

INTRODUCTION TO THE FEDERAL MARITIME COMMISSION AND THE U.S. SHIPPING ACT OF 1984



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The Federal Maritime Commission

- Independent agency
- Five commissioners appointed by President and confirmed by Senate – no more than 3 from same political party
- Approximately 120 staff persons
- Administers Shipping Act of 1984 and certain other laws

History Of U.S. Shipping Legislation

- Shipping Act, 1916 and 1961 amendments
- Shipping Act of 1984 and Ocean Shipping Reform Act of 1998 (“OSRA”)

U.S. Shipping Act Of 1984, As Amended

- Comprehensive regulatory scheme covering ocean common carriers, ocean transportation intermediaries and marine terminal operators

Ocean Transportation Intermediaries

- Non-vessel operating common carrier (“NVOCC”) – common carrier that does not operate the vessels by which ocean transportation is provided and is shipper in relationship with ocean common carrier.
- Ocean Freight Forwarder (“OFF”) – person in the U.S. that dispatches shipments from the U.S. via ocean common carrier and books or arranges space for those shipments on behalf of shippers and processes the documentation or performs related activities incident to those shipments.
- Key differences

NVOCCS

- All NVOCCs operating in the U.S. trades, regardless of location, must publish a tariff and post financial security with the FMC. Bond amount is \$75,000 for U.S. NVOCCs and \$150,000 for foreign NVOCCs.
- NVOCCs located in the U.S. must obtain a license from the FMC.
- Non-U.S. NVOCCs without licenses may act in the U.S. only through an agent that is licensed as a NVOCC or as an ocean freight forwarder.
- NVOCCs in the U.S. trades are subject to same tariff publication requirements as VOCCs.
- NVOCCs can enter into confidential NVOCC Service Arrangements (“NSAs”) with their customers. NSAs are treated in the same manner as service contracts (must be filed confidentially with FMC and certain essential terms must be made available to the public).
- NVOCCs can enter into unfiled, confidential Negotiated Rate Agreements (“NRAs”) with their customer, although these are subject to limitations that may limit their usefulness.

Ocean Freight Forwarders

- Freight forwarders located in the United States providing services on U.S. export shipments must be licensed by the FMC and post financial security with the agency.
- FMC does not regulate freight forwarders located outside the U.S. or providing freight forwarding services in the U.S. import trades.
- Freight forwarders are not shippers and may not enter into service contracts for their own account.

Ocean Common Carrier

- Holds itself out to general public to provide transportation by water of passengers or cargo between the U.S. and a foreign country for compensation, assumes responsibility for transportation from port or point of receipt to port or point of destination, and uses, for all or part of that transportation, a vessel operating on the high seas or Great Lakes between a port in the U.S. and a port in a foreign country.
- Excludes ferry, tramp, chemical parcel tanker, and certain vessels engaged in carriage of perishable agricultural commodities.

Tariffs

- Must publish electronic tariff setting forth all rates, charges, classifications, rules, and practices.
- Changes to tariff resulting in increase in cost to shipper require 30 days' advance notice.
- Certain commodities (e.g., forest products, wastepaper, new assembled motor vehicles) are exempt from tariff publication.
- Unlawful to provide service on terms other than those set forth in tariff (except when transportation is governed by a service contract).
- Tariffs are legally binding on carrier and shipper.

Service Contracts

- Written contract, other than a bill of lading or receipt, between one or more shippers and an individual common carrier (or agreement between or among ocean common carriers) in which the shipper or shippers commit to providing a certain volume or portion of cargo over a fixed period of time and the carrier or agreement commits to a certain rate or rate schedule and a defined service level, such as assured space, transit time, port rotation, or similar service features.
- “Shipper” means cargo owner, bonded and tariffed NVO, or shippers’ association.

Service Contracts--Provisions

- Service Contracts must contain the following:
 - Origin scope*
 - Destination scope*
 - Commodity(ies) covered *
 - Minimum volume or portion*
 - Service commitment
 - Rates
 - Liquidated damages (if any)
 - Duration (effective and expiration dates)*
 - Legal names and addresses of parties
 - Names, titles and addresses of persons signing the contract
 - Date contract is signed
 - Certification of shipper status
 - Description of records that will be maintained to support performance of the contract
 - All other terms of agreement between parties

*public essential terms

Service Contracts – Filing, Publication and Confidentiality

- Service contracts must be filed with FMC electronically prior to implementation (as with tariffs, contracts for certain commodities are exempt from this requirement).
- Following contract terms must be made publicly available in tariff system:
 - Origin and destination scope
 - Commodity(ies)
 - Minimum volume or portion
 - Duration
- Confidentiality is optional, but is the norm

Some Shipping Act Prohibited Acts (Individual Carriers)

- Unreasonably refuse to deal or negotiate (for example, with a shipper).
- Charge or collect rates or charges other than those applicable in a published tariff or filed service contract (rebating).
- Engage in undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage (tariff service)
- Knowingly enter into a service contract with, or accept cargo from, an NVOCC that does not have the required tariff and bond.

