subpoena, or other legal process requiring such disclosure or testimony, if he or she determines that the records or testimony are relevant to the hearing, proceeding or investigation and that disclosure is in the best interests of justice and not otherwise prohibited by Federal statute. Customer financial records shall not be disclosed to any federal agency pursuant to this paragraph that is not a federal financial supervisory agency, unless the records are sought under the Federal Rules of Civil Procedure (28 U.S.C. appendix) or the Federal Rules of Criminal Procedure (18 U.S.C. appendix) or comparable rules of other courts and in connection with litigation to which the receiving federal agency, employee, officer, director, or agent, and the customer are parties, or disclosure is otherwise subject to the relevant exceptions in the RFPA. Where the General Counsel or designee authorizes a current or former officer, director, employee or agent of the Corporation to testify or disclose exempt records pursuant to this paragraph (b)(8), he or she may, in his or her discretion, limit the authorization to so much of the record or testimony as is relevant to the issues at such hearing, proceeding or investigation, and he or she shall give authorization only upon fulfillment of such conditions as he or she deems necessary and practicable to protect the confidential nature of such records or testimony.

(9) *Authorization for disclosure by the Chairman of the Corporation's Board of Directors.* Except where expressly prohibited by law, the Chairman of the Corporation's Board of Directors may in his or her discretion, authorize the disclosure of any Corporation records. Except where disclosure is required by law, the Chairman may direct any current or former officer, director, employee or agent of the Corporation to refuse to disclose any record or to give testimony if the Chairman determines, in his or her discretion, that refusal to permit such disclosure is in the public interest.

(10) *Limitations on disclosure.* All steps practicable shall be taken to protect the confidentiality of exempt records and information. Any disclosure permitted by paragraph (b) of this section is discretionary and nothing in paragraph (b) of this section shall be construed as requiring the disclosure of information. Further, nothing in paragraph (b) of this section shall be construed as restricting, in any manner, the authority of the Board of Directors, the Chairman of the Board of Directors, the Director of the Corporation's Division having primary authority over the exempt records, the Corporation's General Counsel, or their designees, or any other Corporation Division or Office head, in their discretion and in light of the facts and circumstances attendant in any given case, to require conditions upon and to limit the form, manner, and extent of any disclosure permitted by this section. Wherever practicable, disclosure of exempt records shall be made pursuant to a protective order and redacted to exclude all irrelevant or non-responsive exempt information.

§ 309.7 Service of process.

(a) *Service.* Any subpoena or other legal process to obtain information maintained by the FDIC shall be duly issued by a court having jurisdiction over the FDIC, and served upon either the Executive Secretary (or designee), FDIC, 550 17th Street, N.W., Washington, DC 20429, or the Regional Director or Regional Manager of the FDIC region where the legal action from which the subpoena or process was issued is pending. A list of the FDIC's regional offices is available from the Office of Corporate Communications, FDIC, 550 17th Street, N.W., Washington, DC 20429 (telephone 202–898–6996). Where the FDIC is named as a party, service of process shall be made pursuant to the Federal Rules of Civil Procedure, and upon the Executive Secretary (or designee), FDIC, 550 17th Street N.W., Washington, DC 20429, or upon the agent designated to receive service of process in the state, territory, or jurisdiction in which any insured depository institution is located. Identification of the designated agent in the state, territory, or jurisdiction may be obtained from the Office of the Executive Secretary or from the Office of the General Counsel, FDIC, 550 17th Street N.W., Washington, DC 20429. The Executive Secretary (or designee), Regional Director or designated agent shall immediately forward any subpoena, court order or legal process to the General Counsel. The Corporation may require the payment of fees, in accordance with the fee schedule referred to in § 309.5(c)(3), prior to the release of any records requested pursuant to any subpoena or other legal process.

(b) *Notification by person served.* If any current or former officer, director, employee or agent of the Corporation, or any other person who has custody of records belonging to the FDIC, is served with a subpoena, court order, or other process requiring that person's attendance as a witness concerning any matter related to official duties, or the production of any exempt record of the Corporation, such person shall promptly advise the Office of the Corporation's General Counsel of such service, of the testimony and records described in the subpoena, and of all relevant facts which may be of assistance to the General Counsel in determining whether the individual in question should be authorized to testify or the records should be produced. Such person should also inform the court or tribunal which issued the process and the attorney for the party upon whose application the process was issued, if known, of the substance of this section.

(c) *Appearance by person served.* Absent the written authorization of the Corporation's General Counsel, or designee, to disclose the requested information, any current or former officer, director, employee, or agent of the Corporation, and any other person having custody of records of the Corporation, who is required to respond to a subpoena or other legal process, shall attend at the time and place therein specified and respectfully decline to produce any such record or give any testimony with respect thereto, basing such refusal on this section.

By Order of the Board of Directors.

Dated at Washington, DC this 14th day of November, 1995.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Deputy Executive Secretary.

[FR Doc. 95–28718 Filed 11–29–95; 8:45 am]

BILLING CODE 6714–01–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Parts 221 and 292

[Docket No. 49827]

RIN 2105–AC09

Exemption From Property Tariff-Filing Requirements

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

SUMMARY: The Department is exempting U.S. and foreign air carriers from their statutory and regulatory duty to file international property (''cargo'') tariffs with DOT, subject to the reimposition of the duty in specific cases when consistent with the public interest. Commencing with the date of effectiveness of the final rule, currently effective rate tariffs are canceled as a matter of law, pending tariff applications are dismissed, and new tariffs will not be accepted for filing. In response to comments, currently effective cargo rules related to carrier

rights and/or obligations, set forth in general governing rules tariffs, may continue in legal effect for 90 days from the date of effectiveness of the final rule, although carriers may elect to cancel them earlier and also may deviate from such rules through express contract. This action is taken on the Department's initiative in order to streamline government operations and eliminate unjustified regulatory burdens.

