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(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 02-09

**OCEAN COMMON CARRIER STATUS OF
SHANGHAI HAI HUA SHIPPING CO., LTD. (HASCO)**

And

**SNL/HASCO CROSS SPACE CHARTER
AND SAILING AGREEMENT
FMC AGREEMENT NO. 011807**

**ORDER OF INVESTIGATION,
REQUEST FOR ADDITIONAL INFORMATION AND
ORDER TO SHOW CAUSE**

This proceeding is instituted pursuant to sections 4, 5, 6, 8, 10, 11 and 19 of the Shipping Act of 1984 ("1984 Act"), as amended, 46 U.S.C. app. §§ 1703, 1704, 1705, 1707, 1709, 1710 and 1718, and the Commission's regulations governing the publication of tariffs of ocean common carriers (46 C.F.R. Part 520) and the filing of agreements by ocean common carriers (46 C.F.R. Part 535).

BACKGROUND

Under Section 8 of the 1984 Act, 46 U.S.C. app. § 1707, an ocean common carrier which holds out to provide service in the United States foreign trades must publish and maintain a tariff showing all of the carrier's rates, charges and practices. Commission regulations at 46 C.F.R. Part 520 specify that each common carrier must submit notification electronically to the Commission as to the manner of publishing such automated tariff.¹ The Commission, in turn, disseminates to the public information which identifies where each carrier's tariff(s) can be accessed through the medium of the Commission's website, <http://www.fmc.gov>.

Under Section 4 of the 1984 Act, 46 U.S.C. app. § 1703, certain agreements between or among ocean common carriers must be filed with the Commission under the procedures specified in section 5 of the 1984 Act. The agreement is subject to review and action taken thereon by the Commission in accordance with section 6 of the 1984 Act. Such agreements between ocean common carriers are processed and reviewed by the Commission according to strict statutory deadlines; unless rejected by the Commission or enjoined by a U.S. District Court, carrier activity under an effective agreement is immune thereafter from the application of U.S. antitrust laws. The Commission's regulations at 46 C.F.R. Part 535 specify the standards for filing of agreements by or among ocean common carriers, and the procedures by which such agreements are processed, reviewed and monitored by the Commission following effectiveness under section 6 of the 1984 Act.

¹See 46 C.F.R. § 520.3 (d) which requires submission of Form FMC-1 prior to commencement of common carrier service.

Ocean Common Carrier Status Of Shanghai Hai Hua Shipping Co., Ltd.

According to a review of records maintained by the Commission, an automated tariff was published on or about October 25, 2001 in the name of Shanghai Hai Hua Shipping Co. Ltd.,² doing business under the trade name HASCO. HASCO filed a Form FMC-1 in October 2001 in which it reported that it would operate as a vessel-operating common carrier. HASCO's tariff No. 017636-001 identifies the specific rules, rates and port ranges by which the carrier holds out to furnish vessel-operating common carrier services to the public.

It has come to the attention of the Commission that HASCO does not appear to operate any vessels in the trades for which HASCO has published a tariff. Agreement records maintained by the Commission reflect no current agreements under which HASCO currently operates vessels as a participant. In October 2001, HASCO proposed to participate as a party to FMC Agreement No. 011778, a cooperative working arrangement with Great Western Steamship Company ("Great Western"). Under that agreement, the parties proposed to share space on five vessels in a weekly service between Los Angeles/Long Beach CA and ports in the People's Republic of China. A significant feature of the Great Western/HASCO agreement was the provision that Great Western time charter to HASCO one of the five vessels to be deployed under the agreement. The Great Western/HASCO agreement was cancelled by written notice from the parties effective January 4, 2002.³

²Shanghai Hai Hua Shipping Co. Ltd. maintains principal offices at 18th Fl., No. 18, Yangshu Pu Road, Shanghai 200082, PRC.

³Counsel for Great Western subsequently advised the Commission's Bureau of Trade Analysis ("BTA") that the vessel was never delivered to HASCO.

