

Federal Maritime Commission

§ 535.101

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PART 535—OCEAN COMMON CARRIER AND MARINE TERMINAL OPERATOR AGREEMENTS SUBJECT TO THE SHIPPING ACT OF 1984

Subpart A—General Provisions

- Sec.
- 535.101 Authority.
- 535.102 Purpose.
- 535.103 Policies.
- 535.104 Definitions.

Subpart B—Scope

- 535.201 Subject agreements.
- 535.202 Non-subject agreements.

Subpart C—Exemptions

- 535.301 Exemption procedures.
- 535.302 Exemptions for certain modifications of effective agreements.
- 535.303 Husbanding agreements—exemption.
- 535.304 Agency agreements—exemption.
- 535.305 Equipment interchange agreements—exemption.
- 535.306 Nonexclusive transshipment agreements—exemption.
- 535.307 Agreements between or among wholly-owned subsidiaries and/or their parent—exemption.
- 535.308 Marine terminal agreements—exemption.
- 535.309 Marine terminal services agreements—exemption.
- 535.310 Marine terminal facilities agreements—exemption.
- 535.311 Low market share agreements—exemption.
- 535.312 Vessel charter party—exemption.

Subpart D—Filing of Agreements

- 535.401 General requirements.
- 535.402 Complete and definite agreements.
- 535.403 Form of agreements.
- 535.404 Agreement provisions.
- 535.405 Organization of conference agreements.
- 535.406 Modification of agreements.
- 535.407 Application for waiver.
- 535.408 Activities that may be conducted without further filings.

Subpart E—Information Form Requirements

- 535.501 General requirements.
- 535.502 Agreements subject to the Information Form requirements.
- 535.503 Information Form.

- 535.504 Application for waiver.

Subpart F—Action on Agreements

- 535.601 Preliminary review—rejection of agreements.
- 535.602 FEDERAL REGISTER notice.
- 535.603 Comment.
- 535.604 Waiting period.
- 535.605 Requests for expedited review.
- 535.606 Requests for additional information.
- 535.607 Failure to comply with requests for additional information.
- 535.608 Confidentiality of submitted material.
- 535.609 Negotiations.

Subpart G—Reporting Requirements

- 535.701 General requirements.
- 535.702 Agreements subject to Monitoring Report and alternative periodic reporting requirements.
- 535.703 Monitoring Report form.
- 535.704 Filing of minutes.
- 535.705 Application for waiver.

Subpart H—Mandatory and Prohibited Provisions

- 535.801 Independent action.
- 535.802 Service contracts.
- 535.803 Ocean freight forwarder compensation.

Subpart I—Penalties

- 535.901 Failure to file.
- 535.902 Falsification of reports.

Subpart J—Paperwork Reduction

- 535.991 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

APPENDIX A TO PART 535—INFORMATION FORM AND INSTRUCTIONS

APPENDIX B TO PART 535—MONITORING REPORT AND INSTRUCTIONS

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. 305, 40101–40104, 40301–40307, 40501–40503, 40901–40904, 41101–41109, 41301–41302, and 41305–41307.

SOURCE: 69 FR 64414, Nov. 4, 2004, unless otherwise noted.

Subpart A—General Provisions

§ 535.101 Authority.

The rules in this part are issued pursuant to the authority of section 4 of the Administrative Procedure Act (5 U.S.C. 553), sections 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 15, 16, 17, and 19 of the Shipping Act of 1984 (“the Act”) (46 U.S.C. 305, 40101–40104, 40301–40307, 40501–40503, 40901–40904, 41101–41109, 41301–41302, and

§ 535.102

41305–41307), and the Ocean Shipping Reform Act of 1998, Pub. L. 105–258, 112 Stat. 1902.

[69 FR 64414, Nov. 4, 2004, as amended at 74 FR 50727, Oct. 1, 2009]

§ 535.102 Purpose.

This part implements those provisions of the Act that govern agreements by or among ocean common carriers and agreements among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers. This part also sets forth more specifically certain procedures provided for in the Act.

§ 535.103 Policies.

(a) The Act requires that agreements be processed and reviewed, upon their initial filing, according to strict statutory deadlines. This part is intended to establish procedures for the orderly and expeditious review of filed agreements in accordance with the statutory requirements.

(b) The Act requires that agreements be reviewed, upon their initial filing, to ensure compliance with all applicable provisions of the Act and empowers the Commission to obtain information to conduct that review. This part identifies those types of agreements that must be accompanied by information submissions when they are first filed, and sets forth the kind of information for certain agreements that the Commission believes relevant to that review. Only information that is relevant to such a review is requested. It is the policy of the Commission to keep the costs of regulation to a minimum and at the same time obtain information needed to fulfill its statutory responsibility.