DATES: This regulation is effective on November 30, 1995.

However the cancellation of certain tariffs pursuant to the first sentence of § 292.22(b) will take place on March 1, 1996.

FOR FURTHER INFORMATION CONTACT: Mr. Keith A. Shangraw or Mr. John H. Kiser, Office of the Secretary, Office of International Aviation, X–43, Department of Transportation, 400 Seventh Street SW., Washington, DC 20590. Telephone: (202) 366–2435.

SUPPLEMENTARY INFORMATION:

Background

Section 41504 of Title 49 of the United States Code requires every U.S. and foreign air carrier to file with the Department, and to keep open for public inspection, tariffs showing all prices for foreign air transportation between points served by that carrier, as well as all rules relating to that transportation to the extent required by the Department. This includes prices and rules for the carriage of cargo.

Over the years, cargo rate tariffs have provided U.S. regulatory authorities with a means to exercise close regulatory supervision over cargo pricing, either for consumer protection and other public policy reasons, or in the context of bilateral aviation relations. While much less frequent, regulatory supervision of cargo rules was also occasionally exercised. During the last two decades, however, cargo tariff requirements have been reduced substantially by both legislative and regulatory action in favor of placing primary reliance on competitive market forces to achieve essential public policy objectives.[1] For this and other reasons discussed in our Notice of Proposed Rulemaking (NPRM), published October 24, 1994 (59 FR 53377), we have tentatively found that the remaining cargo rate tariffs are no longer necessary to protect the public interest, and that this tariff regime is costly and burdensome to everyone associated with it.

As discussed in the NPRM, the Department's regulatory policy regarding international cargo rates appears at 14 CFR § 399.41. Under this regulation, carrier prices in most international cargo rate categories are effectively deregulated.[2] Barring extreme circumstances, the only tariff rates over which we continue to exercise regulatory supervision are general cargo rates (GCRs) up to and including the 500 kilogram weightbreak, and certain non-standard ''exception'' rates.[3] Even this oversight is not applicable to markets governed by bilateral air transport agreements that establish liberal entry and pricing regimes.

Since the regulation's adoption in 1983, virtually no complaints have been received against filed cargo tariffs, and in many markets carriers have not used the upward flexibility available to them to raise rates to the SFRL ceilings. The international cargo market has continued to evolve to the point where today we believe we no longer need to rely on the routine government supervision of cargo tariffs to protect the public.

Yet, carriers are still filing, and we are still processing, thousands of pages of tariff material each year that has little, if any, meaningful regulatory consequence.[4] Requiring carriers to continue filing cargo tariffs thus burdens the industry unnecessarily, and continuing the physical processing and storage of such tariffs at the Department needlessly wastes scarce and diminishing governmental resources.

We have therefore proposed to amend our tariff regulations to end the routine filing and review of price and other tariff information relating to the scheduled foreign air transportation of cargo, *i.e.* to/from U.S. points. As in the case of the previous elimination of domestic and other cargo tariffs, this proposal would take the form of an exemption of U.S. and foreign carriers from their statutory and regulatory duty to file with the Department, and adhere to, tariffs containing rates or any other rules or conditions of service relating to such transportation. The exemption would encompass all material currently filed in international cargo tariffs with the Department.[5] Similarly, the exemption would be mandatory; it would not permit such filings. However, the duty to file tariffs in any respect could be reimposed in particular cases where consistent with the public interest.

Comments

We received comments on our proposal from Aeromexpress, S.A. de C.V.; the Air Freight Association (AFA); the Air Transport Association of America (ATA); American Airlines, Inc. (American); Athearn Transportation Consultants, Inc. (Athearn); British Airways PLC (BA); Evergreen International Airlines, Inc. (Evergreen); Haupauge Industrial Association (HIA); the International Air Transport Association (IATA); International Support Systems (ISS); Korean Air Lines, Co. (KAL); Nippon Cargo Airlines Co., Ltd. (Nippon); Ocean Freight Consultants, Inc. (OFC); Pakistan International Airlines (PIA); and United Air Lines, Inc. (UAL).

In general, the carriers, ATA and AFA support the proposal; IATA takes no position on the elimination of the requirement to file rate tariffs, but supports the continued filing of cargo rules tariffs; HIA wants the Department to require carriers to make information on their cargo rates available to shippers within a reasonable amount of time; and Athearn, ISS and OFC oppose the proposal in its entirety.

ATA, AFA, and several carriers, however, condition their support upon several modifications or clarifications to the proposal regarding (1) its effect on their ability to incorporate contract terms by reference and/or provide requisite public notice, and (2) its effect

[1] In the cargo area, only international scheduled cargo rate tariffs continue to be filed with the Department. Domestic scheduled service cargo tariffs were eliminated in 1978 by Regulation ER–1080, 43 FR 53635, November 16, 1978. Similarly, both domestic and international charter rate tariffs were eliminated in 1979 by ER–1125, 44 FR 33056, June 8, 1979, while domestic and international tariffs of air freight forwarders (part of a class of carriers called ''indirect cargo air carriers'' or ''foreign indirect air carriers'') were eliminated by ER–1094, 44 FR 6634, February 1, 1979, and by ER–1159, 44 FR 69635, December 4, 1979.

[2] Agreements containing international cargo rates that carriers coordinate through the tariff conferences of the International Air Transport Association (IATA) must be filed with and approved by the Department before they can be implemented. These agreements are subject to economic justification requirements and Department analysis that are independent of its tariff policy and procedures. The new rule is not intended to affect the review of IATA agreements in any way.

[3] Section 399.41 set zones of pricing flexibility for GCRs up to 500 kilograms, and established a Standard Foreign Rate Level (SFRL) for each market as the basis for these zones of flexibility. The SFRL is recalculated periodically to reflect changes in the cost experiences of the carriers. The SFRL zones also govern exception rates, priced at levels higher than comparable GCRs for shipments of live animals, perishable goods and other kinds of specialized cargo.

