

S E R V E D
August 23, 2004
FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION

Docket No. 04 -10

Agreement No. 201158
Docking and Lease Agreement by and between City of
Portland, Maine and Scotia Prince Cruises Limited

ORDER OF INVESTIGATION AND HEARING

Agreement No. 201158 is a “docking and lease agreement” between the city of Portland, Maine (“Portland”), a municipal corporation organized under the laws of Maine, and Scotia Prince Cruises Limited (“Scotia Prince”), a Bermuda corporation. Under the Agreement, effective this date, Scotia Prince leases certain docking and terminal facilities from Portland for purposes of operating a daily passenger and passenger vehicle service between Portland and Yarmouth, Nova Scotia.

Ordinarily, a docking and lease agreement would be classified as a “marine terminal facilities agreement” exempt by regulation from the filing and waiting period requirements of section 5 of the Shipping Act of 1984, as amended (“Shipping Act”), 46 U.S.C. app. §1704. *See* 46 C.F.R. §535.311. Agreement No. 201158, however, contains exclusive use and non-compete provisions which cause it to be classified as a cooperative working agreement under section 4(b)(2) of the Act,

46 U.S. app. 1705(b)(2). Specifically, in sections 15 and 16 of the Agreement, Portland has agreed not to grant to any other operator permission to use its terminal premises for passenger or passenger vehicle service to or from Portland during Scotia Prince's scheduled season.¹ In return, Scotia Prince has agreed not to operate or participate in the operation of any competitive passenger or passenger vehicle service operating between any New England port and any port in Nova Scotia.

The effect of sections 15 and 16 of the agreement is to grant Scotia Prince a monopoly on passenger and passenger vehicle service between Portland, Maine and all ports in Nova Scotia, including Yarmouth. At the same time, Portland is protected from possible competition from Scotia Prince at nearby Portsmouth, NH, Bar Harbor, ME or any other New England port. Inclusion of these restrictive provisions in an otherwise routine agreement raises serious concerns under section 10(d) of the Shipping Act, 46 U.S.C. app. 1709(d). Section 10(d) provides, as pertinent:

(1) No common carrier, ocean transportation intermediary, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

(2) No marine terminal operator may agree with another marine terminal operator or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, any common carrier or ocean tramp.

(3) The prohibitions in subsections (b)(10) and (13) of this section apply to marine terminal operators.

¹ Approximately May 1 - October 31.

(4) No marine terminal operator may give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person.

The restrictions on competitive service at Portland may also contravene section 10(b)(10), made applicable to marine terminal operators by section 10(d)(3), which makes it unlawful to “unreasonably refuse to deal or negotiate.”

Background

Scotia Prince’s service to Portland is provided by the M/V Scotia Prince, a 485 foot cruise vessel which accommodates approximately 1200 passengers and 200 vehicles. The Scotia Prince, which was extensively renovated in 2003, offers passengers restaurant dining, a casino, a café and bars, live entertainment, duty free shopping, a skydeck, and a massage and beauty spa, among other amenities. Overnight berths for 1,054 are provided in 174 cabins and staterooms.

The Scotia Prince operates on a daily basis carrying passengers and passenger vehicles between Portland and Yarmouth in southern Nova Scotia. The vessel departs Portland each evening, sails overnight and arrives at Yarmouth the next morning, eleven hours later. After an hour in port to disembark and embark passengers and vehicles, the Scotia Prince sails for Portland, arriving in the early evening. Approximately 153,000 passengers were boarded in 2003.²

² Scotia Prince Cruises is separately regulated by the Commission as a passenger vessel operator under 46 CFR Part 540.

