED with respect to cargo received by the CMA Group 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 November 26, 2020.
2. The CMA Group 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: (a) emails to all of the CMA Group member's customers; (b) prominent posting on the CMA Group's websites; or (c) other forms of notice determined to be acceptable by the Director of the Bureau of Trade Analysis.
2. The exemption from 46 C.F.R. §§ 520.7 and 520.8(a)(4) expires on November 26, 2020.¹⁰
3. The exemption from 46 C.F.R. § 520.8(a)(1) is limited to tariff changes effective on or before December 25, 2020.

IT IS FURTHER ORDERED, that the CMA Group's request for exemption from 46 U.S.C. § 40501(e) and 46 C.F.R. §§ 520.7(c), 520.8(a)(1), and 520.8(a)(4) is DENIED with respect to cargo received by the CMA Group before the date of this order.

¹⁰ November 26, 2020, is the last day on which the exemption applies. *See* 46 C.F.R. § 502.101.

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

By the Commission.

Rachel E. Dickon
Secretary