[4] In 1994 alone, we received and processed 9,721 pages of cargo tariffs.

[5] Part 221 provides for the filing of up to four seperate kinds of international cargo tariffs: rates tariffs, governing rules tariffs, rate classification tariffs, and restricted articles tariffs.

on federal preemption of State law governing contracts or the regulation of common carriers. Their position on both issues coincides in certain fundamental respects with IATA's reasons for urging the continued filing of cargo rules tariffs, and therefore we will discuss these comments together. Then we will address the arguments of the parties who support the continuation of cargo rates tariffs as well.

Decision

We have decided to adopt the NPRM substantially as proposed. However, we are making certain minor changes in response to the comments. First, as a transition measure, we will permit the carriers to maintain in effect as official tariffs their current rules relating to the general conditions of carriage,[6] for a period of up to ninety days, in order to maintain the legal framework for current contracts while the carriers are drafting new language for air waybill and/or other documents to provide acceptable forms of actual notice to shippers of such terms. We do not find a similar transitional need for cargo rate tariffs, including related applicability rules,[7] because pricing is a key term negotiated and stated in every contract. At the same time, we are providing expressly that carriers may cancel any or all rules tariffs prior to 90 days, and that they may deviate from any filed rules by express contract provision. Second, we are providing explicitly that carrier compliance with the notice requirements set forth in 14 CFR 221.177 permits incorporation of contract terms as a matter of federal law, and that such requirements supercede any contrary State contract law requirements relating to incorporation by reference. On the other hand, we are also making clear that terms cannot be enforced against shippers without proper notice. We also make explicit, in our discussion below, that this cargo tariff exemption is not intended to undermine in any respect the scope of the statutory preemption of State economic regulation provided under 49 U.S.C. 41713.

We find that this final rule should be made effective immediately upon publication in the Federal Register because it grants an exemption from costly regulatory burdens and relieves certain restrictions.

[6] This would include all rules in separate governing rules tariffs and separate restricted articles tariffs.

[7] This would include rate ''classification'' tariffs, which, as IATA notes, may be filed in the rate tariffs or separately.

Discussion of Comments and Issues

1. Notice. Most of the concerns raised by our proposal involve the issue of legal notice of contract terms. While taking no position on the elimination of the requirement to file cargo *rate* tariffs, IATA contends that the proposed rule should be amended to permit the continued filing of cargo *rules* tariffs governing such matters as consignments, liability for loss, claims procedures, handling of dangerous or other restricted goods, acceptability of cargo, and other general matters of concern to shippers of cargo to/from U.S. points. It argues primarily that such rules should continue to be deemed a part of each contract of carriage as a matter of tariff law, regardless of any actual notice to shippers of their existence or content.[8] ATA, AFA, American and United support the elimination of all official tariffs, but want the proposed rule amended or clarified so that a carrier's continued publication of its cargo tariffs or the ''filing of its rates and rules with a named tariff publishing agent'' will ''provide constructive notice to the public of their contents.'' [9] In the alternative, ATA and American request that cargo tariffs be permitted to remain in effect for 180 days in order to allow carriers to revise existing air waybill language to provide adequate notice of all contract terms. British Airways requests at least a 90-day transition period, paralleling the action of the Civil Aeronautics Board (CAB) in eliminating charter tariffs, forwarder tariffs and carrier tariffs for domestic cargo transportation.

IATA joins ATA, American and British Airways in arguing that an immediate elimination of official rules tariffs will cause a disruption in the administration of existing contracts because most waybills state only generally that carriage is subject to the carrier's ''applicable tariffs.'' [10] We are persuaded, as was the CAB in taking similar actions, that a brief transition period of 90 days is justified to permit clarification of any existing contracts that may be rendered ambiguous by reference to rules tariffs no longer officially on file with the Department and to facilitate the redrafting of waybills and other contract documents to provide acceptable actual notice of any missing terms, whether through incorporation by reference or otherwise. A longer period may cause confusion and appears unnecessary. Carriers are neither required nor expected to completely replace their current waybill stock in this 90-day period. The period should be sufficient, however, for them to print notices or other supplemental contractual materials to conform such stock to the new environment until it can be replaced. Carriers needing less time should be able to cancel their rules tariffs when ready, while no carrier should be bound to tariffs on file during the transition where negotiations with shippers suggest a different result.

IATA argues that in the longer term eliminating rules tariffs will not only force carriers to incur the cost of redrafting waybills or other contract documents to provide adequate forms of notice of contract terms, but also that efforts to incorporate terms by reference could engender litigation under State contract law. It also contends that many matters not now subject to direct carrier-shipper negotiation would become so, with the effect of reducing uniformity among carriers, complicating transactions, and hindering the introduction of a paperless ''electronic data interface.'' In IATA's view, such burdens greatly outweigh the perceived cost savings related to the elimination of rules which assertedly change infrequently and impose relatively few administrative costs on DOT and filing parties. IATA contends that the Department's ''narrow cost-benefit analysis'' fails to recognize that the tariff system provides the most efficient means of establishing uniform, binding and predictable contract conditions of carriage, and that therefore the Department has failed to demonstrate that the exemption is ''compelled'' by the public interest.

At the outset, we note that IATA's position contains two fundamental errors. First, the filing of rules tariffs is not a statutory requirement. Rather, rules are to be filed to the extent that the Secretary requires by regulation. It is sufficient to find that the continued filing and review of such tariffs can no longer be justified by the public interest factors underlying the promulgation of the original filing requirement in Part 221, which is certainly the case. Secondly, we do not presume that carriers will cease publishing their rates and rules in tariff-like formats. To the contrary, we assume that the carriers will continue to promulgate, publish and disseminate, directly or through

[8] See, e.g. Slick Airways, Inc. v. U.S., 292 F. 2d 515 (1961).