A review of respected publications which survey the maritime industry, such as *Lloyd's Register, Containen'sation International* and *Fait-play*, fails to identify any vessels currently owned or operated by HASCO in U.S. foreign trades. Of similar import, access to trade databases fails to furnish any indicia that HASCO provides vessel-operating services at present.

SNL/HASCO Cross Space Charter and Sailing Agreement, FMC Agreement No. 011807

On May 29, 2002, counsel filed a Cross Space Charter and Sailing Agreement between HASCO and Sinotrans Container Lines Co. Ltd. ("Sinolines" or "SNL"),⁴ FMC Agreement No. 011807 (the "SNL/HASCO Agreement"). Under that agreement, the parties propose to share space on five vessels in a weekly service between U.S. Pacific ports (including Los Angeles/Long Beach CA) and ports in Asia, (including Hong Kong and Shanghai, PRC). It has been represented by filing counsel that Sinolines also proposes to time charter to HASCO one vessel to be deployed under the agreement.⁵

Under Section 4 of the 1984 Act, only those agreements which are between or among ocean common carriers may be filed with the Commission under the procedures specified in section 5 of the 1984 Act. Section 6(b) of the 1984 Act, 46 U.S.C. app. § 1705(b), provides that the Commission shall reject any filed agreement that, after preliminary review, the Commission finds

⁴**Sinolines** maintains principal offices at Sinotrans Mansion, No. 188, Fujian Middle Road, Shanghai, PRC.

⁵ This further aspect of the parties' cooperative working arrangement, *i.e.*, the authorities and conditions under which Sinolines will sub-charter one vessel to HASCO, is not defined in the filed agreement. The Commission's regulations on agreements require that each filed agreement must be "clear and definite in its terms, must embody the complete understanding of the parties, and must set forth the specific authorities and conditions under which the parties to the agreement will conduct their present operations and regulate the relationships among the agreement members," 46 C.F.R. §535.103(g).

does not meet the requirements of section 5 of the 1984 Act. See also, 46 C.F.R. §535.401(c) and §535.601.

In submitting the SNL/HASCO agreement, filing counsel asserts that the agreement “will not be implemented until HASCO has established it is or will be a VOCC [vessel-operating common carrier].” Letter from Robert B. Yoshitomi, Esq., dated May 25, 2002. The Information Form filed by the parties to the SNL/HASCO agreement reflects that HASCO made no port calls within the geographic scope of the agreement during the past 12 months. It thus appears that HASCO has not previously, and does not now, operate any vessels in U.S. foreign trade, whether under the terms of the SNL/HASCO Cross Space Charter and Sailing Agreement or pursuant to any existing vessel charter(s) from others.

DISCUSSION

The Commission is informed that Sinolines will take delivery of five vessels pursuant to time charters, for the purposes of operating such vessels in the U.S. trades. The Commission is further informed by filing counsel that Sinolines will then sub-time charter one of Sinolines’ vessels to HASCO. Filing counsel has advised the Commission, however, that the SNL/HASCO Agreement will not be implemented until HASCO “has established it is or will be a VOCC. ”

Based on the termination of former Agreement No. 011778 with Great Western, it therefore appears that HASCO does not operate any vessels in U.S. foreign trade, and that HASCO will not have commenced operating any vessel(s) prior to the effective date of the SNL/HASCO Cross Space Charter and Sailing Agreement. It also appears that HASCO does not anticipate operating any vessel or vessels in the U.S. trades independent of those operations to be furnished in conjunction with its agreement partner pursuant to the SNL/HASCO Agreement.

