Source of flooding and location	# Depth in feet above ground. * Elevation in feet (NGVD)
Maps are available for inspection at the City of Lincoln Planning Department, 555 South Tenth Street, Lincoln, Nebraska.	
NEW MEXICO	
Silver City (Town), Grant County (FEMA Docket No. 7198)	
San Vicente Arroyo:	
Approximately 400 feet downstream of State Route 90	*5,822
At confluence with Silva and Pinos Altos Creeks	*5,890
Pinos Altos Creek:	
At confluence with San Vicente Arroyo	*5,890
At 32nd Street	*6,035
Approximately 1,300 feet upstream of 32nd Street	*6,047
Tributary 7 to Pinos Altos Creek:	
At confluence with Pinos Altos Creek	*5,951
Approximately 700 feet upstream of confluence with Pinos Altos Creek	*5,961
Silva Creek:	
At confluence with San Vicente Arroyo	*5,890
Approximately 2,500 feet upstream of U.S. Route 180	*5,939
Approximately 7,000 feet upstream of U.S. Route 180	*5,990
Maps are available for inspection at the Town of Silver City Town Hall, Broadway Street, Silver City, New Mexico.	

(Catalog of Federal Domestic Assistance No. 83.100, ''Flood Insurance.'')

Dated: February 24, 1997.

Richard W. Krimm,

Executive Associate Director, Mitigation Directorate.

[FR Doc. 97–5274 Filed 3–3–97; 8:45 am]

BILLING CODE 6718–04–P

FEDERAL MARITIME COMMISSION

46 CFR Part 586

[Docket No. 96–20]

Port Restrictions and Requirements in the United States/Japan Trade

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission, in response to unfavorable conditions in the foreign oceanborne trade between the United States and Japan, is imposing $100,000 per-voyage fees on liner vessels operated by Japanese carriers calling at United States ports. The unfavorable conditions identified by the Commission involve restrictions on and requirements for use of Japanese ports. These conditions arise out of or result from laws, rules, and regulations of the Government of Japan.

DATES: *Effective Date:* April 14, 1997.

ADDRESSES: Requests for publicly available information or additional filings should be addressed to: Joseph C. Polking, Secretary, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, D.C. 20573, (202) 523–5725.

FOR FURTHER INFORMATION CONTACT: Thomas Panebianco, General Counsel, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, D.C. 20573, (202) 523–5740.

SUPPLEMENTARY INFORMATION:

Background

On November 6, 1996, the Commission proposed a rule, pursuant to section 19(1)(b) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(1)(b) (''Section 19'') to assess fees on Japanese liner operators in response to requirements and restrictions on the use of Japanese ports.[1] In the Notice of Proposed Rulemaking, 61 FR 58160, Nov. 13, 1996, (''Notice'') the Commission stated that the Government of Japan appeared to discriminate against U.S. carriers by not licensing non-Japanese companies to perform stevedoring or terminal operating services. The Commission further found that the Government of Japan, through its licensing practices and other support, appeared to protect the dominant position of the Japan Harbor Transportation Association (''JHTA''), the trade organization that wields broad control over the Japanese harbor services industry. The Commission explained that JHTA's authority over Japanese harbor services stemmed from its administration of the prior consultation system, a process of mandatory discussions and pre-approvals for ocean carrier operational plans. In response to these conditions, the Commission proposed to levy a per-voyage fee of $100,000 each time a liner vessel owned or operated by one of the three Japanese liner operators serving U.S. trades (Kawasaki Kisen Kaisha, Nippon Yusen Kaisha, and Mitsui O.S.K. Lines) enters a U.S. port from abroad.

The closing date for comments, originally set for January 13, 1997, was extended to January 20, 1997, to allow parties to address the outcome of maritime consultations held between the United States Government and the Government of Japan on January 6–7, 1997.

Comments

American President Lines and Sea-Land Service

Joint comments strongly supporting the proposed rule were filed by American President Lines, Ltd. (''APL''), and Sea-Land Service, Inc. (''Sea-Land''), the two U.S. carriers operating in the Japan trade. Those lines stated:

> The premise on which [the proposed rule] rests is indisputable, namely, that the government of Japan has, through its discriminatory licensing system in the harbor services industry, created conditions unfavorable to shipping in the U.S.-Japan trade. As accurately recounted in the Supplementary Information to the Notice, the stevedoring and terminal services providers in Japan are licensed by the Ministry of Transport (''MOT'') in a largely discretionary process and are exclusively Japanese entities. Also, [JHTA] functions as a trade association of such providers with the approval of MOT. The activities of the JHTA, in which MOT have long acquiesced, are characterized by blatant anti-competitive practices including those at issue in this and prior proceedings of the Commission.

APL/Sea-Land Comments at 1–2.

The U.S. carriers explained that the need for changes in Japanese port practices is becoming more urgent:

> In years past, when carriers performed their individual vessel and terminal operations, JHTA-imposed inefficiencies were merely an unwelcome set of phenomena. However, difficult market conditions in the trans-Pacific trade in general and in the U.S.-Japan trade in particular have forced carriers to enter into reciprocal slot charter and terminal rationalization arrangements in order to increase service competitiveness while lowering costs. Thus, when an economically-driven redeployment of the assets of several carriers operating under a strategic alliance is frustrated or delayed by the absolute control and abuse of power of the JHTA in Japan over

[1] Section 19 authorizes and directs the Commission to ''make rules and regulations affecting shipping in the foreign trade not in conflict with law in order to adjust or meet general or special conditions unfavorable to shipping in the foreign trade, whether in any particular trade or upon any particular route or in commerce generally, including . . . terminal operations . . . which arise out of or result from foreign laws, rules, or regulations or from competitive methods or practices employed by owners, operators, agents, or masters of vessels of a foreign country . . . .''

The rules and regulations the Commission is authorized to make include limitation of sailings, suspension of carriers' tariffs or rights to use conference tariffs, suspension of carriers' rights to operate under FMC-filed terminal and other agreements, fees of up to $1,000,000 per voyage, or any other action deemed necessary and appropriate to adjust or meet the unfavorable condition. 46 U.S.C. app. 876(9).

every operational aspect of the alliance, the need for reform becomes acute.

APL/Sea-Land Comments at 4.

APL and Sea-Land also pointed out that other foreign carriers serving Japan are being adversely affected as well. They noted that the European Commission, at the behest of European carriers, has urged the Government of Japan for years to secure the elimination of port restrictions. It was also pointed out that in October of last year, the European Commission filed a formal complaint with the World Trade Organization regarding the prior consultation process and JHTA's ''de facto monopoly on stevedoring in Japan.''