[9] ATA comments, page 3.

[10] The argument presumes that such a general reference would not constitute a valid ''incorporation by reference'' of tariff provisions into the contract of carriage under State contract law, nor would it fully comply with the Department's notice regulations in 14 CFR Part 221. Without the specificity of certain tariff provisions, these parties contend, the waybill contract might be rendered ambiguous or uncertain.

agents, a number of documents containing both rules and rates, as indicated by ATA, American and United. In addition to foreign tariff-filing requirements, the carriers indicate that such publications are necessary to reach potential customers and to incorporate terms into the waybill by reference, where necessary.

IATA's characterization of constructive notice of official tariff material as more ''efficient'' than the forms of actual notice that have been used successfully where cargo tariffs have been eliminated is, in our view, questionable. More fundamentally, its emphasis on official tariffs as a means to produce ''uniformity'' among carrier rules ignores many of the considerations of procompetitive and market-oriented public policy that underlay previous reductions in filing requirements. Those considerations are equally present here and form an additional basis for our conclusion that the continued filing of international cargo rates and rules tariffs is no longer in the public interest.

Most of IATA's arguments relating to the long-run desirability of maintaining constructive notice of cargo rules through filed tariffs are similar to those found unpersuasive by the Civil Aeronautics Board when it eliminated domestic cargo tariffs and international air freight forwarder tariffs.[11] More importantly, IATA has not effectively challenged the reasons given in the NPRM for concluding that the elimination of filed tariffs should have no significant impact on the ability of carriers and shippers to deal with the general terms and conditions of carriage.

Thus, the NPRM noted that domestic cargo tariffs were eliminated without significant difficulty; that international forwarder tariffs were eliminated in 1979 with no apparent adverse effect on the forwarders' ability to do business with their customers, many of whom are smaller shippers; that most international small shipper traffic is handled by large forwarder intermediaries and small package specialists who are familiar with direct carrier services and are able to negotiate the best price/service options; that most areas of potential carrier and shipper concern are governed directly by provisions of the Warsaw Convention and that, largely as a result of its requirements, the basic conditions of service for international cargo transportation are already stated in the carriers' waybills; and that to the extent that shippers have questions about the application or interpretation of certain contract provisions, it is likely that they consult the carrier directly rather than its tariffs. IATA has not demonstrated that the elimination of cargo rules tariffs in the past has created any of the longer-term difficulties it describes, nor has it even alleged that to be the case. Moreover, IATA does not address the fact that domestic cargo carriers have functioned effectively without the presumed advantage of federal incorporation rules, since 14 CFR Part 253 was limited to passenger transportation. All general conditions of domestic carriage are either fully stated on contract documents or are incorporated by reference to other sources accessable to shippers without apparent significant risk of challenge under State contract law requirements.[12]

While IATA and AFA both assert that international rates, classifications, and rules are more complex than domestic ones, they have not cited significant differences, nor have they indicated how current international waybills or other transportation documents would need to be revised to provide sufficient actual notice of all necessary conditions of carriage.[13] AFA has not discussed examples of revisions required by the elimination of international forwarder tariffs in 1979. Moreover, no party has challenged the Department's observation that international waybills are already drafted with considerable specificity to accommodate the detailed requirements of the Warsaw Convention, which governs major elements of the contract of carriage regardless of the existence of filed tariffs, as well as other important matters. Indeed, of the important general rules cited by IATA, all are governed by the Warsaw Convention and are dealt with specifically in the IATA waybill, which is a model for many carriers.[14]

There is therefore no record basis for concluding that the elimination of international cargo rules tariffs will impose significant economic or administrative burdens on carriers or shippers. However, the NPRM noted that, to the extent that tariffs might set forth certain conditions of carriage in greater detail than does the current waybill, such details could be incorporated into the contract if notice is given in conformity with the Department's alternative posting requirements in 14 CFR § 221.177, which are incorporation-by-reference standards essentially identical to those provided for domestic passenger transportation by 14 CFR Part 253.[15] In giving the carriers an alternative to the paper tariff notice requirement, which most had found difficult to comply with, it was the Department's intention to shift from a constructive to an actual notice system consonent with contract principles. To the extent that carriers wish to rely upon such an incorporation mechanism for cargo, Part 221.177 is already in place and it is likely that some, if not many, carriers are already complying with its graduated notice provisions in preference to the earlier requirement in Part 221.170 that complete paper tariffs be made available for inspection at each sales office.

While ATA, AFA, American and United support the elimination of all official tariffs in favor of an incorporation by reference mechanism, they request that the final rule make the provisions of section 221.177 more explicit in certain respects, including a specific request by ATA, AFA and United that carriers be authorized to incorporate terms and conditions of service included in a ''tariff'' published either individually or through a recognized and identified agent. All four commenters, plus IATA, emphasize a need for assurance that carrier reliance upon federal incorporation by reference requirements will be protected from challenge under possibly divergent State law requirements.

AFA questions whether the provisions of 14 CFR § 221.177 permit

[11] Moreover, when it adopted uniform rules for incorporation by reference of domestic passenger conditions in 14 CFR Part 253, the CAB found that insufficient grounds had been presented to warrant extending those rules to domestic cargo transportation.

[12] A typical domestic waybill incorporates by reference the ''rates, rules and classifications set forth in the most recent Official Airline Cargo Rate Tariff,'' an unofficial carrier document. All other terms and conditions are stated on the waybill.

[13] IATA claims that the development of ''paperless transactions'' will suffer, but does not explain how the electronic medium is any less adapted to providing information, including requisite notice, than the paper medium. The incorporation by reference rules in 14 CFR 221.177 already contemplate notice through electronic media.