Reauest for Additional Information and Order of Investigation as to FMC Agreement No. 011807

The status of HASCO as a *bona fide ocean* common carrier potentially has significant regulatory implications for the parties to the SNL/HASCO Agreement. The Shipping Act of 1984 applies to agreements by or among ocean common carriers.⁶ It appears questionable that HASCO may be considered to be a vessel-operating common carrier qualified to enter into an agreement subject to the Shipping Act of 1984 independent of its vessel-sharing partner. In addition to providing HASCO with status as a VOCC for agreement purposes, this device may enable HASCO to avoid other applicable regulatory requirements. Agreements subject to the 1984 which are filed and effective provide qualified carriers antitrust immunity as well as the economic benefits of providing services jointly with other ocean common carriers as part of a cross-space charter and sailing agreement. However, in this instance it appears that only through the device of its agreement to simultaneously sub-charter a vessel from its agreement partner and operate that vessel in a service established and circumscribed by The SNL/HASCO Agreement can HASCO lay claim to the VOCC status by which HASCO can execute or participate in a section 4 agreement in the first instance.⁷

Under sections 4, 5 and 6 of the 1984 Act, the Commission has a duty to carefully examine not only the substantive lawfulness of the SNL/HASCO agreement but also HASCO's eligibility as an ocean common carrier, as defined in section 3(16) of the 1984 Act, to enter into such agreement. Under section 6(d) of the 1984 Act, the Commission may proceed by way of a request

⁶Under section 3 of the 1984 Act, 46 U.S.C. app. § 1702, an ocean common carrier is defined as a vessel-operating common carrier, i.e., one that operates a vessel, as it would pertain here, on the high seas between a port in the United States and a port in a foreign country.

⁷We note that on June 5, 2002, Sinolines filed a vessel-sharing agreement with Hanjin Shipping Co., Ltd., FMC Agreement No. 011808, in the same geographic trade as the SNL/HASCO Agreement. Under the new Hanjin agreement, Sinolines is to contribute five vessels. It is unclear whether these five vessels include the vessel that Sinolines anticipates sub-chartering to HASCO.

for additional information directed to the parties to an agreement in order to determine whether the agreement meets the requirements of sections 5 and 6 of the 1984 Act. The Commission therefore requests additional information from HASCO and Sinolines in response to questions transmitted confidentially to filing counsel today with a copy of this Order, pursuant to the Commission's rules at 46 C.F.R. §535.606(e). The questions are meant to elicit sufficient evidence to determine whether HASCO qualifies as an ocean common carrier and hence, whether the proposed agreement may become effective under section 4 of the 1984 Act as an agreement "by or among" two ocean common carriers. By this action pursuant to section 6(c)(2) of the 1984 Act, 46 U.S.C. app. § 1705, and 46 C. F. R. §535.606(b), the effective date of the subject agreement modification may be delayed until 45 days after the Commission has received the parties' responses.⁸

HASCO's Present Status As A Vessel Operating Common Carrier

The Commission previously has found that the maintenance of an ocean common carrier tariff absent a present intention and capacity to furnish those VOCC services held out in such tariff is contrary to the purposes of the Shipping Act and the Commission's tariff regulations. In Docket **No. 80-77, Failure of Vessel Operating Common Carriers in the Foreign Commerce of the United States to Comply With the Certification Filing Requirements of Section 21 (b) of the Shipping Act, 1916**, the Commission held that:

[C]arriers not actively carrying cargo or clearly committed to commence carrying cargo between ports named in a tariff at the rates stated therein are not common carriers by water within the meaning of Section 18 (b) and their tariffs in such unserved trades are subject to cancellation. **See Publication of Inactive Tariffs, 20 FMC 433,**

⁸To permit this proceeding to move expeditiously to decision, the Commission has determined to direct HASCO and Sinolines to furnish the requested information within 30 days of service hereof.

(1978). The Commission will, therefore, cancel the tariffs of the Appendix B carriers as contrary to Section 18 (b) and the Commission's tariff filing regulations (46 C.F.R. Part 536), . . .

21 S.R.R. **706, 707** (FMC, 1978). See also, ***Publication of Inactive Tariffs By Independent Carriers***, 17 S. R. R. 47 1 (FMC, 1977) in which the Commission concluded that tariff cancellations were deemed necessary in serving important public purposes:

It is misleading to the public, potentially unfair to competing carriers, and an administrative burden upon our staff for "paper" tariffs to be kept on file, available for possible use if it should suit the narrow purposes of the person issuing them to quickly enter the trade, but otherwise describing a nonexistent service. We construe such a situation as contravening the implicit requirements of Shipping Act section 18(b), subsections (1) through (3), which necessitates the prompt submission of accurate information concerning the services offered by a common carrier, including the suspension of all or any part of the operations described by its published tariffs. [Citations omitted.]