The U.S. carriers opined that the amount of the sanction proposed by the Commission, $100,000 per voyage, is reasonable under the present circumstances. According to those lines, the sanction ''is an assessment which is far less than the economic impact on the U.S. Carriers of the cumulative adverse effects of the prior consultation system, that is, the abuse of unbridled market power by the harbor services industry in Japan.'' APL/Sea-Land Comments at 3. However, the U.S. carriers suggested that, if JHTA were to retaliate against U.S. carriers in response to the actions taken by the Commission, either directly or through labor disturbances, the severity of sanctions should be increased substantially. Similarly, they urged that if the Government of Japan or its instrumentalities take any retaliatory action against the U.S. carriers in response to actions taken by the Commission, the severity of sanctions should also be increased.

The sanctions should be continued until U.S. carriers are licensed to perform stevedoring and terminal operating services co-extensive with those performed by licensed entities in Japan and by Japanese carriers and their affiliates in U.S. ports, the U.S. carriers recommended. Moreover, they argued that they must be free to operate as, or contract for the operation of, stevedores and terminal operators independent of JHTA's system of prior consultation. They also maintained that any remaining conspiracy by the Japan harbor services monopoly to injure or eliminate competition from the new licensees, or to deprive new licensees of a supply of skilled labor, would merit continuing sanctions.

APL and Sea-Land also reported on consultations between the Government of Japan and the United States in Washington on January 6–7, 1997, concerning prior consultation, licensing, and other Japanese port practices. According to the U.S. lines, the Japanese delegation to these talks recited the view that the practices in question were purely commercial matters, and the talks adjourned without an agreement of any kind having been reached.

International Chamber of Commerce

Comments in support of the proposed rule were submitted by the Commission on Maritime Transport of the International Chamber of Commerce (''ICC–CMT''). The comments indicated that the ICC–CMT is made up of representatives of all segments of the maritime sector, including carriers, shippers, forwarders and port interests from around the world.

The ICC–CMT raised the following concerns: (1) Limited competition in Japan's harbor services creates port costs which are arguably among the highest in the world; (2) carriers are subjected to a system of prior consultation with the JHTA which makes it difficult to effectively improve service or reduce costs; and (3) shippers are forced to absorb some of the very high costs which result from these restrictions. The comments expressed hope that the Government of Japan will see to it that port services are opened to competition, and indicated support for all governmental efforts to remove restrictions and assure free and fair trade in maritime transport services.

Japan Foreign Steamship Association

The Japan Foreign Steamship Association (''JFSA''), the organization of non-Japanese shipping lines in Japan, submitted a copy of a position paper urging specific and detailed changes in Japanese port policies and practices.

JFSA represents the interests of the foreign carriers (including the U.S. lines) in prior consultation and other dealings with JHTA. According to a cover letter included in its submission, JFSA's position paper was provided to the Director General of the Maritime Transport Bureau, Ministry of Transport (''MOT''), for consideration at a MOT-chaired meeting between JFSA, the Japanese Shipowners' Association, and JHTA, held January 29, 1997.

JFSA in its position paper proposed a number of changes to the prior consultation system. Under the JFSA plan, shipping lines would be permitted to consult or negotiate directly with their stevedoring companies, rather than be required to submit their operational plans to JHTA for approval. Stevedore companies would then consult (either on their own or, if they choose, through JHTA), with labor. JFSA also urged that the requirement for prior consultation be limited to ''major issues,'' defined as arrangements for rationalization requiring changes in ports, terminals, or berths, that may seriously affect the employment of port laborers, rather than all operational changes, as is currently the case.

In addition, JFSA requested a commitment from MOT, JHTA and its member companies that prior consultations will not be used as a tool for allocating business among member companies, and that prior consultation will never be required for individual business transactions between carriers and stevedoring companies. JFSA proposed procedural rules for prior consultation, including time limits and requirements that decisions be explained in writing. According to JFSA, MOT should be responsible for implementation and enforcement of the revised process, and disputes over operation of the process should be referred to a standing arbitration body nominated by all parties and supervised by MOT.

JFSA urged that, within a reasonable time period, carriers be allowed to freely select stevedore and terminal service companies, and be allowed to obtain unrestricted general stevedore licenses at any or all Japanese ports. The present system of regulated rates, according to JFSA, should be abolished to allow for competitive bidding for port services. In addition, JFSA proposed the implementation of permanent Sunday work, including terminal and gate services, and 24-hour port operations.

According to JFSA, the proposed changes would ''insure fair and equitable commercial operating conditions comparable to those now enjoyed in U.S. and European international trades by Japanese shipping companies.'' The changes were said to be necessary to secure fair and reasonable business practices, protect the significant investment of shipping lines, ascertain a satisfactory service environment for Japanese export and import industry, and maintain and assure sufficient work volume to satisfy labor requirements.

American Association of Exporters and Importers

The American Association of Exporters and Importers (''AAEI'') stated that ''the port practices in question supported by Japanese government regulations are trade restrictive practices working against the interests of U.S. (and all other) shippers.'' AAEI also acknowledged that the practices in question fall within the Commission's jurisdiction.

However, AAEI stated that it believes the practices at issue place Japan in

violation of World Trade Organization (''WTO'') rules, and followed that ''the United States has both the obligation and the long term need to settle its trade disputes, in areas covered by WTO rules, through WTO dispute settlement channels.'' Accordingly, AAEI proposed a procedure whereby the Commission, before taking any action, would join with the Office of the United States Trade Representative to ''satisfy themselves that these . . . port practices . . . are in violation of WTO rules.'' If so satisfied, AAEI would have the Commission take no action while the U.S. sought to resolve these matters through the WTO; otherwise, the agencies would jointly issue an explanation of why WTO rules did not apply, ''in order to justify'' FMC action.

AAEI also asked that the Commission perform an impact study of the costs to the U.S. business community of cargo diversion to Canadian ports which, according to AAEI, might occur as a result of the Commission's action.

Port of Portland

The Port of Portland, located in Portland, Oregon, raised three points concerning the proposed rule. First, it suggested that the Commission should clarify whether the $100,000 fee would be assessed on a ''per port call'' basis, or on a ''per voyage'' basis. Second, it suggested that the Commission consider and publish additional steps the Government of Japan might take to avert the imposition of sanctions. Finally, the Port of Portland expressed concern that the proposed sanctions could lead to the diversion of vessel calls to non-U.S. ports in Mexico and Canada. The Port of Portland urged the Commission to consider and publish alternative sanctions that would not create such a risk.