[14] The IATA waybill states that carriage is subject to the Warsaw Convention, and, where not in conflict with it, to the carrier's ''general conditions of carriage,'' applicable domestic laws and regulations, and ''applicable tariffs'' of such carrier. Tariffs, which are not necessarily filed officially in many countries, are at most one of several means of supplementing the basic conditions of contract.

[15] Under section 221.177, carriers must give written notice, on or with the waybill or other contract instrument, that the contract of carriage may include terms incorporated by law from public tariffs or by reference from other sources; that the customer may inspect the full text of such terms at any carrier sales office and request a mailed copy thereof; and that the customer may receive an immediate explanation of any terms covering carrier liability limits, claims restrictions, service modification rights, or contract modification rights. In addition, direct written notice of the salient features of incorporated terms that restrict refunds, impose monetary penalties, or permit price changes must be provided on or with the waybill or other contract instrument.

the incorporation by reference of material filed in unofficial carrier tariffs or other documents, since the current language of subsection 221.177(b)(1) refers to notice of the possible incorporation of ''terms and conditions filed in public tariffs with U.S. authorities.'' Supporting ATA's request, AFA suggests that this reference be changed to cover unofficial tariffs filed with a recognized tariff publishing agent, or that a similar provision be made in proposed Part 292.

While the NPRM proposed a ''rule of construction'' in section 292.20 which would implicitly permit such incorporation by reference, subject to the various specific notice requirements set forth in section 221.177, we agree with the commenters that the final rule should be clarified in this and several other respects. We have decided to add provisions to Part 292 which will expressly authorize carriers exempt from filing tariffs under that Part to incorporate any terms by reference into their contracts for the carriage of cargo in scheduled foreign air transportation upon compliance with all of the notice, inspection, explanation and other requirements set forth in section 221.177.[16] Completing the basic parallel to 14 CFR Part 253, we will also expressly provide that shippers are not bound by incorporated terms unless the carrier complies with such requirements, and that the requirements are intended to preempt any State requirements governing incorporation of contract terms by reference. The NPRM contained a similar preemption statement in the explanatory section, but, given the concerns of the carriers and AFA on this subject, we will clarify our intention in Part 292 itself.

At the same time, we are not prepared to consider weakening the notice requirements contained in Section 221.177 to further simplify incorporation by reference of terms for cargo carriage. The graduated system of written notice and right of immediate inspection for most general terms coupled with direct notice and/or a right to immediate explanation of certain more important terms constitutes a deliberate balance between ease of contract formation and the importance of informed assent. Once on actual notice that terms may be incorporated by reference, the customer is under an obligation to inquire and understand them. A general desire to minimize necessary modifications to existing waybills is not, in our view, a justification for modifying this balance.[17]

American, and to some extent United, are also concerned that carriers will continue to face a public notice requirement that is currently satisfied by the filing of tariffs. American points to the statement in the NPRM that 14 CFR Part 249 and section 221.177 will continue to require each carrier, individually and through its agents, to maintain pertinent information on its cargo prices and rules, and to make that information available to the public upon request. The carriers have apparently misunderstood the scope of that statement, which was a narrow reference to the record retention requirements of Part 249 and the notice provisions of section 221.177 applicable solely in cases of incorporation by reference.[18] We construe the term ''tariff information'' in section 221.170 to mean tariffs filed with the Department. Thus, in their absence, there is no general ''duty'' to make such information public. Our experience with the elimination of domestic cargo tariffs and other tariffs has demonstrated clearly that carriers have ample marketplace incentives to disseminate their rates and rules as broadly as possible, and that the threat of administrative enforcement action to compel a general duty in this regard has little influence. Similarly, our experience has been that carriers have strong economic incentives to maintain evidence of past rates and rules, as well as specific waybills beyond the time requirement of Part 249, as a defense against litigation. Such evidence is discoverable by other parties in the event of litigation. Therefore, we have not proposed a general public notice requirement for exempted carriers, nor have the comments persuaded us that one is necessary.

2. Preemption. In addition to the requests of ATA, AFA, American, United, and IATA that the final rule make as clear as possible that State contract law requirements governing incorporation by reference differing from those in 14 CFR § 221.177 are preempted, several of these commenters have also expressed concern that the tariff exemption itself might be construed by some courts as evidence that State regulatory requirements might have increased applicability to airline activities. We do not believe such a concern to be well founded. While the legal effect of filed tariffs was at one time an important element in the consideration of the scope of federal preemption by the courts, Congress in 1978 adopted a broad preemption provision protecting the ''rates, routes and services'' of carriers with federal authority[19] in anticipation of the statutory sunset of domestic tariffs and other public utility regulation. The statute has been given a broad reading by the courts, most recently in American Airlines, Inc. v. Wolens, 115 S. Ct. 817, 130 L. Ed. 2d 63 (1995). IATA's argument that the absence of a federal rules tariff facility ''actively supervised by the Department'' may generate unnecessary and costly litigation over both State contract and public utility law requirements ignores the fact that domestic cargo carriage has flourished without the benefit of either filed tariffs or federal incorporation rules for well over a decade. As noted above, domestic waybills do make some use of incorporation by reference. Some litigation may be inevitable in this area, in part because the statute also preserves many remedies at common law. However, we see no reason to assume that the elimination of the tariff requirement for cargo rules will result in an increased risk of litigation for the carriers.