17 S.R.R. 471, at **472; *Ghezzi Trucking Inc. - Cancellation of Inactive Tariffs***, 11 S. R. R. 598, 600 (1970). The Commission also seeks to assure that vessel-operating common carrier tariffs not be used as a means or device by which to circumvent the bonding requirements applicable to NVOCCs.⁹ See, e.g. Docket **No. 98-31, *Publication of Inactive or Inaccurate Ocean Common Carrier Tariffs***, 28 S.R.R. 529, 531 (FMC, 1998). Finally, the Commission seeks to assure that vessel-operating common carrier tariffs not be used as a means or device to secure service contract eligibility, a necessary contracting element resulting from the Ocean Shipping Reform Act of 1998.

⁹ Absent operation of oceangoing vessels, HASCO's "holding out" to provide transport services may be indicative of operation as a non-vessel-operating common carrier ("NVOCC"). Under section 19 of the 1984 Act, 46 U.S.C. app. § 1718, an NVOCC must file with the Commission a bond covering its financial responsibility for transportation-related activities. If not domiciled in the U.S., the NVOCC must designate a person in the United States as agent for receipt of legal process.

The Commission hereby institutes an investigation under section 11 of the 1984 Act to determine whether HASCO is an ocean common carrier; whether the SNL/HASCO Agreement should be disapproved if it is found that HASCO is not an ocean common carrier; whether the SNL/HASCO agreement should be disapproved if it is found that the agreement, as tiled, does not meet the requirements of 46 C.F.R. §535.103(g); to show cause why HASCO's tariff No. 017636-001 should not be cancelled; and to show cause why HASCO should not be ordered to cease and desist doing business as a common carrier until such time as it provides proof to the Commission that it publishes and maintains a valid automated tariff as an NVOCC and maintains a bond and resident agent as required by section 19 of the Shipping Act of 1984 and Commission regulations.

NOW THEREFORE, IT IS ORDERED That, pursuant to section 11 of the Shipping Act of 1984, Shanghai Hai Hua Shipping Co. Ltd. dba HASCO is directed to show cause why the Commission should not find HASCO in violation of sections 8 and 10(b) of the Shipping Act of 1984 for failure to provide service as a vessel-operating common carrier in accordance with the routes, rules and rates set forth in its tariff, No. 017636-001;

IT IS FURTHER ORDERED That HASCO is directed to show cause why the Commission should not order the cancellation of any tariff(s) by which Respondent currently holds out to the public, for failure to provide service as a vessel-operating common carrier in accordance with such tariff;

IT IS FURTHER ORDERED That HASCO is directed to show cause why it should not be directed to cease and desist doing business as a common carrier until such time as HASCO provides proof to the Commission that it publishes and maintains a valid automated tariff as a NVOCC in accordance with the routes, rules and rates set forth therein, and maintains a bond and resident

agent as required by section 19 of the Shipping Act of 1984 and Commission regulations pursuant thereto;

IT IS FURTHER ORDERED That, pursuant to section 6 of the Shipping Act of 1984, Sinotrans Container Lines Co. Ltd. dba Sinolines and Shanghai Hai Hua Shipping Co. Ltd. dba HASCO, each are directed to furnish written responses to the questions transmitted confidentially to filing counsel pursuant to the Commission's rules at 46 C.F.R. §535.606(e), in order that the Commission may make the determinations required by sections 5(a) and 6 of the 1984 Act;

IT IS FURTHER ORDERED That, pursuant to section 6 of the Shipping Act of 1984, Sinolines and HASCO each are directed to show cause why the Commission should not disapprove, modify or order the cancellation of the SNL/HASCO Cross Space Charter and Sailing Agreement, FMC Agreement No. 011807, inasmuch as such agreement is not between or among two ocean common carriers as required by section 4 of the 1984 Act;