Japanese Shipowners' Association

The Japanese Shipowners' Association (''JSA'') stated that it is an association domiciled in Japan of 147 shipping companies doing business both in the ocean worldwide trades and in Japan's domestic trades. The JSA indicated that it is ''curious to know why our leading members are to be penalized where they are not accused of any misconduct and where the allegations in the Notice are as vague as they are groundless.'' JSA went on to state:

> Our understanding is that the Japanese Ministry of Transport has never received an application from a U.S. carrier, that the licensing law has not been administered to discriminate against the nationality of an applicant, that no MOT official was authorized to advise any U.S. carriers not to apply for a license and that, according to the Association's inquiry, no such advice was ever given by a responsible MOT official.
>
> Unilateral sanctions proposed against entities having no responsibility could lead to only confusion, as well as to a precedent detrimental to the future of U.S./Japan trade relationships.

Mitsui O.S.K. Lines, Kawasaki Kisen Kaisha, and Nippon Yusen Kaisha

Opposition to Sanctions

Comments and a memorandum opposing the proposed rule were jointly filed by Mitsui O.S.K. Lines, Ltd. (''MOL''), Kawasaki Kisen Kaisha, Ltd. (''K-Line''), and Nippon Yusen Kaisha (''NYK''), the three Japanese liner carriers operating in the U.S. trades. Those lines, as an initial matter, stated that they are private companies, that they are not in a position to direct or control the policies and actions of the Ministry of Transport, and that they ''deplore a statutory application which would punish us irrespective of the lawful character of our carrier operations in the Japan/U.S. oceanborne trades.'' MOL/K-Line/NYK Comments at 4.

The Japanese carriers indicated that they will be severely injured by the threatened sanctions. Based on 1996 vessel operations, during which sailings were said to have averaged 34 per month, imposition of the proposed $100,000 fee reportedly would cost the Japanese lines 3.5 to 4 million dollars per month in 1997, approximately 42 to 45 million dollars per year.

Licensing

The Japanese carriers challenged the Commission's proposed finding that the Ministry of Transport uses its licensing authority to restrict entry and to shield JHTA and its members from foreign competition. They asserted that the Government of Japan has never discriminated against U.S. carriers with regard to the issuance of licenses, and that MOT has never advised U.S. carriers on the matter of licensing or received an application from a U.S. carrier.

The Japanese carriers stated that there is no ownership restriction in the Port Transportation Business Law which would bar a U.S. carrier applicant based on nationality. According to MOL, NYK and K-Line, the supply-demand requirement in the law was enacted as an internal measure to promote tranquility at the waterfront; ''while this restriction inherently serves to place a limit at some point on the number of licenses the ministry can grant, it is a limit when reached that would apply to any applicant regardless of its nationality.'' MOL/K-Line/NYK Memorandum at 2–3. They asserted that MOT has offered written assurance that a U.S. carrier's application ''would be fairly and evenly adjudged under the same standards as Japanese applications. . . .'' *Id.* at 2.

The Japanese carriers argued that the ''basis'' and ''linchpin'' of the Commission's proposed action is the ''single undocumented assertion'' that U.S. carriers have been shut out of the Japanese stevedoring market and advised not to bother to apply, and contended that no legal or factual support is presented to substantiate these findings. *Id.* at 2; MOL/K-Line/NYK Comments at 5. They urged the Commission to discontinue the proceeding on the basis that ''sanctions under section 19 simply cannot be applied absent a demonstration by substantial evidence of discrimination against U.S. carriers.'' MOL/K-Line/NYK Memorandum at 4. They further asserted that the Commission violated section 553(b)(3)(c) of the Administrative Procedure Act, 5 U.S.C. 553(b)(3)(c), and contravened the carriers' protections of the Due Process Clause of the Fifth Amendment, by failing to disclose factual information such as the timing and circumstances under which inquiries regarding licenses were made, the names of relevant carrier and MOT officials, and accounts of the exchanges. The Japanese carriers urged the Commission to release any such details and to allow an opportunity for comment on them.

The Japanese carriers suggested that the Government of Japan is taking steps to address the licensing-related concerns raised by the Commission. They indicated that in December, 1996, MOT announced a proposal to abolish the licensing system over a three-to-five year period. Attached to the comments was a newspaper article outlining MOT's plan, indicating that prior to any action the proposal would be deliberated at the administrative reform committee and studied at the Council for Transport Policy. Furthermore, the article stated that, as a precondition for such a move, ''measures for ensuring the stable management of ports are necessary.'' MOL/K-Line/NYK Comments, Attachment 3. However, the Japanese lines pointed out that MOT's announcement was met with opposition by waterfront labor unions, suggesting need for a period of time before the intended changes can be made.

Prior Consultation

The Japanese carriers read the Notice to propose that only the Government of Japan's licensing practices, and not

prior consultation, contravene the standards set forth in section 19:

[T]he Commission's Notice observes that it is the Ministry of Transport's discriminatory and restrictive licensing which would ''appear'' to constitute conditions unfavorable to shipping. Though critical of the procedural aspects of the Prior Consultation system and MOT's alleged exercise of authority as to permit JHTA to wield ''unchecked authority'' through the Prior Consultation process, we read the Notice as not concluding that the system itself is a condition which is unfavorable to shipping.

MOL/K-Line/NYK Comments at 10. Nevertheless, they maintained that the Commission has inaccurately characterized the prior consultation system.

MOL, NYK and K-Line suggested that the Commission failed to distinguish between the system of prior consultation itself, which they asserted enjoys the support of both Japanese and non-Japanese carriers, and the way it is administered, which they conceded is in need of reform. They reviewed the procedures for prior consultation:

[M]atters related to innovated services which affect port laborers are negotiated first between the shipping company (or JSPC or JFSA) and JHTA and then JHTA and the harbor workers' Unions. Under the procedures followed since 1986, matters are proposed for prior consultation through the submission of a written application by the shipping company. * * * The initiation of this process is known as ''pre-prior consultation'' under which the matter proposed is considered at a meeting attended by JHTA's Chairman and some of its prior consultation committee members and the shipping company applicant.

Once a matter passes pre-prior consultation and has been accepted by JHTA for Prior Consultation, it is deliberated between JHTA and the Unions, first, at the ''Central'' or national level and then at the local level. Under these procedures, therefore, there are no direct negotiations between shipping companies and the harbor worker unions, thus reducing the prospect of labor conflicts and confrontations.

MOL/K-Line/NYK Comments at 11–12.[2]

The Japanese lines suggested that the prior consultation system was developed to resolve the conflicting objectives of shipping companies and shoreside laborers and to avoid the debilitating confrontations of the past. They asserted that they are aware of no other system that offers a better prospect for labor peace. Pointing to the 1986 boycott of YS Line vessels described in the Notice, they claimed that waterfront unions support prior consultation and are willing to take whatever steps are necessary to defend it.