(c) To further the goal of expedited processing and review of agreements upon their initial filing, agreements are required to meet certain minimum requirements as to form. These requirements are intended to ensure expedited review and should assist parties in preparing agreements. These requirements as to form do not affect the substance of an agreement and are intended to allow parties the freedom to develop innovative commercial rela-

46 CFR Ch. IV (10–1–09 Edition)

tionships and provide efficient and economic transportation systems.

(d) The Act itself excludes certain agreements from the filing requirements and authorizes the Commission to exempt other classes of agreements from any requirement of the Act or this part. To minimize delay in the implementation of routine agreements and to avoid the private and public cost of unnecessary regulation, certain classes of agreements are exempt from the filing requirements of this part.

(e) Under the regulatory framework established by the Act, the role of the Commission as a monitoring agency has been enhanced. The Act favors greater freedom in allowing parties to form their commercial arrangements. This, however, requires greater monitoring of agreements after they have become effective to assure their continued compliance with all applicable provisions of the Act. The Act empowers the Commission to impose certain recordkeeping and reporting requirements. This part identifies those agreements that require specific record retention and reporting to the Commission and prescribes the applicable period of record retention, the form and content of such reporting, and the applicable time periods for filing with the Commission. Only information that is necessary to assure that the Commission's monitoring responsibilities will be fulfilled is requested.

(f) The Act requires that conference agreements contain certain mandatory provisions. Each conference agreement must:

- (1) State its purpose;
- (2) Provide reasonable and equal terms and conditions for admission and readmission to membership;
- (3) Allow for withdrawal from membership upon reasonable notice without penalty;
- (4) Require an independent neutral body to police the conference, if requested by a member;
- (5) Prohibit conduct specified in sections 10(c)(1) or 10(c)(3) of the Act (46 U.S.C. 41105(1) or 41105(3));
- (6) Provide for a consultation process;
- (7) Establish procedures for considering shippers' requests and complaints; and

(8) Provide for independent action.

(g) To promote competitive and efficient transportation and a greater reliance on the marketplace, the Act places limits on carriers' agreements regarding service contracts. Carriers may not enter into an agreement to prohibit or restrict members from engaging in contract negotiations, may not require members to disclose service contract negotiations or terms and conditions (other than those required to be published), and may not adopt mandatory rules or requirements affecting the right of an agreement member or agreement members to negotiate and enter into contracts. However, agreement members may adopt voluntary guidelines covering the terms and procedures of members' contracts.

[69 FR 64414, Nov. 4, 2004, as amended at 74 FR 50727, Oct. 1, 2009]

§ 535.104 Definitions.

When used in this part:

(a) *Agreement* means an understanding, arrangement, or association, written or oral (including any modification, cancellation or appendix) entered into by or among ocean common carriers and/or marine terminal operators, but does not include a maritime labor agreement.

(b) *Antitrust laws* means the Act of July 2, 1890 (ch. 647, 26 Stat. 209), 15 U.S.C. 1, as amended; the Act of October 15, 1914 (ch. 323, 38 Stat. 730), 15 U.S.C. 12, as amended; the Federal Trade Commission Act (38 Stat. 717), 15 U.S.C. 41, as amended; sections 73 and 74 of the Act of August 27, 1894 (28 Stat. 570), 15 U.S.C. 8, 9, as amended; the Act of June 19, 1936 (ch. 592, 49 Stat. 1526), 15 U.S.C. 13, as amended; the Antitrust Civil Process Act (76 Stat. 548), 15 U.S.C. 1311, note as amended; and amendments and Acts supplementary thereto.

(c) *Appendix* means a document containing additional material of limited application and appended to an agreement, distinctly differentiated from the main body of the basic agreement.

(d) *Assessment agreement* means an agreement, whether part of a collective bargaining agreement or negotiated separately, that provides for collectively bargained fringe benefit obligations on other than a uniform man-

hour basis regardless of the cargo handled or type of vessel or equipment utilized.

(e) *Capacity rationalization* means a concerted reduction, stabilization, withholding, or other limitation in any manner whatsoever by ocean common carriers on the size or number of vessels or available space offered collectively or individually to shippers in any trade or service.

(f) *Common carrier* means a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from the port or point of receipt to the port or point of destination; and

(2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel tanker, or by a vessel when primarily engaged in the carriage of perishable agricultural commodities:

(i) If the common carrier and the owner of those commodities are wholly owned, directly or indirectly, by a person primarily engaged in the marketing and distribution of those commodities; and

(ii) Only with respect to those commodities.