Some Shipping Act Prohibited Acts (Individual Carriers)

- For service pursuant to a service contract, engage in any unfair or unjust discriminatory practice in the matter of rates or charges with respect to any port
- Fail to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property

Agreements Among Ocean Common Carriers

The statutory requirement for ocean common carriers to file their agreements with the FMC is comprehensive and includes agreements to --

- Discuss, fix or regulate rates
- Pool or apportion traffic, revenues, earnings and losses
- Allot ports or regulate number and character of sailings
- Limit or regulate the volume or character of cargo carried
- Engage in exclusive, preferential or cooperative working agreements
- Control, regulate or prevent competition
- Discuss and agree on any matter related to service contracts

Agreements (cont'd)

- The filing requirement is not limited to the filing of agreements that affect competition or which would otherwise violate the antitrust laws. All cooperative arrangements among liner companies must be filed.
- Agreements generally become effective 45 days after filing and may not be implemented before they go into effect.
- FMC may seek to enjoin operation of a substantially anticompetitive agreement by filing suit in district court.
 - Unreasonable increase in transportation cost
 - Unreasonable reduction in transportation service
- Some agreements/amendments exempt from 45-day waiting period or from filing.

Shipping Act Antitrust Exemption

- U.S. antitrust laws do not apply to any agreement filed with the FMC and effective under the Act or which is exempt from filing
- Also, antitrust laws do not apply to any activity or agreement within the scope of the Act, whether or not prohibited by the Act, undertaken or entered into with a reasonable basis to conclude that:
 - (A) It is pursuant to a filed or effective agreement, or
 - (B) It is exempt from any filing or publication requirement

FMC Oversight of Carrier Agreements

- Agreements with rate, service contract, or pooling authority must file minutes of meetings with FMC within 21 days of meeting. “Meetings” are broadly defined.
- Agreements with foregoing authority and a market share of 35% or more, and all agreements with capacity rationalization authority, must file quarterly monitoring reports with FMC within 75 days of the end of each calendar quarter.
- Simple space charter agreements with no rate or capacity rationalization authority are not subject to minute filing or quarterly reporting requirements, although FMC has authority to impose such requirements on an *ad hoc* basis.

Shipping Act Prohibited Acts (Two or More Carriers)

- Operate under agreement that is not filed or filed but not in effect, or contrary to effective agreement.
- Prohibit or restrict negotiations for individual service contracts, or require disclosure of same, or affect right to negotiate and enter into service contracts.
- Boycott or take any other concerted action resulting in an unreasonable refusal to deal.
- Allocate shippers among carriers or prohibit a carrier from soliciting cargo from a particular shipper.
- Unjustly discriminate against NVOCCs or shippers' associations due to their status.

Monetary Penalties

- Violation of a Shipping Act provision or FMC regulation can result in a civil penalty up to \$9,000 per violation or, if knowing and willful, up to \$45,000 per violation.
- Each day of continuing violation is a separate violation.
- Such penalties can be assessed for violation of agreement requirements or for tariff or service contract actions.
- FMC case law has held that each bill of lading is a separate violation.

Marine Terminal Operators -- General

- Person in the U.S. engaged in the business of providing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier.
- Required to register with FMC (Form FMC-1).
- Can voluntarily publish marine terminal schedule (similar to carrier tariff), but not required to do so.
- Marine terminal schedule contractually binding in absence of actual contract.

Marine Terminal Operator Agreements

- Must file agreements between one or more marine terminal operators and one or more ocean common carriers to:
 - Discuss, fix, or regulate rates or other conditions of service
 - Engage in exclusive, preferential or cooperative working arrangements, to the extent the agreement involves ocean transportation in the foreign commerce of the United States

Port Congestion -- Causes

- Larger ships/increased volume
- Truck supply/HOS
- Chassis
- Infrastructure
- Weather
- Technology
- Work Rules/Practices

FMC Role in Congestion

- Listening sessions in LA/LB, Baltimore, Charleston and New Orleans
- Has some authority (e.g., NY/NJ demurrage and detention rules)

Role of Ports/Terminals

- Can ports/terminals work together to address congestion and other issues (productivity, environmental, land use)?
- Some examples:
 - Alameda Corridor
 - PierPASS
 - LA/LB Clean Truck program
 - VPA/APMT
 - Seattle/Tacoma
 - “Gray Pools”

THANK YOU