MOL, NYK and K-Line stated that over the past year parties began to address the flaws in the current system. They described negotiations between shipping lines and JHTA regarding transparency and simplification of procedures, and pointed to an agreement signed in August, 1996, confirming the necessity of prior consultation and establishing new procedures and time limits to accelerate the process.

The Japanese carriers also stated that the Commission did not properly characterize the role of MOT with regard to the prior consultation system. They contended that prior consultation is a private sector business practice, and that MOT has no interest in its continuation, other than labor peace and the smooth running of Japan's ports. According to the Japanese carriers, MOT's only involvement with the system has come when carriers have asked it to bring about the restoration, continuance, and improvement of the system. They maintained that MOT treats prior consultation negotiations as matters for the private sector, except when they break down, at which point MOT may become involved as a catalyst. This is because, according to MOL, NYK and K-Line, under Japanese labor laws, there is a policy of non-interference in employer-union bargaining.

The Japanese lines stated that the 1992 Ministerial View referred to in the Notice was not an endorsement of JHTA's activities; rather, it ''merely called for respect for the existing system regarding the operations of existing container terminals which procedures had been privately negotiated by the parties.'' MOL/K-Line/NYK Comments at 19. The Japanese carriers also pointed out that MOT has endeavored to arrange meetings of interested carrier parties and JHTA with the aim of improving the prior consultation process.

Port and Terminal Interests

After the comment period closed, the Commission received a number of closely similar or identical comments from various port and terminal interests, including H&M International Transportation, Inc.; the Port of Seattle; the Port Authority of New York and New Jersey; the Jacksonville Port Authority; Cronos Containers Inc.; Ceres Terminals Inc.; Georgia Ports Authority; and the Port of Oakland.[3] These comments urged that the Commission stay final action, or reduce or revise the proposed sanctions. The commenters raised the concerns that the Japanese carriers would divert sailings to non-U.S. ports or ''load center'' operations at a single U.S. port. Several of these commenters suggested that it is unfair to penalize Japanese carriers for Japanese port conditions, when the carriers have invested millions of dollars in U.S. terminals, inland facilities, equipment, and ships. Jacksonville Port Authority expressed concerns that the rule would negatively affect the Japanese-flag auto carriers that call there.

Discussion

Licensing

The Japanese carriers appear to have taken the position, first, that the sole basis for the Commission's proposed finding of conditions unfavorable to shipping is the Government of Japan's reportedly restrictive and discriminatory licensing practices, and second, that MOT has never actually acted discriminatorily in issuing licenses. Therefore, they concluded, the proposed rule should be withdrawn. However, both aspects of the Japanese lines' argument are without foundation or merit.

It is clear from the Notice that the administration of the restrictive licensing requirement is not the sole unfavorable condition at issue in this proceeding. Rather, the Commission listed in section 586.2(a)(1–4) of the proposed rule, and explained in detail in the Supplementary Information, an extensive series of apparent unfavorable conditions. These conditions included MOT's refusal to grant U.S. carriers licenses, with the result that U.S. carriers have no choice but to submit their shoreside planning and operations to JHTA control; however, several other conditions were set forth as well, including JHTA's use of the prior consultation system to control competition in the harbor services market, impose restrictions on carrier operations, and force carriers to take on unnecessary stevedoring companies.

There is also little apparent basis for the Japanese carriers' challenges to the Commission's proposed finding that the Government of Japan's licensing processes are discriminatory and restrictive. The Japanese lines asserted that MOT, to their knowledge, never advised U.S. carriers on the matter of licensing or received an application from a U.S. carrier, that there are no

[2] ''JSPC'' refers to the Japanese Shipowners Ports Council, the component of the Japanese Shipowners' Association that deals directly with harbor service-related matters. JSPC often serves as the voice of the Japanese lines in prior consultation and other dealings with JHTA.

[3] The Commission has determined to accept these comments into the record.

nationality-based restrictions in the Port Transportation Business Law, and that MOT would review any new application without regard to nationality. However, these arguments focus entirely on purported procedures for obtaining a license, ignoring the practical bars to obtaining such a license that stem from well-known official Japanese policies. By emphasizing the form and substance of the licensing system, the Japanese lines disregard its discriminatory and restrictive effects and results, which are of primary concern to the Commission.

These official barriers to licensing U.S. carriers and other potential entrants to the stevedoring market, and their practical effects, were confirmed most recently in the U.S.-Japan maritime consultations on January 6–7, 1997. During these meetings, officials from the Departments of State and Transportation reportedly inquired as to how MOT would apply its supply and demand test to a stevedoring application filed by a large organization such as APL or Sea-Land. [4] After reviewing supply and demand factors to be considered, the delegation of the Government of Japan reportedly stated that, in general, Japanese ports are either balanced or supply is slightly larger than demand, that there is already too much competition, and that there are too many service providers already. The Japanese delegation was said then to have suggested that U.S. carriers buy an interest in an existing stevedore company or form a joint venture with such a company, so that the supply-demand balance could be maintained. Given the mandatory nature of the supply-demand test, the position articulated by the Government of Japan leads inescapably to the conclusion that licenses will not be issued to U.S. carriers. Under such circumstances, it would seem futile for U.S. carriers to go to the considerable time and expense of preparing and submitting formal applications, absent a clear shift in policy by the Government of Japan.

Given these conditions, even if the Government of Japan's licensing standard is administered in a nationality-neutral manner, it is still discriminatory and protectionist in effect. By barring new entrants, the licensing system protects existing operators, all of whom are Japanese firms, from competition from U.S. or other foreign companies. It also shields JHTA from competition from new non-JHTA entrants, thereby protecting that group's dominant position.

The Japanese carriers invite the Commission to be sidetracked on an evidentiary dispute regarding whether MOT officials told U.S. carriers that licenses would not be granted, or told them not to apply, or whether involved officials were properly authorized. Such a diversion is unwarranted, however. First, statements by MOT officials that licenses would not be granted are entirely consistent with the position recently articulated by the Government of Japan that supply currently balances or exceeds demand in Japanese ports. More importantly, however, the Commission's concerns regarding licensing are based on the system's restrictive and protectionist effects, rather than the timing or details of any particular bureaucratic exchange. [5]

MOT's recently announced proposal to abolish its current licensing system does not warrant deferral of further Commission action. MOT proposed that the change be made in three to five years, that it be subject to review and consultation by a number of governmental bodies, and that other unspecified measures would be enacted to ensure the ''stable management'' of ports. While elimination of the licensing requirement would address a number of the Commission's concerns, the conditions attaching to the MOT proposal and its over-the-horizon timetable call into question whether, and under what conditions, such reforms might actually be made. If MOT is indeed of the opinion that more entrants and increased competition would be appropriate in the port services sector, its broad administrative discretion could be used to issue new stevedoring licenses to U.S. carriers and other qualified applicants; any action or plan substantially short of that would appear to be an inadequate resolution of these issues.