IT IS FURTHER ORDERED That, pursuant to section 6 of the Shipping Act of 1984, Sinolines and HASCO each are directed to show cause why the Commission should not disapprove, modify or order the cancellation of the SNL/HASCO Cross Space Charter and Sailing Agreement, FMC Agreement No. 011807, inasmuch as such agreement does not meet the requirements of 46 C.F.R. §535.103(g);

IT IS FURTHER ORDERED That this proceeding is limited to the submission of facts and memoranda of law;

IT IS FURTHER ORDERED That any person having an interest and desiring to intervene in this proceeding shall file a petition for leave to intervene in accordance with Rule 72 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.72. Such petition shall be

accompanied by the petitioner's memorandum of law and affidavits of fact, if any, and shall be filed no later than the day fixed below;

IT IS FURTHER ORDERED That Shanghai Hai Hua Shipping Co., Ltd. dba HASCO, and Sinotrans Container Lines Co. Ltd. dba Sinolines, are named Respondents in this proceeding;

IT IS FURTHER ORDERED That Sinolines and HASCO shall file responses to the questions transmitted confidentially to filing counsel pursuant to the Commission's rules at 46 C.F.R. §535.606(e), no later than July 26, 2002;

IT IS FURTHER ORDERED That affidavits of fact and memoranda of law shall be filed by Respondents and any intervenors in support of Respondents no later than July 26, 2002;

IT IS FURTHER ORDERED That the Commission's Bureau of Enforcement be made a party to this proceeding;

IT IS FURTHER ORDERED That reply affidavits and memoranda of law shall be filed by the Bureau of Enforcement and any intervenors in opposition to Respondents no later than August 26, 2002;

IT IS FURTHER ORDERED That, pursuant to 46 C.F.R. § 502.7, every document, exhibit, or other paper written in a language other than English to be filed with the Commission or offered in evidence in this proceeding shall be accompanied by an English translation thereof duly verified under oath to be an accurate translation;

IT IS FURTHER ORDERED That:

(a) Should any party believe that an evidentiary hearing is required, that party must submit a request for such hearing together with a statement setting forth in detail the facts to be proved, the relevance of those facts to the issues in this proceeding, a description of the evidence which would be adduced, and why such evidence cannot be submitted by affidavit;

(b) Should any party believe that an oral argument is required, that party must submit a request specifying the reasons therefore and why argument by memorandum is inadequate to present the party's case; and

(c) Any request for evidentiary hearing or oral argument shall be filed no later than August 26, 2002;

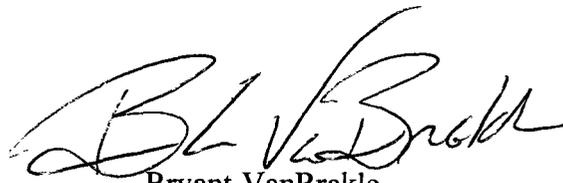
IT IS FURTHER ORDERED, That, pursuant to 46 C.F.R. § 502.10, Subpart L of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.201 et seq., which provides for depositions, interrogatories and discovery, is waived in this proceeding until and unless the Commission determines to grant a request for evidentiary hearing or to refer any matter arising out of this proceeding to an Administrative Law Judge for possible assessment of civil penalties pursuant to section 13 of the 1984 Act, 46 U.S.C. app. § 1712.

IT IS FURTHER ORDERED That notice of this Order to Show Cause be published in the Federal Register, and that a copy thereof be served upon each Respondent at its last known address;

IT IS FURTHER ORDERED That all documents submitted by any party of record in this proceeding shall be filed in accordance with Rule 118 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.118, as well as being mailed directly to all parties of record;

FINALLY, IT IS ORDERED That pursuant to the terms of Rule 61 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.61, the final decision of the Commission in this proceeding shall be issued by October 25, 2002.

By the Commission.


Bryant VanBrakle
Secretary