

*Sud Americana De Vapores S.A. v. Inter-American Freight Conference* ("CSAV"), 28 S.R.R. 141, 141–142 (1998). The Commission found that the winding up was not "routine operational," but extraordinary and, therefore, not falling within the exemption of section 535.407(c).

In CSAV, the Commission provided further guidance as to matters it would consider "routine operational or administrative," namely, the establishment of individual tariff rates;<sup>20</sup> the scheduling of individual meetings; the securing of office space or supplies; and the circulation of particular reports or memoranda to members. These are matters which require day-to-day operational flexibility. CSAV, 28 S.R.R. at 142.

As discussed above, the Commission's general rule has been that all agreements must be true, complete, detailed and specific and represent the present understanding of the parties. With the exception of agreement clauses which anticipate a further agreement to be filed that are permitted under section 535.407(b), only two types of "further agreements" may be acted upon without further filing: agreements which fall under section 535.407(c), or which are otherwise exempt from filing under an explicit exemption found in subpart C of this part.

OCWGA suggests that the Commission recognize four additional types of "further agreements" as "interstitial implementation of routine operational or administrative matters": (1) Changes to the number of vessels/slots (or changes within a quantified range); (2) changes in port calls; (3) decisions on operation within another filed agreement; and (4) "operational" agreements generally. OCWGA at 14–17. While we rejected the first three suggestions in our previous rulemaking on "routine operational or administrative matters," we now reconsider these suggestions in light of the comments and recent changes in the industry.

It has been the Commission's approach since the passage of the Shipping Act to determine on an ad hoc basis what it considers "routine operational and administrative matters" to be implemented without further filing. However, we believe the comments indicate the public's desire that the better approach is to list specifically operational matters that are exempted and revise the current regulations accordingly.

OCWGA's suggestion that the Commission enumerate what must be contained (a positive list), rather than what need not be contained (a negative list or exemptions) appears impractical. The Commission chooses to follow the latter approach. While it is true that the Commission may anticipate some developments in the industry, we do not have the ability to predict them all, nor should we seek to stifle innovation or dictate what must be contemplated in an agreement. We can, however, determine what activities, as they are presently employed by agreements, are most likely not to raise concerns about competition.

The Commission, therefore, proposes to remove the current terms "interstitial implementation" and "routine operational and administrative" altogether from its rules, and add a list of specific exemptions for certain types of operations. Under section 16 of the Shipping Act, the Commission has the discretion to grant exemptions it finds will neither cause substantial reduction in competition nor be detrimental to commerce. 46 U.S.C. app. § 1715. The Commission has determined to propose several new specific exemptions to replace the current exemptions for "routine operational and administrative matters" and other operational matters which it finds have met the criteria for exemptions under section 16.

The initial proposals for a list begin with the activities already determined by the Commission to be "routine operational and administrative matters," such as those enumerated in CSAV. Additionally, the Commission proposes to include the following matters previously treated as "interstitial implementation of routine operational and administrative matters" not requiring further filing:

- charter parties arising out of filed agreements (such as those pursuant to a space, slot or vessel sharing agreement);
- specific monetary amounts for compensation for space; booking and documentation procedures;
- insurance;
- procedures for resolution of disputes relating to loss and/or damage to cargo;
- maintenance of books and records;
- force majeure clauses;
- common terminal and stevedoring arrangements;
- procedures for allocating space and forecasting demand; and
- schedule adjustments.<sup>21</sup>

With regard to the suggestion that changes to the number of vessels or slots to be operated (*i.e.*, capacity) be implemented without amendment to an agreement, we find that it may be acceptable to change these terms without further filing if the originally-filed agreement contains an adequately described range (*i.e.*, maximum and minimum) of slots or vessels to be used under the agreement and if the changes fall within that range. This approach would allow filers to adjust their agreement from time to time without the need to file, and allow the Commission to make an assessment of the commercial impact of the agreement for both ends of the range.

OCWGA also urges the Commission to exempt slot charter costs from a filed slot charter agreement. As the comments point out, it has been the practice of the Commission to allow slot charter costs to be agreed upon from time to time (without requiring further filings or amendments), and not specifically disclosed in the filed agreement, under an interpretation of 535.407(b) and (c). The phrases, "as may be agreed upon from time to time" or "whatever is reasonable based on actual costs" have been used in filed agreements to this effect. We have therefore proposed to treat slot charter rates as matters specifically exempted in proposed section 535.408.

The Commission is also proposing to codify its de facto exemption from the filing requirements for vessel charter parties in a new section 535.312. This codification would eliminate uncertainty the commenters now appear to have regarding which agreements must be filed. These contracts, which are generally for the control of single vessels, do not appear to have potential to result in a substantial reduction in competition or be detrimental to commerce, and are therefore within the Commission's section 16 authority for exemption from the requirements of the Shipping Act and its regulations.

The commenters are also concerned about operational flexibility for changes to port calls which typically are commercial decisions that must be made quickly. It appears that most agreements are filed reciting only a general "geographic scope" within which they will operate. While it

changes in the course of carrying out the agreement. We are skeptical that these need the sort of day-to-day flexibility the current exemption contemplates. Nevertheless, as a practical matter, we also recognize that these details of agreement implementation may be the most commercially sensitive and their absence appears to be unlikely to impair the Commission's ability to assess the relationship among the parties.

<sup>20</sup> The establishment of individual tariff rates are specifically enumerated as exempt in the text of the rule. 46 CFR 535.407(c).

<sup>21</sup> We recognize that most if not all of these commercially essential matters are likely determined before an agreement can be implemented and are unlikely to require frequent