Prior Consultation

There is no support for the Japanese carriers' broad assertion that the Commission ''fails accurately to describe or comprehend the prior consultation system.'' MOL/K-Line/NYK Comments at 10. The Japanese lines failed to identify any specific factual errors in the Commission's account and, in fact, their description of prior consultation is consistent with that of the Notice, differing only in focus and emphasis on historical context. The U.S. carriers, in contrast, ardently supported the proposed findings in the Notice regarding prior consultation.

As the Japanese carriers explained, the prior consultation system involves ''two party/two party'' negotiations for all planned changes in shipping line operations involving Japanese ports. The first ''two party'' negotiation is between a shipping line and JHTA, while the second is between JHTA and the waterfront unions. As was described in the Notice, virtually all carrier operational changes must be submitted for prior consultation. [6] If a carrier wishes to make such a change and it is deemed important by JHTA, a representative of the line, often accompanied by an official of the stevedoring company it uses, must explain its request to the JHTA Chairman. At this stage (sometimes referred to as ''pre-pre-prior consultation''), the JHTA Chairman may refuse to accept the request, or require changes or impose conditions for acceptance.

If the carrier's request is acceptable to the JHTA Chairman, it is taken up at a formal ''pre-prior consultation'' meeting between the carrier and its stevedore, on the one hand, and JHTA on the other. If the request is accepted at this stage, the matter is deliberated at formal prior consultation meetings between JHTA and union officials, both in Tokyo and at the local level. It appears that the formal pre-prior consultation and prior consultation meetings are merely formalities; if a carrier's request is unacceptable to JHTA, it simply is not accepted for consideration at the formal prior consultation meetings. In contrast, if a request is accepted at the initial stage by the JHTA Chairman, it is almost assured to be approved at the formal meetings.

JHTA's processes are characterized by a total lack of transparency. There are almost no written rules, either substantive or procedural, nor are there written reasons for decisions or an appeal process. JHTA appears to have

[4] Section 19(12) of the Merchant Marine Act, 1920, states: ''the Commission may consult with, seek the cooperation of, or make recommendations to other appropriate agencies prior to taking any action under this section.''

[5] Moreover, we are skeptical that the Japanese carriers, which in response to the Commission's 1995 Information Demand Orders pled unawareness of virtually all matters concerning MOT's licensing practices, can now credibly attest to the details of MOT officials' past conversations regarding licensing.

[6] As noted in the proposed rule, these include: changes in berth, route, or port calls; inauguration of new services or new vessels; calls by non-container ships at container berths; changes in vessel size or technology which affect stevedoring or terminal operations; temporary assignment of vessels as substitutes or the renaming of vessels; rationalization agreements between carriers involving vessel sharing or berthing changes; the assignment of a stevedoring contractor or terminal operator to a carrier and any subsequent change in assignment; requests for Sunday work; changes in mandatory weighing and measuring arrangements; or any other changes which affect stevedoring or terminal operations.

absolute discretion over the terms and conditions imposed in the prior consultation process.

This arrangement, whereby JHTA can arbitrarily permit or deny carriers access to the prior consultation process, gives JHTA extraordinary leverage. If JHTA refuses to accept a proposed matter for prior consultation, any attempt by the carrier or its stevedore to implement the plan is likely to be met with work stoppages or other labor disruptions. Carriers are left with no choice but to acquiesce to any conditions imposed by JHTA. In a recent conversation with a U.S. Government official, the JHTA Chairman gave a clue as to the extent of his influence and discretion, reportedly stating that he enjoys ''absolute power'' to influence harbor-related matters in Japan.

It is uncontroverted that JHTA uses this leverage (that is, its unchecked authority to accept or reject carrier plans for pre-prior consultation) to prevent competition and maintain an agreed upon allocation of work among JHTA member companies. This conclusion is well-established in the responses of several lines to the Information Demand Orders, and was further supported in the U.S. lines' comments. For example, JHTA has prevented carriers and consortia from freely switching terminals or stevedores, and from consolidating and rationalizing operations. Also, it has refused to grant prior consultation requests unless carriers agreed to employ additional unnecessary stevedoring companies or contractors. Such practices prevent any real competition and undermine attempts to increase the efficiency of port operations, with the result that Japan has port costs that far exceed those of its Asian neighbors and other major trading nations.

The Japanese carriers raised several arguments in defense of the prior consultation system. First, they asserted that the system itself enjoys universal support among carriers. This, however, is clearly incorrect, as JFSA and the U.S. carriers advocate substantial revisions in the current system. Their proposed changes would go to the heart of the Commission's concerns, removing JHTA's free hand to approve or deny carrier requests, restrict competition, and allocate stevedoring work. The improvements advanced by the non-Japanese lines would, among other things, allow carriers to arrange their operations normally with their chosen stevedoring and terminal companies, as is the case in other major maritime nations. Under the JFSA proposal, JHTA could still maintain a legitimate collective bargaining role in negotiations between employers and labor unions, but would no longer be a ''black box'' issuing unappealable directions as to how carriers' shoreside operations should be conducted.

The Japanese carriers stated that the system was created to maintain labor stability and avoid the need for face to face confrontations between carriers and unions over the inauguration of ''innovated vessels.'' They pointed out that the inauguration of container service, which occurred in the 1960's and 70's, raised serious issues and led to disruption in waterfront labor relations in many maritime nations, including the U.S. They suggested that prior consultation is still necessary to avoid the disruptions of the past, and stated that they know of no other system that would better guarantee labor stability.

These reasons, however, do not justify the anticompetitive practices currently engaged in by JHTA. At no point has the Commission ever questioned the appropriateness of JHTA's role as an intermediary between employers and unions, or the practice of collective bargaining for waterfront labor, nor has it challenged any employer's right to designate JHTA as its representative in such negotiations. The Commission's concern lies with JHTA's autocratic control of carrier operations, suppression of competition, allocation of work among members, extraction of fees and other concessions, and retaliation against its detractors. None of these factors is a necessary or logical precondition to JHTA's collective bargaining or labor relations role, and none merits a policy of labor-related ''non-interference'' by the Government of Japan. Rather, these measures only serve to consolidate JHTA's power and shield its member companies from market forces.