Portland is a municipal corporation which operates the Port of Portland under the authority and control of the Portland City Council. Portland has recently undertaken to construct a new “International Passenger and Ferry Terminal” and has committed \$17 million dollars of public money to do so. It is the intention of the parties to relocate Scotia Prince’s operation to the new terminal and to continue to apply the exclusive use provisions in sections 15 and 16, applicable to all terminal facilities in Portland, after the relocation.³

In response to the Federal Register publication of Agreement No. 201158, Bay Ferries Limited (“Bay Ferries”) submitted comments objecting to certain provisions of the agreement, specifically sections 15 and 16. Bay Ferries is a Canadian corporation, headquartered in Charlottetown, Prince Edward Island, which provides transportation of passengers and passenger vehicles between Bar Harbor, Maine and Yarmouth, Nova Scotia. Bay Ferries’ service is provided by “The Cat,” a 300 foot, high speed catamaran which accommodates 875 passengers and 250 vehicles, including busses and oversized vehicles. The Cat has no berths or cabins and offers relatively modest amenities. It makes the crossing from Bar Harbor to Yarmouth in about three hours, including port time.

Bay Ferries has expressed its desire to provide passenger and passenger vehicle service between Portland and Yarmouth, has met with Portland officials and has indicated it is prepared to introduce service utilizing its existing catamaran with an intermediary call at Bar Harbor. Bay Ferries anticipates providing service between Portland and Yarmouth, with an intermediary call at Bar Harbor, in 4.5 hours.

³ Docking and Lease Extension #2 between Portland and Scotia Prince Cruises Limited, p.2, January 3, 2004.

Discussion

Exclusive arrangements which foreclose competition, such as those created by sections 15 and 16 of Agreement No. 201158, have been considered in a number of Commission decisions and are generally viewed as contrary to this nation's pro-competitive policies. In *Petchem, Inc. v Canaveral Port Authority*, 23 S.R.R. 974, 988 (1986), we stated:

The exclusive arrangement between the Port Authority and Hvide is prima facie unreasonable because it is contrary to the general policies of the United States favoring competition, which fact obligates Respondents to justify the arrangement.

As we have recognized, however, the Shipping Act of 1984, like the Shipping Act, 1916, does "not forbid all preferential or prejudicial treatment; only that which is undue or unreasonable." *Id.*, quoting *A.P. St. Philip v. Atlantic Land & Improvement Co. et al*, 13 F.M.C. 167, 174 (1969). After discussing the decision in *Agreement No. T-2598*, 17 F.M.C. 286 (1974), where the parties successfully justified an exclusive terminal and stevedoring arrangement, we held in *Petchem, supra*:

In sum, the appropriate standard for judging exclusive terminal arrangements under the Shipping Acts is a synthesis of the *St. Philip* and *Agreement T-2598* decisions. Such arrangements are generally undesirable and, in the absence of justification by their proponents, may be unlawful under the Shipping Acts. However, in certain circumstances, such arrangements may be necessary to provide adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services and generally to advance the port's economic well-being. *Id.*, at 990.

While an exclusive arrangement may be justified under appropriate circumstances, we noted with approval the ALJ's affirmation that "the greater the degree of preference or monopoly, the greater the evidentiary burden of justification." *All Marine Moorings v. ITO Corp. of Baltimore*, 27 S.R.R. 539, 545 (1996).

A refusal “to deal or negotiate” is, in and of itself, not a violation of the Shipping Act. We must determine whether the refusal was unreasonable or whether it may have been justified by particular circumstances in effect. In *Petchem, Inc. v. Federal Maritime Commission*, 853 F.2d 558, 563 (D.C. Cir. 1988), the Court of Appeals recognized that “[t]he Shipping Act contemplates the existence of permissible preferences or prejudices.” The Commission’s analysis in *Seacon Terminals, Inc. v. Port of Seattle*, 26 S.R.R 886 (1993), indicates that whether a marine terminal operator gave good faith consideration to an entity’s proposal or efforts at negotiation is central to determining whether a refusal to deal or negotiate was reasonable.

In view of the above, an evidentiary investigation is necessary to determine whether the City of Portland and/or Scotia Prince Cruises is in violation of sections 10(b)(10) and 10(d)(1)-(4) of the Shipping Act by entering into and operating under a restrictive working arrangement which negatively impacts competition for passenger and passenger vessel service in the trade between Portland and Nova Scotia.

