

On their face, therefore, such agreements were, in fact, "agreements to agree." The two sets of guidelines for agreement language (both intended for agreements with rate-making activity) were the only such Commission-provided examples for agreements containing such open-ended authority. It appears that over the years, the "suggested authority" language has been adopted for use in non-rate-making agreements (also called "operational agreements") as well.

The Commission subsequently recognized and addressed the need for some open-ended authority in agreements through current section 535.407(b). This provision permits "agreement clauses which contemplate a further agreement or give the parties authority to discuss and/or negotiate a further agreement, the terms of which are not fully set forth in the enabling agreement" to be included in filed agreements only if "the enabling agreement indicates that any such further agreement cannot go into effect unless filed and effective under the Act." The 1984 Interim Agreements Rule's supplementary information described the Commission's reasons for requiring that provisions in agreements that contemplate further agreements not become operative until filed and effective under the Shipping Act:

[a] problem of open-ended authority arises where an agreement allows for future substantive modification of an agreement without specifically requiring filing under section 5. Such general authority to make future modifications without filing with the Commission would subvert the Commission's ability to review and monitor an agreement. 49 FR 36372.

Subject to applicable provisions of law, the Conference is authorized to:

1. Agree upon and establish rates and charges for the carriage of cargo and rules and regulations governing the application thereof and defining the service to be rendered therefor;

2. Declare rates for specified commodities to be "open" with or without agreed minimum, and thereafter declare the rates for such commodities to be "closed";

3. Agree upon and establish tariffs, tariff amendments, and supplements;

4. Make rules and regulations for the handling and carriage of cargo;

5. Provide for use of a contract/noncontract rate system for filing with the Commission for approval pursuant to section 14b of the Shipping Act, 1916;

6. Agree on amounts of brokerage and/or compensation to forwarders and the conditions for the payment thereof as permitted by applicable law;

7. Keep such records and statistics as may be required by the parties or deemed helpful to their interests.

46 CFR 522.6(a)(1968)(emphasis added).

Similar "authority" provisions were also suggested for non-conference rate agreements. 46 CFR 522.6(b)(196

The Commission's 1984 Agreements Rules offered a further degree of commercial flexibility to agreement parties through another provision: the exception from filing for the "interstitial implementation of routine operational and administrative matters" under section 535.407(c).¹⁷ The Commission explained in the 1984 Interim Agreements Rule that the provision was originally intended to "allow[] flexibility to make changes for tariff matters or routine operational and administrative matters having no anticompetitive effect." 49 FR 36372. The Commission asserted that this section "provide[s] that activities which may reasonably be viewed as interstitial to a stated agreement authority need not be expressly stated." *Id.* The Interim Rule gave only the following two examples: (1) authority to establish "overland common point" rates would be interstitial to general ratemaking authority, but establishing a tariffed contract rate system would not; and (2) changes in the terms and conditions of a charter party (contract) underlying a space charter agreement would generally be interstitial, but changes in the number of vessels (or range of number of vessels) and definition of vessel capacity (or range of capacities) dedicated in a joint service or space charter agreement would not. *Id.*¹⁸

Until recently, conferences (and other rate) agreements were those with which the Commission had the most concern. The Commission's current rules on agreements were adopted at a time when conferences were the principal method by which ocean common carriers exercised their antitrust immunity to achieve price discipline and rate stabilization. Now, however, there has been a precipitous decline in

the number and role of traditional conferences, and their influence has been supplanted by discussion agreements on pricing. This development, concurrent with the appearance of global strategic alliances, has resulted in agreements which may be more effective than conferences ever were at stabilizing rates by controlling capacity.

As a result of the above-discussed history, the commenters assert that "permissive authority" has come to be invoked for matters much broader than simply the implementation of rate-related authority, *i.e.* tariffs and service contracts. In addition, the exemption from filing for "interstitial implementation of routine operational and administrative matters" under section 535.407(c) has been a prime source of confusion. Some commenters assert that "interstitial implementation of routine operational or administrative matters" could be indicated by the use of phrases such as, "the parties agree to ___ according to terms, rates and conditions as the parties may from time to time agree." Thus, with respect to "permissive authority," responses to the NOI generally proffer two types of future actions taken pursuant to an agreement: (1) those allowed by grants of authority which might (or might not) be exercised, but which do not anticipate subsequent filing if exercised; and (2) those allowed without further filing due to their categorization as "interstitial implementation of routine operational or administrative matters." There also appears to be another type of "permissive authority": that which outlines a range (for example of capacity, ports, *etc.*) in which the agreement may operate. The following discussion addresses each of these interpretations.

In promulgating the exception for "interstitial implementation of routine operational and administrative matters," the Commission explained that section 535.407(c) would be interpreted on an *ad hoc* basis. *Id.* The comments received in the NOI demonstrate that this *ad hoc* approach may have created some confusion. Recently, the Commission found a violation of section 10(a)(2) of the Shipping Act¹⁹ where a conference failed to file its understanding as to the winding up of its affairs. The respondent conference argued that such a matter was "routine operational or administrative" and therefore exempt from the filing requirements. *Compania*

¹⁷ Section 535.407(c) reads:

"Further specific agreements or understandings which are established pursuant to express enabling authority in an agreement are considered interstitial implementation and are permitted without further filing under section 5 of the Act only if the further agreement concerns routine operational or administrative matters, including the establishment of tariff rates, rules, and regulations."

¹⁸ The Commission also gave the following guidance:

"[A]n agreement which merely stated that the parties are authorized "to operate a joint service," without indicating the number, or range of vessels, committed to the service would not be deemed to reflect the full understanding of the parties. Such a deficiency would defeat any meaningful Commission review. Similarly, a statement in a joint service agreement which authorized the parties to "acquire substitute or additional tonnage" would result in a situation where the Commission would be unable to evaluate the economic impact of the agreement on the trade under section 6(g). Finally, a filed agreement which referred to or was governed by another agreement not filed with the Commission would be incomplete."

Id.

¹⁹ Section 10(a)(2) reads, "No person may . . . operate under an agreement required to be filed under section 5 of this Act that has not become effective under section 6, or that has been rejected, disapproved or canceled."