While JHTA itself is an organization of harbor service providers, its abuses are not purely private sector matters. As explained in detail in the Notice and Information Demand Orders, in accordance with Japanese laws and regulations, JHTA operates with the permission of, and under the supervision of, MOT, which can annul JHTA's incorporation if it acts contrary to the public interest. MOT is authorized to give oversight or guidance relating to the prior consultation system, and has in fact intervened repeatedly, as confirmed by the Japanese carriers, to bring about the ''restoration, improvement, and continuance'' of the system. Moreover, MOT is vested with broad regulatory authority over JHTA member companies, including licensing authority and the right to review and disapprove rates and business plans. The Japanese lines' protestations that MOT generally takes no role in the day-to-day operations of prior consultation, and that it has no vested interest in its continuation, are immaterial. Given the Government of Japan's regulatory and oversight authority, JHTA and its member firms could not continue to operate in the current manner without the Government of Japan's ongoing support and approval.

The Japanese lines suggested that recent changes in prior consultation have eliminated the U.S. carriers' concerns. While any improvements are praiseworthy, these recent changes have been aimed only at adding transparency and speed to the process. They have done nothing to address the core problems of the system, such as JHTA's absolute authority to block carrier plans at the pre-pre-prior consultation stage, and its use of this authority to eliminate competition and extract other concessions.

Procedural Issues

The Japanese carriers argued that this proceeding is procedurally defective, and that their due process rights have been violated, because they have not had an opportunity to review the responses submitted by other carriers to the Commission's 1995 Information Demand Orders. They asserted that it was improper for the Commission to rely on these materials to reach the proposed findings set forth in the Notice without making them available to the Japanese carriers.

These procedural challenges are without basis. Confidentiality of submissions is explicitly provided for in the statute; section 19(8) states: ''Notwithstanding any other law, the Commission may refuse to disclose to the public a response or other information provided under the terms of this section.'' The confidentiality provided by this section is necessary to ensure that the Commission receives the most complete and accurate information possible. Disclosure in some cases could lead to retribution against respondents, seriously discouraging candid submissions. These points apparently were not lost on the Japanese carriers, as they requested confidential treatment for their entire Information Demand Order submissions.[7]

[7] The ''[n]otwithstanding any other law . . .'' language in the statute undermines the Japanese carriers'' argument that full disclosure is required by the Administrative Procedure Act. It would defy logic and common tenets of statutory construction to suggest that Congress added the non-disclosure provision in 1990 with the intention that it be

Continued

The Japanese carriers' assertion that their due process rights have been violated also lacks merit. In *American Association of Exporters and Importers* v. *U.S.,* the Court of Appeals for the Federal Circuit rejected statutory and constitutional challenges raised by an importers'' and exporters'' group to actions of the Committee for the Implementation of Trade Agreements, a federal agency, regulating and imposing quotas on trade in textiles. The court found no merit in appellant's claim that the agency violated importers' due process rights by denying them the opportunity to be heard prior to the imposition of quotas. In reasoning applicable to this proceeding, the court held that ''a prerequisite for due process protection is some interest worthy of protecting; 'We must look to see if the interest is within the [Constitution's] protection of liberty and property.' '' 751 F.2d at 1250, quoting *Board of Regents* v. *Roth,* 408 U.S. 564, 571 (1972). The court reasoned that a protectable interest must be more than a unilateral expectation; rather, those seeking constitutional protection under the due process clause must point to a ''legitimate claim of entitlement'' prior to any consideration of the government's constitutional obligations. The court held that the mere subjective expectation of a future business transaction does not rise to the level of an interest worthy of protection, and that ''[n]o one has a protectable interest in international trade.'' *Id.,* citing *Arnett* v. *Kennedy,* 416 U.S. 134, 167 (1974); *Perry* v. *Sinderman,* 408 U.S. 593, 603 (1972); *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294 (1933).

The Japanese carriers' expectation to be permitted, in the future, to operate in the U.S. foreign trades free of fees or charges therefore does not rise to the level of an interest in property worthy of constitutional protection. Accordingly, there can be no finding that the Japanese carriers' due process rights were violated.

There also is no merit to the Japanese carriers' argument that the instant proceeding is an ''adjudication'' and that as such they are entitled to additional procedural protections. The Commission's notice did not propose findings of unlawful conduct on the part of these three individual companies. Rather, it proposed findings that there exist conditions unfavorable to shipping in the U.S.-Japan trade, arising out of Japanese laws, rules, and regulations. In response, it proposed an across-the-board fee of $100,000, prospectively establishing the terms and conditions by which all Japanese carriers may operate liner vessels in the U.S. trades. The character of the proceeding is not transformed by the fact that the Commission, drawing on its trade monitoring resources, preliminarily identified in the Notice those carriers that appeared to fall into the subject class. Indeed, should it come to the Commission's attention that other Japanese carriers are operating liner services in the U.S. trades, the final rule will be amended to include them. *See* Docket No. 91–24, *Actions to Adjust or Meet Conditions Unfavorable to Shipping in the United States/Korea Trade*—Amendment to Final Rule, 58 FR 7988 (1993) (adding a Korean carrier that had newly entered the trade to a list of lines subject to sanctions).

Port and Terminal Concerns

The Port of Portland asked that the Commission clarify whether the $100,000 fee would be levied ''per-voyage'' or ''per-port call.'' As set forth in the proposed rule, the fee would be assessed on a per-voyage basis; that is, after a line first calls in the U.S. from abroad and is assessed the $100,000 fee, it would not be subject to additional fees for each successive U.S. port call on that voyage. This treatment would seem to eliminate the concern that the fee could lead to Japanese lines dropping or consolidating port calls in the U.S. Also, in response to Jacksonville Port Authority's concerns, we would point out that the rule applies only to container-carrying liner vessels, not dedicated car-carriers.

A number of commenters requested that the Commission address the possibility that Japanese carriers will cancel sailings or shift services to Canadian or Mexican ports in response to the fee. Such actions would appear improbable, and have not, in any event, been suggested by the Japanese carriers thus far in this proceeding. The $100,000 fee represents only a small percentage of the Japanese carriers' gross per-voyage revenues in the U.S. trades. [8] Given carriers' high fixed costs, it is unlikely that they would cancel services, foregoing multi-million dollar revenues, in order to avoid paying the fee. Similarly, it does not appear that the level of the fee would justify the high costs of shifting vessel calls to foreign ports. Such moves would require lines to make costly changes in contracts and arrangements for, among other things, terminal facilities, stevedoring, warehousing and storage, inland transportation, sailing schedules, and foreign and U.S. customs clearance. Nevertheless, the Commission will closely monitor and evaluate cost, revenue, and service level data to guard against adverse effects on U.S. ports, terminals, and shippers.

