

Docket #: EP -743 -Hoppel, Mayer & Coleman -
Subject: Water Carrier Tariff Filing Procedures

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Message: Filing of initial comments per direction in Notice of Proposed Rulemaking

SURFACE TRANSPORTATION BOARD

Docket No. EP-743

WATER CARRIER TARIFF FILING PROCEDURES

TROPICAL SHIPPING AND CONSTRUCTION COMPANY COMMENTS ON NOTICE OF PROPOSED RULEMAKING

INTRODUCTION

Tropical Shipping & Construction Co. Ltd. ("Tropical"), a vessel operating water carrier that operates, *inter alia*, in the domestic offshore trade between the U.S. mainland and the U.S. Virgin Islands, through its undersigned counsel, respectfully submits these comments in Docket No. EP-743

On December 21, 2018 the Surface Transportation Board ("STB" or "Board") served a Notice of Proposed Rulemaking in Docket No. EP-743. The STB proposes to implement regulatory changes to allow water carriers operating in the noncontiguous domestic trade to publish electronic tariffs on the Internet and to file in such tariffs their rates, charges and rules while eliminating the current requirement that these tariffs items also be filed with the STB, as long as the carriers keep the tariffs available to the STB and to the general public.. The STB also proposes that water carriers maintain a history of the tariff information for a period of five years.

Tropical strongly supports this STB proposal to lessen the regulatory burdens on water carriers and the STB, while maintaining regulatory oversight of the water carriers.

THE STB POSSESSES THE AUTHORITY TO MAKE THE PROPOSED CHANGES

Under 49 U.S.C. 13702(b), the STB is authorized to prescribe the form and manner of publishing, filing and keeping tariffs maintained by water carriers in the non-contiguous domestic trades available for public inspection. The STB initially used this authority to require the paper filing of water carrier tariffs with the STB. However, over the last twenty years the Board has shown flexibility in its use of the regulatory authority, first granting special tariff authority to a number of water carriers by allowing them, in lieu of paper tariffs filed with the STB to file the tariffs electronically through the Federal Maritime Commission's Automated Tariff Filing System ("ATFI"). When ATFI was eliminated after passage of the Ocean Shipping Reform Act, Pub. L. No 105-258, the STB granted water carriers the option to use a number of alternative electronic formats. Tropical itself has been the beneficiary of the STB policies. Tropical has been allowed to maintain its tariff electronically, while emailing updates to the tariff to the STB in .pdf format.

In furtherance of the same goal of responsible regulation, on February 24, 2017, President Trump issued Executive Order 13777, Enforcing the Regulatory Reform Agenda (March 1, 2017). E.O. 13777 directing the administrators of most federal agencies to designate a Regulatory Reform Officer to "oversee the implementation of regulatory reform initiatives and policies to ensure that agencies effectively carry out regulatory reforms." Independent regulatory agencies such as the STB are not subject directly to E. O 13777 however they are encouraged to comply through Office of Management and Budget memorandum M-17-23 issued April 28, 2017. As stated in the STB proposal, in April, 2017, the STB established its Regulatory Reform Task Force with the objective of identifying rules and practices that are burdensome, unnecessary, or outdated. The current water carrier tariff regulations were among these identified as requiring revision and as imposing significant costs on the water carriers as well as the STB. See, RRTF 90-Day Status Reports (issued May 25, 2017 and November 21, 2017). The proposed rulemaking is the product of the STB's regulatory reform efforts.

The elimination of the requirement to email the STB with tariff changes, is a significant step to simplify the process while preserving compliance with the STB's mandate under 49 U.S.C. 13702 (b).

IF IMPLEMENTED AS A FINAL RULE THE STB PROPOSAL WOULD PROVIDE SUBSTANTIAL BENEFITS TO THE WATER CARRIERS AND THE STB

By implementing the proposed regulatory revisions, the STB would eliminate a significant and unnecessary regulatory burden, permit the water carriers to function in a more efficient and less costly manner and further the goals of minimizing unnecessary government intervention and reducing regulatory costs. It follows that the STB would also benefit from reduced expenses.

Under the current STB regulations, Tropical has had to assign a specific person to gather all changes to its STB tariff each day and to prepare an email and .pdf files to transmit such changes to the STB even though the changes are published in Tropical's public tariff on the Internet. The current STB regulations almost double the work necessary for a tariff change, requiring not only the insertion of the tariff change in the electronic public tariff but preparing a separate document containing the same information for submission to the STB which can just as easily see the information in the public electronic tariff.

The required maintenance of a historical data base for five years as required by the proposed rulemaking is consistent with Tropical's practice with respect to its Federal Maritime Commission Internet tariffs, and for its own business purposes.

Tropical would also benefit from elimination of the charges by the STB for the tariff filings with the STB. The current proposal not only will save Tropical such expense, it will eliminate the costs of the STB to prepare and send the invoices. Under the proposed rule both water carriers and the STB would benefit from cost savings. .

FULL STB JURISDICTION OF TARIFF RATES UNDER THE FILED RATE DOCTRINE WOULD BE PRESERVED

The STB currently has not only the regulatory authority to require that the tariffs of the domestic offshore water carriers be filed with the STB but also that the rates in those tariffs be reasonable (49 U.S.C. 13701). The STB has the further authority that if it finds a rate to be unreasonable, it may prescribe the applicable rate. (49 U.S.C. 13701 (b)).

The fact that the tariff rates are not physically filed with the STB if the proposed rulemaking is made a final rule would not remove from the STB its authority to examine and rectify any unreasonable rates. Under the filed rate doctrine, U.S. courts have decided that the doctrine precludes court claims as to rates filed with a federal regulatory agency. Keogh v. Chicago & Northwest Railway Co., 260 U.S. 156 (1922), Square D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 499 (1986). As stated in In Re Hawaiian and Guamanian Cabotage Antitrust Litigation, 754 F. Supp 2d 1239 (W.D. Wash 2010) and affirmed by an unpublished memorandum of the U.S. Court of Appeals for the Ninth Circuit, Docket No. 10-36165, filed September 29, 2011, the filed rate doctrine continues to apply and to require complaints as to the tariff rates, whether those rates are filed or not with the STB, to be adjudicated under the STB complaint process. The court decisions affirm that the STB's regulatory oversight continues unabated even if the rates are not filed with the STB and that the agency which is the recognized expert in dealing with tariff and rate matters, will continue to have full authority to do so even if the rates are maintained solely on the public Internet tariffs of the water carriers.

CONCLUSION

As shown in the STB's proposed rule discussion, and by Tropical here, the physical filing of a tariff no longer serves a regulatory purpose. Just as the Federal Maritime Commission has eliminated the filing of tariffs of ocean common carriers under the FMC's foreign commerce jurisdiction, the proposed STB rule to allow electronic maintenance of tariffs with public and STB complete access strikes the right balance in giving the water carriers the freedom to conduct their business while maintaining full STB oversight under its regulations. The proposed rule also provides the water carriers and the STB savings of both time and costs. The STB should adopt the rule as stated in the proposed rulemaking.

Respectfully submitted,

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