3. Rates and other issues. Athearn, ISS and OFC, shipping consultants which, as part of their services, audit international shipping invoices to determine if their customers have been properly charged, all oppose the proposal.[20] In general, they contend that the proposal will deny shippers and/or their auditors the only assured, complete source of factual information on international carrier rates and rules; that carriers are reluctant to provide customers with precise rate information while cargo agents, whose commissions are based on gross sales, will not always quote the best rates; that existing alternative sources of tariff information,

[16] Amending section 221.177 itself is neither necessary nor desirable, since tariff-filing requirements could be reimposed in specific cases. To correct ambiguities in existing language, it is sufficient to provide in Part 292 that the sign required by subsection 221.177(a)(3) is not required of exempt carriers, and that notices required of such carriers under subsection 221.177(b) shall refer to the title or general nature of the publication or document containing the referenced terms rather than to ''terms and conditions filed in public tariffs with U.S. authorities.'' See section 292.21(a)(1).

[17] Moreover, a DOT rule defining tariffs published by carriers or their agents as ''official,'' ''filed,'' ''applicable'' or any other term suggesting legal effect in order to accommodate existing waybill language would be potentially misleading.

[18] Where no incorporation of rules by reference to unofficial sources is made, shippers will have direct notice of all contract of carriage terms on the waybill or other accompanying document.

[19] Now codified as 49 U.S.C. 41713.

[20] OFC also seeks an extension of the comment period, arguing that the proposal has not been well publicized among the shipping community. We do not believe such an extension to be necessary. The NPRM was published in the Federal Register, which is legal notice, and the breadth of the comments received indicates industry awareness of the proposal.

such as The Air Cargo Tariff (TACT), are inadequate since they are infrequently issued and incomplete; that these sources often do not include all rates available, especially the lowest ones; and that shipper costs will increase due to de facto cargo rate increases.

In addition, the shipping consultants assert that, because these tariffs are a matter of public record, they also serve to protect unsophisticated shippers by discouraging carriers from engaging in unreasonable practices and charging unfair rates; that the proposal will undermine this public benefit, which facilitates the recovery of thousands of dollars annually from overcharges; that the elimination of easily monitored, published tariffs, defining carriers' maximum rates, would increase forwarders' opportunities for misrating; and that without filed tariffs, shippers will lose their ability to apply reasonable controls on shipping expenses.[21]

ISS contends that the lack of complaints indicates that the current system is working, and provides important protection to consumers; and that while many shipments tendered by large volume forwarders or ''consolidators'' are governed by negotiated ''contract rates,'' most of the air waybills issued by forwarders acting as carrier agents are governed by filed tariffs and are often misrated. Athearn contends that the Department has overstated the proposal's cost savings since, even with the exemption, carriers will still bear the costs of disseminating their prices. If the Department needs to reduce costs, it should recognize that paper tariffs are obsolete, and explore converting them to less expensive electronic media so that they will continue to be available to the public at one central location.

These commenters have not substantiated their basic contention that filed tariffs are an essential source of pricing information that is not, or will not be, available to shippers through normal marketplace incentives and mechanisms. Notwithstanding the contrary experience following domestic cargo and international forwarder tariff deregulation, Athern states that it is ''questionable'' whether carriers will continue to publish and routinely make available to the public the comprehensive rate information contained in tariffs. However, Athern also states that the general source of international rate information for forwarders today is the unofficial memorandum tariff identified as TACT, and further that ''because most rates have been available through tariff publication firms, there has not been the need by shippers or their auditors to deal with each carrier.'' This corresponds with the Department's experience that very few requests are received each year from the public for certified copies of present or past cargo tariffs, as well as with our findings in support of the alternative notice requirement in 14 CFR 221.177 that most carrier tariffs maintained at sales offices were incomplete, inaccessible and infrequently used by the public.[22] In general, both the CAB and the Department have found that filed tariffs are not an effective means of informing the public of a carrier's prices and services. The airline commenters in this proceeding agree, affirming that they will continue to publish international rates and rules in formats similar to those used now for both legal and promotional reasons.[23]

Finally, the rate consultants have not substantiated their contentions that tariff-filing discourages unreasonable carrier practices and prices, and acts as a necessary check on ''misrating.'' As the Department has found, it is competition in the marketplace, not the filing of tariffs or the Department's substantive review policies, that keeps prices and practices within reasonable bounds. The concepts of ''overcharging'' and ''misrating'' used by these commenters have meaning only in the context of approved tariffs, not the free marketplace where shippers are free to negotiate the best deal for each contract and may be expected to place their business with carriers and/or agents that provide the best information and the best rate options. It is this competition and this freedom to negotiate which provides the greatest economic benefits to the shipping public. The rate consultants have provided no sound basis for their argument that cargo tariffs should continue to be required.

Regulatory Analyses and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

The Department has determined that this rule is not significant under Executive Order 12866 and the Department's Regulatory Policies and Procedures (44 CFR 11034; Feb. 26, 1979). A regulatory evaluation in this Docket shows that the benefits of the proposed rule exceed the costs to the industry and the Federal government significantly, since it eliminates a regulatory burden, without imposing other requirements. This rule could result in net savings to the airlines of approximately $600,000 per year.

Executive Order 12612

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12612 (''Federalism''), and the Department has determined the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

I certify that this rule will not have a significant economic impact on a substantial number of small entities, because the tariff filing requirements apply to scheduled service air carriers. The vast majority of the air carriers filing international (''foreign'') air cargo tariffs are large operators with revenues in excess of several million dollars each year. Small air carriers operating aircraft with 60 seats or less and 18,000 pounds payload or less that offer on-demand air-taxi service are not required to file such tariffs.

Paperwork Reduction Act

With respect to the Paperwork Reduction Act, this rule eliminates information collection requirements that require the approval of the Office of Management and Budget pursuant to the Act. This proposal reduces paperwork burdens, as described in detail in the Regulatory Evaluation in this docket.

The implementation of these regulations will reduce tariff filings of cargo rates, rules and charges by almost 10,000 cargo tariff pages and about 200 Cargo Special Tariff Permission Applications (STPA's) filed each year, saving the air carriers a filing fee of $2 a cargo page and $12 a cargo STPA (which generally consists of about three double-sided pages for each STPA form).