The Commission is not swayed by the argument, raised by a number of port commenters, that it would be unfair to impose fees on Japanese carriers when they are not responsible for Japanese port conditions and have invested millions of dollars in U.S. port facilities. Indeed, this argument highlights the inequity in treatment afforded U.S. lines in Japan versus that afforded Japanese carriers in this country, as U.S. carriers have had no opportunity to make similar investments in owning and operating Japanese terminal facilities. Japanese carriers have enjoyed continued success in the American market, enjoying high revenues and substantial growth in liner services and terminal operations, in large part due to the favorable and open business climate created by the laws, rules, and regulations of the United States. However, Japanese firms cannot expect to continue to reap the benefits of favorable U.S. transportation policies if such treatment is not reciprocated by the Government of Japan.

Recent Developments

As noted in the comments, a meeting reportedly was held on January 29, 1997, involving JHTA, non-Japanese carriers (represented by JFSA), and Japanese carriers (represented by JSPC). The meeting was arranged and chaired by MOT for the purpose of discussing possible reforms to the prior consultation system. Apparently, at the meeting JFSA presented a proposal based on the position paper submitted to the Commission. No proposals were submitted by JSPC or JHTA. MOT did not take a position on the JFSA proposal. We understand that another such meeting was held February 18,

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vitiated by the general provisions of the pre-existing APA. In addition, we would point out that the section cited by the Japanese lines includes an exception ''to the extent there is involved . . . [a] foreign affairs function of the United States.'' 46 U.S.C. § 553(a)(1); *see American Association of Exporters and Importers* v. *U.S.,* 751 F.2d 1239 (Fed. Cir. 1985).

[8] For example, for an average-sized vessel in the Asia-U.S. trades (i.e., a vessel with 3000 20-foot container capacity operating three-quarters full) the FMC fee would cost a carrier about $45 per container. In contrast, a carrier collects freight charges averaging $1,836 per container in the Japan-U.S. trades, and $2,250 from the China, Hong Kong, and Taiwan regions, according to FMC rate indices. A carrier will collect freight of over $4 million for one sailing of one average-sized vessel from Japan to the U.S., and over $5 million from the China range to the U.S., not including revenues from the return or onward voyage.

1997; however, by all accounts, no progress was made.

It appears that the Government of Japan has modified its stance somewhat with regard to JHTA and prior consultation. Rather than insisting that these are purely private matters outside of its control, it now appears to be acknowledging that the system has serious problems and indicating that it will endeavor to bring about a solution. However, thus far MOT's only action has been to arrange meetings, in the hopes that JHTA and the carriers will find a solution among themselves. The Government of Japan has suggested to U.S. officials that more time to reach a solution is needed.

MOT, however, has had ample time to address the restrictive conditions that exist in its ports. The instant controversy did not begin with the issuance of the Commission's Information Demand Orders or proposed rule. The U.S. Government and other major trading nations have been informing the Government of Japan repeatedly and strenuously for several years that its port policies and practices are unacceptable. In October of 1995, the Commission clearly indicated that these problems may be serious enough to warrant sanctions under Section 19. However, the Government of Japan simply maintained that the disputed practices were a matter for the private sector. While it is encouraging that the Government of Japan has finally begun acknowledging the seriousness of these matters, and meeting with involved parties, these steps do not go far enough now to warrant a stay of Commission action.

It appears unlikely, moreover, that a resolution to the current problems involving prior consultation will be reached through commercial negotiations limited to carriers and JHTA. At issue in this proceeding are, among other things, JHTA's dominance of the stevedoring industry, its control of the prior consultation system, and its use of that system to force changes and extract concessions from carriers. It appears, in sum, that JHTA has boundless negotiating leverage, and the carriers, especially foreign carriers, have none. Under such conditions, it is improbable that JHTA will simply volunteer to relinquish its overarching control over port services. Rather, it appears that only decisive measures by the Government of Japan can bring about meaningful reforms.

Demonstrating this point, JHTA recently threatened U.S. Government officials with massive retaliation against U.S. carriers if the Commission does not withdraw its proposed rule. Earlier this month, the JHTA Chairman reportedly told U.S. officials that, unless the threat of FMC sanctions against Japanese carriers is removed, he ''will not let any U.S. ships come into Japanese ports.'' Stating that it would be impossible to resolve issues with sanctions looming, he announced that he intends to suspend prior consultations for U.S. shipping firms, and possibly European firms as well, if the proposed rule is not withdrawn. Such threats were reportedly repeated at the February 18, 1997, meeting between JHTA and the carrier groups.

The JHTA Chairman's threats confirm and validate the need for immediate action in this area. That JHTA could recklessly threaten to disrupt the U.S.-Japan oceanborne trade, causing severe commercial harm to U.S. carriers, shippers, and international commerce, and that it has the apparent will and means to carry out such threats, strongly supports and justifies a finding of conditions unfavorable to shipping. These are clearly not private sector matters; the responsibility lies with the Government of Japan to eliminate the conditions which have left international trade so vulnerable to JHTA's self-serving caprice.

Final Rule

Based on the foregoing, the Commission concludes that a finding of conditions unfavorable to shipping in the U.S.-Japan trade is warranted. Accordingly, the Commission is issuing a final rule levying a fee of $100,000 each time a container-carrying liner vessel owned or operated by a Japanese carrier enters a U.S. port from abroad, assessed in the manner set forth in the proposed rule. This final rule will become effective April 14, 1997.[9]

The Commission is authorized to assess a per-voyage fee of up to one million dollars to adjust or meet conditions unfavorable to shipping in the foreign trade. At this time, a $100,000 fee is an appropriate and measured response to the conditions identified herein. However, if these issues are not addressed in a timely fashion, the level of this fee will be increased.

In addition, the Commission is gravely concerned about the possibility of retaliation against U.S. carriers for the actions and positions taken by the Commission and the United States Government. The validity of these concerns, voiced as well by the U.S. carriers in their comments, was confirmed by the repeated threats of JHTA officials. Therefore, as indicated in the final rule, the Commission has determined that the level of the fee will be increased upon a finding that the Government of Japan, JHTA, or related bodies have retaliated against U.S. carriers. Such a finding may be made expeditiously upon review by the Commission of information collected from carriers, U.S. Government agencies, or other sources, without the need for additional notice and comment. The level of the fee increase will be commensurate with the economic harm to U.S. carriers as a result of the retaliation. Similarly, should a finding of retaliation be made prior to the effective date of the final rule, the rule will be amended to become effective immediately.

[9] Accordingly, the Motion to Withdraw Proposed Rule and Discontinue the Proceeding, filed February 12, 1997, by MOL, NYK, and K-Line, is denied.

List of Subjects in 46 CFR Part 586

Cargo vessels, Exports, Foreign relations, Imports, Maritime carriers, Penalties, Rates and fares, Tariffs.