NOW THEREFORE, IT IS ORDERED That, pursuant to sections 10(b)(10),10(d)(1)-(4), 11, and 13 of the Shipping Act, 46 U.S.C. app. 1709(b)(10), 1709(d)(1)-(4), 1710, and 1712, an investigation is hereby instituted to determine:

(1) whether the Port of Portland and/or Scotia Prince Cruises, alone or in conjunction with one another, have violated sections 10(b)(10) and 10(d)(3) of the Shipping Act by entering into an agreement whereby the Port of Portland unreasonably refuses to deal or negotiate with other providers of passenger and passenger vehicle transportation;

(2) whether the Port of Portland and/or Scotia Prince Cruises, alone or in conjunction with one another, have violated sections 10(b)(10) and 10(d)(3) of the Shipping Act by entering into an

agreement whereby Scotia Prince Cruises unreasonably refuses to deal or negotiate with ports in New England other than Portland;

(3) whether the Port of Portland has violated section 10 (d)(1) of the Shipping Act by failing to establish, observe and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property;

(4) whether the Port of Portland and Scotia Prince Cruises have violated section 10(d)(2) of the Shipping Act by agreeing to boycott or unreasonably discriminate in the provision of terminal services to a common carrier;

(5) whether the Port of Portland has violated section 10(d)(4) of the Shipping Act by providing Scotia Prince Cruises with an undue and unreasonable preference or advantage;

(6) whether, in the event violations of sections 10(b) and 10(d) of the Shipping Act are found, civil penalties should be assessed against the Port of Portland and Scotia Prince Cruises and, if so, in what amount; and

(7) whether, in the event such violations are found, the Port of Portland and Scotia Prince Cruises should be ordered to cease and desist from practices and agreements which are in violation of sections 10(b)(10) and 10(d)(1)-(4) of the Shipping Act.

IT IS FURTHER ORDERED, That the Port of Portland and Scotia Prince Cruises Limited are designated as respondents in this proceeding;

IT IS FURTHER ORDERED, That a public hearing be held in this proceeding and that these matters be assigned for hearing before an Administrative Law Judge ("ALJ") of the Commission's Office of Administrative Law Judges at a date and place to be hereafter determined by the ALJ in compliance with Rule 61 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.61. The hearing

shall include oral testimony and cross-examination in the discretion of the presiding ALJ only after consideration has been given by the parties and the presiding ALJ to the use of alternative forms of dispute resolution, including but not limited to mediation pursuant to 46 C.F.R. 502.91, and upon a proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions, or other documents or that the nature of the matters in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record.

IT IS FURTHER ORDERED, That the Commission's Bureau of Enforcement is designated a party to this proceeding.

IT IS FURTHER ORDERED, That notice of this Order be published in the Federal Register, and a copy be served on each party of record.

IT IS FURTHER ORDERED, That other persons having an interest in participating in this proceeding may file petitions for leave to intervene in accordance with Rule 72 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.72.

IT IS FURTHER ORDERED, That all further notices, orders, and/or decisions issued by or on behalf of the Commission in this proceeding, including notice of the time and place of hearing or prehearing conference, shall be served on each party of record;

IT IS FURTHER ORDERED, That all documents submitted by any party of record in this proceeding shall be directed to the Secretary, Federal Maritime Commission, Washington, DC 20573-0001, in accordance with Rule 118 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.118, and shall be served on each party of record.

FINALLY, IT IS ORDERED, That in accordance with Rule 61 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.61, the initial decision of the presiding ALJ shall be issued by August 23, 2005, and the final decision of the Commission shall be issued by December 21, 2005.

By the Commission.

A handwritten signature in black ink, appearing to read 'Bryant L. VanBrakle', written in a cursive style.

Bryant L. VanBrakle
Secretary