Such filing fees, now paid to DOT, total about $22,400 or less annually. In addition, ATPCO charges carriers $18 for preparing each STPA for submission to the Department, which amounts to an additional $3,600 per year for an average of 200 STPA's.

Air carriers and their cargo filing agents also will avoid the burden of filing the tariffs with DOT, estimated to be about 5.34 hours for each of the 10,200 cargo tariff pages and STPA

[21] OFC asks that any final rule give shippers access to the Department's resources so as to ensure that carriers will furnish complete information on their cargo rates and rules to shippers on request and within a reasonable amount of time. We do not believe this to be necessary. Normal contract law has the tools needed to accomplish these goals.

[22] 53 FR 52677, December 29, 1988.

[23] IATA also concurs that shippers and interested agent/intermediaries can access applicable rates directly from carriers ''as efficiently as through tariff filings.''

forms, or about 54,468 burden hours, which at an estimated industry salary rate of about $10.40 an hour would indicate a savings of approximately $566,467.

In addition, other costs incurred by carriers to formulate and disseminate the cargo rate and rule pages to their customers (by the air carriers or their agent, such as the Airline Tariff Publishing Company (ATPCO) or Cargo Rate Services (CRS)) may be affected. Elimination of government filing may favorably affect some portion of their overall cost other than the DOT filing fee; for instance, $48 for an international cargo tariff page publication/distribution cost in 1994 by the Airline Tariff Publishing Company (ATPCO) in Cargo Tariff Bulletin No. 19, dated November 18, 1993.

The reporting and recordkeeping requirements associated with this rule are being submitted to OMB for approval in accordance with 44 U.S.C. chapter 35 under OMB NO. 2137–AC48; Administration: Department of Transportation; TITLE: Exemption From Property Tariff-Filing Requirements; NEED FOR INFORMATION: Exempts a data page filing requirement; PROPOSED USE OF INFORMATION: Exemption is based on ''de minimis'' regulatory use; FREQUENCY: Currently, an initial tariff filing is required of each respondent; changes are voluntary, whenever an air carrier elects; BURDEN ESTIMATE: 5.34 hours for an STPA or a cargo rate page; RESPONDENTS: 45; FORM(S): 10,200 pages or forms per annum; AVERAGE BURDEN HOURS PER RESPONDENT: 1,210 hours.

For further information on paperwork reduction contact: The Information Requirements Division, M–34, Office of the Secretary of Transportation, 400 Seventh Street SW., Washington, D.C. 20590, (202) 366–4735 or Edward Clarke, Office of Management and Budget, New Executive Office Building, Room 3228, Washington, D.C. 20503.

Any comments regarding the burden estimate or any aspect of these information requirements, including suggestions for reducing the burden, may be sent to: Director, Office of International Aviation, X–40, U.S. Department of Transportation, Office of the Secretary, 400 Seventh Street SW., Room 6402, Washington, D.C. 20590–0001 as well as the above contact.

Regulation Identifier Number

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects

14 CFR Part 221

Air rates and fares, Freight, Reporting and recordkeeping requirements.

14 CFR Part 292

Air rates and fares, Freight, Reporting and recordkeeping requirements, Preemption.

For the reasons set forth herein, and under the authority delegated in 49 CFR 1.56(j)(2)(ii), the Department of Transportation amends 14 CFR Part 221 and adds a new Part 292 as follows:

PART 221—TARIFFS

1. The authority citation for Part 221 is revised to read as follows:

Authority: 49 U.S.C. 40101, 40109, 40113, 46101, 46102, Chapter 411, Chapter 413, Chapter 415 and Subchapter I of Chapter 417.

2. Section 221.3 is amended by removing the period at the end of paragraph (d)(8) and adding a semicolon in its place, and by adding a new paragraph (d)(9) to read as follows:

§ 221.3 Carrier's duty.

* * * * *

(d) * * *

(9) Part 292, *International Cargo Transportation*, except as provided in 292.

* * * * *

3. A new Part 292 is added to read as follows:

PART 292—INTERNATIONAL CARGO TRANSPORTATION

Subpart A—General

Subpart B—Exemption From Filing Tariffs

Subpart C—Effect of Exemption

Authority: 49 U.S.C. 40101, 40105, 40109, 40113, 40114, 41504, 41701, 41707, 41708, 41709, 41712, 46101; 14 CFR 1.56(j)(2)(ii).

Subpart A—General

§ 291.1 Applicability.

This part applies to direct air carriers providing scheduled transportation of cargo in foreign air transportation.

§ 292.2 Definitions.

For purposes of this part:

Cargo means property other than baggage accompanied or checked by passengers, or mail.

Cargo tariff means a tariff containing rates, charges or provisions governing the application of such rates or charges, or the conditions of service, applicable to the scheduled transportation of cargo in foreign air transportation.

Direct air carrier means an air carrier or foreign air carrier directly engaged in the operation of aircraft under a certificate, regulation, order, exemption or permit issued by the Department or its predecessor, the Civil Aeronautics Board.

Subpart B—Exemption From Filing Tariffs

§ 292.10 Exemption.

Direct air carriers are exempted from the requirement to file cargo tariffs with the Department of Transportation provided in 49 U.S.C. 41504 and 14 CFR Part 221.

§ 292.11 Revocation of exemption.

(a) The Department, upon complaint or upon its own initiative, may, immediately and without hearing, revoke, in whole or in part, the exemption granted by this part with respect to a carrier or carriers, when such action is in the public interest.

(b) Any such action will be taken in an order issued by the Assistant Secretary for Aviation and International Affairs, and will identify:

(1) The tariff matter to be filed; and

(2) The deadline for carrier compliance.

(c) Revocations under this section will have the effect of reinstating all applicable tariff requirements and procedures specified in the Department's regulations for the tariff material to be filed, unless otherwise specified by Department order.