Therefore, pursuant to section 19(1)(b) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(1)(b), as amended, Reorganization Plan No. 7 of 1961, 75 Stat. 840, and 46 CFR Part 585, Part 586 of Title 46 of the Code of Federal Regulations is amended as follows:

1. The authority section for Part 586 continues to read as follows:

Authority: 46 U.S.C. app. 876(1)(b); 46 U.S.C. app. 876(5) through (12); 46 CFR Part 585; Reorganization Plan No. 7 of 1961, 26 FR 7315 (August 12, 1961).

2. Section 586.2 is added to read as follows:

§ 586.2 Conditions unfavorable to shipping in the United States/Japan trade.

(a) *Conditions unfavorable to shipping in the trade.* The Federal Maritime Commission (''Commission'') has identified the following conditions unfavorable to shipping in the U.S.-Japan trade, arising out of or resulting from laws, rules, or regulations of the Government of Japan:

(1) Shipping lines in the Japan-U.S. trades are not allowed to make operational changes, major or minor, without the permission of the Japan Harbor Transportation Association (''JHTA''), an association of Japanese waterfront employers operating with the permission of, and under the regulatory authority and ministerial guidance of, the Japan Ministry of Transport (''MOT'').

(2) JHTA has absolute and unappealable discretion to withhold permission for proposed operational changes by refusing to accept such

proposals for ''prior consultation,'' a mandatory process of negotiations and pre-approvals involving carriers, JHTA, and waterfront unions.

(3) There are no written criteria for JHTA's decisions whether to permit or disallow carrier requests for operational changes, nor are there written explanations given for the decisions.

(4) JHTA uses and has threatened to use its prior consultation authority to punish and disrupt the business operations of its detractors.

(5) JHTA uses its authority over carrier operations through prior consultation as leverage to extract fees and impose operational restrictions, such as Sunday work limits.

(6) JHTA uses its prior consultation authority to allocate work among its member companies (whose rates and business plans are subject to MOT approval), by barring carriers and consortia from freely choosing or switching operators and by compelling shipping lines to hire additional, unneeded stevedore companies or contractors.

(7) The Government of Japan administers a restrictive licensing standard which blocks new entrants from entering into the stevedoring industry in Japan. Given that all currently licensed stevedores are Japanese companies, and all are JHTA members, this blocking of new entrants by the Government of Japan shields existing operators from competition, protects JHTA's dominant position, and ensures that the stevedoring market remains entirely Japanese.

(8) Because of the restrictive licensing requirement, U.S. carriers cannot perform stevedoring or terminal operating services for themselves or third parties in Japan. In contrast, Japanese carriers (or their related companies or subsidiaries) currently perform stevedoring and terminal operating services in Japan and the United States.

(b) *Definitions*—(1) *Japanese carrier* means Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd, and Nippon Yusen Kaisha.

(2) *Designated vessel* means any container-carrying liner vessel owned or operated by a Japanese carrier (or any subsidiary, related company, or parent company thereof).

(c) *Assessment of fees.* A fee of one hundred thousand dollars is assessed each time a designated vessel is entered in any port of the United States from any foreign port or place.

(d) *Report and payment.* Each Japanese carrier, on the fifteenth day of each month, shall file with the Secretary of the Federal Maritime Commission a report listing each vessel for which fees were assessed under paragraph (c) during the preceding calendar month, and the date of each vessel's entry. Each report shall be accompanied by a cashier's check or certified check, payable to the Federal Maritime Commission, for the full amount of the fees owed for the month covered by the report. Each report shall be sworn to be true and complete, under oath, by the carrier official responsible for its execution.

(e) *Refusal of clearance by the collector of customs.* If any Japanese carrier subject to this section shall fail to pay any fee or to file any report required by paragraph (d) of this section within the prescribed period, the Commission may request the Chief, Carrier Rulings Branch of the U.S. Customs Service to direct the collectors of customs at U.S. ports to refuse the clearance required by 46 U.S.C. app. 91 to any designated vessel owned or operated by that carrier.

(f) *Denial of entry to or detention at United States ports by the Secretary of Transportation.* If any Japanese carrier subject to this section shall fail to pay any fee or to file any report required by paragraph (d) of this section within the prescribed period, the Commission may request the Secretary of Transportation to direct the Coast Guard to:

(1) Deny entry for purpose of oceanborne trade, of any designated vessel owned or operated by that carrier to any port or place in the United States or the navigable waters of the United States; or

(2) Detain that vessel at the port or place in the United States from which it is about to depart for another port or place in the United States.

(g) *Adjustment in fees to meet retaliatory measures.* Upon a finding by the Commission that U.S. carriers have been subject to discriminatory fees, restrictions, service disruptions, or other retaliatory measures by JHTA, the Government of Japan, or any agency, organization, or person under the authority or control thereof, the level of the fee set forth in paragraph (c) shall be increased. The level of the increase shall be equal to the economic harm to U.S. carriers on a per-voyage basis as a result of such retaliatory actions, provided that the total fee assessed under this section shall not exceed one million dollars per voyage.

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 97–5233 Filed 3–3–97; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 59

[CC Docket 96–237, FCC 97–36]

Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: On February 7, 1996, the Commission released *Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996,* Report and Order, CC Docket 96–237, FCC 97–36, to implement new section 259 of the Communications Act of 1934, as added by the Telecommunications Act of 1996. Section 259 generally requires incumbent local exchange carriers (incumbent LECs) to make available ''public switched network infrastructure, technology, information, and telecommunications facilities and functions'' to ''qualifying carriers'' that are eligible to receive federal universal service support but that lack economies of scale or scope. Wherever possible, the Commission adopts general rules that restate the statutory language. This approach, which relies in large part on private negotiations among parties to satisfy their unique requirements in each case, will help ensure that certain carriers who agree to fulfill universal service obligations pursuant to section 214(e) can implement evolving levels of technology to continue to fulfill those obligations.

EFFECTIVE DATE: The requirements and regulations established in this decision shall become effective upon approval by the Office of Management and Budget (OMB) of the new information collection requirements adopted herein, but no sooner than April 3, 1997. The Commission will publish a document in the Federal Register announcing the effective date of these regulations following OMB's approval of the information collections in this decision.

FOR FURTHER INFORMATION CONTACT: Thomas J. Beers, Deputy Chief, Industry Analysis Division, Common Carrier Bureau, at (202) 418–0952, or Scott Bergmann, Industry Analysis Division, Common Carrier Bureau, at (202) 418–7102. For additional information concerning the information collections in the Report and Order contact Dorothy Conway, at (202) 418–0217, or via the Internet to dconway@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report