(g) *Conference agreement* means an agreement between or among two or more ocean common carriers that provides for the fixing of and adherence to uniform tariff rates, charges, practices, and conditions of service relating to the receipt, carriage, handling and/or delivery of passengers or cargo for all members. The term does not include joint service, pooling, sailing, space charter, or transshipment agreements.

(h) *Consultation* means a process whereby a conference and a shipper confer for the purpose of promoting the commercial resolution of disputes and/or the prevention and elimination of the occurrence of malpractices.

(i) *Cooperative working agreement* means an agreement that establishes

exclusive, preferential, or cooperative working relationships that are subject to the Act, but that do not fall precisely within the parameters of any specifically defined agreement.

(j) *Effective agreement* means an agreement effective under the Act.

(k) *Equal access agreement* means an agreement between ocean common carriers of different nationalities, as determined by the incorporation or domicile of the carriers' operating companies, whereby such ocean common carriers associate for the purpose of gaining reciprocal access to cargo that is otherwise reserved by national decree, legislation, statute or regulation to carriage by the merchant marine of the carriers' respective nations.

(l) *Independent neutral body* means a disinterested third party, authorized by a conference and its members to review, examine, and investigate alleged breaches or violations of the conference agreement and/or the conference's properly promulgated tariffs, rules, or regulations by any member of the conference.

(m) *Information Form* means the form containing economic information that must accompany the filing of certain agreements and modifications.

(n) *Interconference agreement* means an agreement between conferences.

(o)(1) *Joint service agreement* means an agreement between ocean common carriers operating as a joint venture whereby a separate service is established that:

(i) Holds itself out in its own distinct operating name;

(ii) Independently fixes its own rates, charges, practices, and conditions of service or chooses to participate under its operating name in another agreement that is duly authorized to determine and implement such activities;

(iii) Independently publishes its own tariff or chooses to participate under its operating name in an otherwise established tariff;

(iv) Issues its own bills of lading; and

(v) Acts generally as a single carrier.

(2) The common use of facilities in a joint service may occur, and there is no competition between members for cargo in the agreement trade; but they otherwise maintain their separate identities.

(p) *Marine terminal facilities* means one or more structures (and services connected therewith) comprising a terminal unit, including, but not limited to docks, berths, piers, aprons, wharves, warehouses, covered and/or open storage space, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo and/or passengers or the interchange of same between land and ocean common carriers or between two ocean common carriers. This term is not limited to waterfront or port facilities and includes so-called off-dock container freight stations at inland locations and any other facility from which inbound waterborne cargo may be tendered to the consignee or outbound cargo may be received from shippers for vessel or container loading.

(q) *Marine terminal operator* means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to subchapter II of chapter 135 of title 49 U.S.C. This term does not include shippers or consignees who exclusively furnish marine terminal facilities or services in connection with tendering or receiving proprietary cargo from a common carrier or water carrier.

(r) *Maritime labor agreement* means a collective-bargaining agreement between an employer subject to the Act or group of such employers, and a labor organization representing employees in the maritime or stevedoring industry, or an agreement preparatory to such a collective-bargaining agreement among members of a multi-employer bargaining group, or an agreement specifically implementing provisions of such a collective-bargaining agreement or providing for the formation, financing or administration of a multi-employer bargaining group; but the term does not include an assessment agreement.

(s) *Modification* means any change, alteration, correction, addition, deletion, or revision of an existing effective agreement or to any appendix to such an agreement.

(t) *Monitoring Report* means the report containing economic information that must be filed at defined intervals with regard to certain agreements that are effective under the Act.

(u) *Ocean common carrier* means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

(v) *Ocean freight forwarder* means a person in the United States that dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers; and processes the documentation or performs related activities incident to those shipments.

(w) *Person* means individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States or of a foreign country.

(x) *Pooling agreement* means an agreement between ocean common carriers that provides for the division of cargo carryings, earnings, or revenue and/or losses between the members in accordance with an established formula or scheme.

(y) *Port* means the place at which an ocean common carrier originates or terminates (and/or transships) its actual ocean carriage of cargo or passengers as to any particular transportation movement.

(z) *Rate*, for purposes of this part, includes both the basic price paid by a shipper to an ocean common carrier for a specified level of transportation service for a stated quantity of a particular commodity, from origin to destination, on or after a stated effective date or within a defined time frame, and also any accessorial charges or allowances that increase or decrease the total transportation cost to the shipper.

(aa) *Rate agreement* means an agreement between ocean common carriers that authorizes the discussion of or agreement on, either on a binding basis under a common tariff or on a non-

binding basis, any kind of rate or charge.