Subpart C—Effect of Exemption

§ 292.20 Rule of construction.

Carriers holding an effective exemption from the duty to file tariffs under this part shall not, unless otherwise directed by order of the Department, be subject to tariff posting, notification or subscription requirements set forth in 49 U.S.C. 41504 or 14 CFR part 221, *except* as provided in § 292.21 of this part.

§ 292.21 Incorporation of contract terms by reference.

(a) Carriers holding an effective exemption from the duty to file tariffs under this part may incorporate contract

terms by reference (*i.e.* without stating their full text) into the waybill or other document embodying the contract of carriage for the scheduled transportation of cargo in foreign air transportation, *provided that:*

(1) The notice, inspection, explanation and other requirements set forth in 14 CFR 221.177(a)(1), (a)(2), (a)(4), (b), (c) and (d) are complied with, to the extent applicable, except that the notice required under 14 CFR 221.177(b)(1) shall refer to the title or general nature of the publication(s) or document(s) containing the full text of the referenced terms rather than to ''terms and conditions filed in public tariffs with U.S. authorities'';

(b) In addition to other remedies at law, a carrier may not claim the benefit as against a shipper or consignee of, and a shipper or consignee shall not be bound by, any contract term which is incorporated by reference under this part unless the requirements of paragraph (a)(1) of this section are complied with, to the extent applicable; and

(c) The purpose of this section is to set uniform disclosure requirements, which preempt any State requirements on the same subject, for terms incorporated by reference into contracts of carriage for the scheduled transportation of cargo in foreign air transportation.

§ 292.22 Effectiveness of tariffs on file.

(a) Cargo rate tariffs on file with the Department, including related classification and/or applicability rules, cease to be effective as tariffs under 49 U.S.C. 41504 and 41510, as well as under the provisions of 14 CFR Part 221, and they are canceled by operation of law.

(b) As of March 1, 1996, all remaining cargo tariffs on file with the Department cease to be effective as tariffs under 49 USC 41504 and the provisions of 14 CFR part 221, and are cancelled by operation of law. Any such tariffs may be cancelled voluntarily prior to that date. With respect to terms expressly agreed in the contract of carriage, carriers, agents and other persons are relieved from the requirement of adherence to filed tariffs in 49 USC 41510 and the related provisions of 14 CFR part 221 as of November 30, 1995.

(c) Applications for filing and/or effectiveness of any cargo tariffs pending on November 30, 1995 are dismissed by operation of law. No new filings or applications will be permitted except as provided under § 292.11.

Issued in Washington, D.C. on November 13, 1995.

Patrick V. Murphy,

Deputy Assistant Secretary for Aviation and International Affairs.

[FR Doc. 95–28474 Filed 11–29–95; 8:45 am]

BILLING CODE 4910–62–P

Coast Guard

33 CFR Part 165

[CGD13–95–008]

RIN 2115–AA97

Safety Zone Regulations; Bellingham Bay, Bellingham, WA

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing a permanent safety zone for the annual Fourth of July Blast Over Bellingham Fireworks Display in Bellingham, Washington. This event is held each year on the Fourth of July on the waters of Bellingham Bay. In the past, the Coast Guard has established a temporary safety zone each year to protect the safety of life on the navigable waters during the event. However, because the event recurs annually, the Coast Guard is adopting a permanent rule to better inform the boating public.

EFFECTIVE DATE: January 2, 1996.

ADDRESSES: Documents referred to in this preamble are available for inspection or copying at U.S. Coast Guard Group Seattle, 1519 Alaskan Way South, Building One, Room 130, Seattle, WA 98134. Normal office hours are between 7 a.m. and 4 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT: LT Ben White, Assistant Operations Officer, U.S. Coast Guard Group Seattle (Telephone: (206) 217–6009).

SUPPLEMENTARY INFORMATION:

Drafting Information: The principal persons involved in drafting this document are LT Susan Workman, Project Manager, U.S. Coast Guard Group Seattle, and LCDR John Odell, Project Counsel, Thirteenth Coast Guard District Legal Office.

Regulatory History

On April 10, 1995, the Coast Guard published a Notice of Proposed Rulemaking (entitled Safety Zone Regulations, Bellingham Bay, Bellingham, WA) in the Federal Register (60 FR 18063). The Coast Guard received no letters commenting on the proposal. No public hearing was requested, and none was held.

Background and Purpose

The Coast Guard is adopting permanent safety zone regulations for the annual Fourth of July Blast Over Bellingham in Bellingham, Washington. This event is held on the waters of Bellingham Bay each year from 9:30 p.m. to 11 p.m. on July fourth and is sponsored by the Whatcom County Chamber of Commerce. The Coast Guard (by adopting a permanent safety zone through this action) intends to promote the safety of spectators and participants during this event. The fireworks display is conducted from a barge located on the waters of Bellingham Bay, Bellingham, Washington. To promote the safety of both the spectators and participants and to keep spectators away from the fireworks barge during the fireworks display, this rule establishes a safety zone around the fireworks barge and prohibits entry into the area that surrounds the fireworks barge during the event. This safety zone will be enforced by representatives of the Captain of the Port, Puget Sound, Seattle, Washington. The Captain of the Port may be assisted by other federal agencies.

Regulatory Evaluation

This rule is not a significant action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that order. It has been exempted from review by the Office of Management and Budget under that order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this regulation to be so minimal that a full regulatory evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary. The safety zone established by this regulation would encompass less than a half of one square nautical mile on Bellingham Bay adjacent to Squalicum Harbor. Entry into the safety zone will be restricted for less than three hours on the day of the event. These restrictions will have little effect on maritime commerce in the area.

Small Entities

The impact on small entities is expected to be minimal. Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this regulation will not have a significant economic impact on a substantial number of small entities.