

years ago following the enactment of the Shipping Act, provide the Commission with a summary of the business transacted at a meeting of parties to an agreement filed with the Commission. Minutes provide the Commission with information on specific areas on which agreement parties focus their attention (*i.e.*, rates, service contracting, conditions of service), as well as the economic and competitive conditions of the trade that influence their collective activity. Minutes have been recognized by Congress as “perhaps the chief means whereby the [agency] was to be kept apprised of conference action”⁵¹ and are useful in monitoring the activities of the agreement and its members, and in understanding important topics and issues discussed by the agreement members. More recently, during the legislative process that led to the enactment of OSRA, the Commission was encouraged to be more vigilant in exercising its agreements oversight function.⁵²

The liner shipping industry has undergone significant regulatory and structural change since the enactment of the Shipping Act and the adoption of the Commission’s current minutes regulations. Carrier agreements have become more complex, and many include authority to engage in a wider variety of activities. These changes have made it more difficult for the Commission to monitor agreement activities and assess economic and competitive trade conditions. Moreover, our experience reviewing agreement minutes, discussions with agreement filing counsel and representatives, and recent fact findings and other investigative proceedings have highlighted areas of concern that necessitate an enhancement of our minutes program. These areas of concern include: (1) Inadequate inclusion and coverage of substantive issues and insufficient level of detail used to describe carrier discussions; (2) failure to file minutes of meetings held under authority of the agreement where substantive issues are being discussed; (3) inadequate identification of and lack of provision for Commission access to documents used or discussed in agreement meetings; and (4) untimely filing of agreement minutes.

To address these concerns, the Commission proposes to replace its rules governing the filing of minutes by agreements, currently set forth at 46

CFR 535.706–07.⁵³ Our proposal would: (1) Require minutes to be filed by agreements based on the types of authority specified in the agreement, rather than according to agreement type as currently provided for in 46 CFR 535.706(b); (2) eliminate current regulatory language that limits the minutes filing requirement to meetings at which the parties are authorized to take “final action”; (3) clarify the level of detail required to describe matters discussed or considered at agreement meetings; (4) establish a new requirement that each document distributed, discussed, or exchanged at meetings be submitted with the minutes of such meetings; (5) clarify the format used for assigning sequential numbers for minutes currently provided in 46 CFR 535.706(d); (6) reduce the time period for filing minutes with the Commission from 30 days as required in 46 CFR 535.701(f), to 15 days from the date of the meeting; and (7) amend language throughout the existing minutes rules to update definitions and Bureau designations, and replace references to “conferences” with the term “agreement,” clarifying the broad range of agreements to which these provisions apply.

B. Discussion of the components of the current minutes rules and the proposed changes

1. Agreements Required to File Minutes

The Commission’s current rules require that minutes of agreement meetings be filed by “conferences, interconference agreements, agreements between a conference and other ocean common carriers, pooling agreements, equal access agreements, discussion agreements, marine terminal conferences, and marine terminal rate fixing agreements * * *” 46 CFR 535.706(b). Although most of these named agreement types are specifically defined in 46 CFR 535.104, others are not, *e.g.*, discussion agreements.⁵⁴ Thus, 46 CFR 535.706(b) identifies those agreements that must file minutes based on a specific type of agreement, rather

than on the actual activities in which the parties are authorized to engage. Due to the changes in the industry and the concurrent increase in the types of agreement activities, this approach may not reflect all of the actual authority contained in the agreement itself, or the activities in which the agreement parties are engaged. Moreover, use of these agreement categories to identify which agreements must file minutes with the Commission often raises questions about agreements’ compliance with Commission regulations. Further, use of these categories has often resulted in lengthy discussions with filing counsel as to an agreement’s minutes filing responsibilities, particularly for those agreements that contain multiple authorities, *e.g.*, vessel space sharing, voluntary rate discussion, and joint service contracting authority.

When the Commission’s rules governing the filing of agreement minutes were promulgated under the Shipping Act, the authority of most carrier agreements generally fit into the enumerated categories in the rules. At that time, the specified agreement types represented the universe of consequential agreements filed with the Commission and minutes were filed by agreements considered to be of significant regulatory concern. Rarely was there a question as to an agreement’s minutes filing responsibilities based on its agreement classification. However, over time these agreement categories have not kept pace with the evolving nature of collective carrier activities. For example, most agreements now on file with the Commission combine a number of activities under one agreement (*e.g.*, operational agreements that also include authority to discuss service contract rates or terms), or have established new authority not anticipated when the current definitions were drafted (*e.g.*, portal agreements).

To address the evolving nature of carrier agreements and to clarify which agreements must file minutes of their meetings, we propose to create a new subsection (a) for the redesignated 46 CFR 535.704. This new subsection would provide that the filing requirement be based on the specific type of authority contained in the filed agreement, rather than on a generic agreement type. Thus, agreements authorized to engage in “discussion or establishment of any type of rates, whether in tariffs or service contracts; pooling or apportioning of cargo; discussion of revenues, earnings, or losses; discussion or exchange of vessel operating costs; or discussion of service contract matters, including the

⁵³ Sections 535.706–07 will be redesignated as section 535.704.

⁵⁴ While the Commission’s rules do not specifically define a “discussion agreement,” 46 CFR 535.104(aa) defines “rate agreement” to mean an agreement between ocean common carriers which authorizes agreement upon, on either a binding basis under a common tariff or on a non-binding basis, or discussion of, any kind of rate. An agreement between ocean common carriers that authorizes voluntary, non-binding agreement on or discussion of a variety of pricing or operational matters including rates and terms of individual carrier tariffs or service contracts, or capacity rationalization, is what is commonly referred to as a “discussion agreement.”

⁵¹ Report of the Antitrust Subcommittee on the Judiciary on the Ocean Freight Industry, House of Representatives, 87th Cong., 2nd Sess., 363 (1962).

⁵² Senate Report at 13.