(bb) *Sailing agreement* means an agreement between ocean common carriers to provide service by establishing a schedule of ports that each carrier will serve, the frequency of each carrier's calls at those ports, and/or the size and capacity of the vessels to be deployed by the parties. The term does not include joint service agreements, or capacity rationalization agreements.

(cc) *Service contract* means a written contract, other than a bill of lading or a receipt, between one or more shippers and an individual ocean common carrier or an agreement between or among ocean common carriers in which the shipper or shippers makes a commitment to provide a certain volume or portion of cargo over a fixed time period, and the ocean common carrier or the 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. The contract may also specify provisions in the event of non-performance on the part of any party.

(dd) *Shipper* means:

- (1) A cargo owner;
- (2) The person for whose account the ocean transportation is provided;
- (3) The person to whom delivery is to be made;
- (4) A shippers' association; or
- (5) A non-vessel-operating common carrier (*i.e.*, a common carrier that does not operate the vessels by which the ocean transportation is provided and is a shipper in its relationship with an ocean common carrier) that accepts responsibility for payment of all charges applicable under the tariff or service contract.

(ee) *Shippers' association* means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

(ff) *Shippers' requests and complaints* means a communication from a shipper to a conference requesting a change in tariff rates, rules, regulations, or service; protesting or objecting to existing rates, rules, regulations or service; objecting to rate increases or other tariff

changes; protesting allegedly erroneous service contract or tariff implementation or application, and/or requesting to enter into a service contract. Routine information requests are not included in the term.

(gg) *Space charter agreement* means an agreement between ocean common carriers whereby a carrier (or carriers) agrees to provide vessel space for use by another carrier (or carriers) in exchange for compensation or services. The arrangement may include arrangements for equipment interchange and receipt/delivery of cargo, but may not include capacity rationalization as defined in this subpart.

(hh) *Sub-trade* means the scope of ocean liner cargo carried between each U.S. port range and each foreign country within the scope of the agreement. U.S. port ranges are defined as follows:

(1) Atlantic and Gulf shall encompass ports along the eastern seaboard and the Gulf of Mexico from the northern boundary of Maine to Brownsville, Texas. It also includes all ports bordering on the Great Lakes and their connecting waterways, all ports in the State of New York on the St. Lawrence River, and all ports in Puerto Rico and the U.S. Virgin Islands; and

(2) Pacific shall encompass all ports in the States of Alaska, Hawaii, California, Oregon, and Washington. It also includes all ports in Guam, American Samoa, Northern Marianas, Johnston Island, Midway Island, and Wake Island.

(ii) *Through transportation* means continuous transportation between origin and destination for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is an ocean common carrier, between a United States point or port and a foreign point or port.

(jj) *Transshipment agreement* means an agreement between an ocean common carrier serving a port or point of origin and another such carrier serving a port or point of destination, whereby cargo is transferred from one carrier to another carrier at an intermediate port served by direct vessel call of both such carriers in the conduct of through transportation and the publishing carrier performs the transportation on one leg of the through transportation on

its own vessel or on a vessel on which it has rights to space under a filed and effective agreement. Such an agreement does not provide for the concerted discussion, publication or otherwise fixing of rates for the account of the cargo interests, conditions of service or other tariff matters other than the tariff description of the transshipment service offered, the port of transshipment and the participation of the nonpublishing carrier. An agreement that involves the movement of cargo in a domestic offshore trade as part of a through movement of cargo via transshipment involving the foreign commerce of the United States shall be considered to be in the foreign commerce of the United States and, therefore, subject to the Act and this part.

(kk) *Vessel-operating costs* means any of the following expenses incurred by an ocean common carrier: salaries and wages of officers and unlicensed crew, including relief crews and others regularly employed aboard the vessel; fringe benefits; expenses associated with consumable stores, supplies and equipment; vessel fuel and incidental costs; vessel maintenance and repair expense; hull and machinery insurance costs; protection and indemnity insurance costs; costs for other marine risk insurance not properly chargeable to hull and machinery insurance or to protection and indemnity insurance accounts; and charter hire expenses.

Subpart B—Scope

§ 535.201 Subject agreements.

(a) *Ocean common carrier agreements.* This part applies to agreements by or among ocean common carriers to:

(1) Discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service;

(2) Pool or apportion traffic, revenues, earnings, or losses;

(3) Allot ports or restrict or otherwise regulate the number and character of sailings between ports;

(4) Limit or regulate the volume or character of cargo or passenger traffic to be carried;

(5) Engage in exclusive, preferential, or cooperative working arrangements