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(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

DOCKET NO. 91-31

ACTIONS TO ADDRESS ADVERSE CONDITIONS
AFFECTING UNITED STATES CARRIERS
IN THE UNITED STATES/PEOPLE'S
REPUBLIC OF CHINA TRADE

NOTICE AND ORDER OF INVESTIGATION

Upon publication of this Notice and Order in the Federal Register, the Federal Maritime Commission ("Commission") initiates an investigation of shipping conditions in the United States/People's Republic of China Trade ("U.S./PRC Trade" or "PRC Trade") under the Foreign Shipping Practices Act of 1988 ("FSPA"), 46 U.S.C. app. § 1710a. This investigation seeks to determine whether conditions exist in the PRC Trade which adversely affect the operations of United States carriers and which do not exist for People's Republic of China ("PRC") carriers in the United States ("U.S.").

On January 29, 1991, the Commission issued an Order directed to the two United States carriers¹ and two PRC carriers² which serve the U.S./PRC Trade. By simultaneous Federal Register Notice, the Commission solicited relevant information from interested persons. These actions resulted from allegations and information made available to the Commission concerning five subject matter areas affecting commercial operations of U.S. carriers in the PRC, as follows:

1. Full branch office status. It was reported that U.S. carriers' representative offices in the PRC are precluded from conducting normal business activities, such as soliciting and booking cargo, issuing bills of lading, collecting freight charges, and contracting for handling and ancillary services.
2. Recognition of carriers' tariffs. U.S. carriers allegedly are precluded from assessing their lawful tariff rates, and from effecting rate increases deemed necessary to their efficient operation in the PRC Trade.
3. Port service issues. It was reported that U.S. carriers are not permitted to select, own or operate dockside facilities and equipment, or to control terminal

¹American President Lines, Ltd. ("APL") and Sea-Land Service, Inc. ("Sea-Land").

²China Ocean Shipping Co. ("COSCO") and China National Foreign Trade Transportation Corp. ("SINOTRANS").

services, and that U.S. carriers are charged exorbitant rates for port calls.

4. Intermodal and related services. U.S. carriers allegedly cannot own or operate trucking services, inland CY and CFS terminals, conduct warehousing activities, or provide services as a dockside agency.
5. "Doing business" costs. It was alleged that U.S. carriers are assessed disproportionately high charges in the course of their business operations in the PRC or are assessed discriminatory charges vis-a-vis PRC carriers.

To determine the accuracy of these allegations and to obtain additional relevant information, the Commission sought evidence regarding, inter alia, attempts by U.S. carriers to persuade the PRC to ease these restrictive practices and the PRC responses to such efforts; the existence and financial or operational effect of any disadvantage or adversity suffered by U.S. carriers as a result of these PRC policies or practices; and the existence or lack of comparable restrictions on PRC carriers in their activities in the PRC and in the United States. In response to the Order, affidavits, documents and memoranda were submitted by the named PRC and U.S. carriers.³ Comments responding to the Federal Register Notice were submitted by the Shipbuilders Council of America, Craig

³APL, Sea-Land and COSCO submitted their responses under claim of confidentiality, as permitted under 46 CFR Part 588. SINOTRANS submitted a two-page, unverified response without assertion of confidential treatment. COSCO subsequently withdrew its claim of confidentiality.

B. Simonsen, and the Asia North American Eastbound Rate Agreement ("ANERA").

These responses and comments provided substantial information with respect to the issues raised in the Order. Based on a review of that information, the following summarizes the current status of PRC restrictive practices:

Full branch office status.

1. In April 1986, the PRC enacted the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises. Article 5 of the Rules for the Implementation of the Law of the People's Republic of China on Wholly Foreign-Owned Enterprises restricts the establishment of wholly foreign-owned enterprises in the businesses of traffic and transportation.
2. As a result of the law on wholly foreign-owned enterprises and its related rules, the only two means by which a foreign carrier can operate in the PRC on a long term basis are (a) the resident representative office and (b) joint ventures between foreign carriers and a PRC partner operating under the supervision of PRC authorities.
3. In October 1980, the PRC State Council promulgated Interim Regulations of the People's Republic of China Concerning the Control of Resident Offices of Foreign Enterprises ("Interim Regulations"). Article 2 states that no foreign enterprise is allowed to start business

activities in the PRC unless the registration procedure is completed and approval is granted by PRC authorities. Maritime shipping operators must apply to the PRC Ministry of Communications, under Article 4 of the Interim Regulations.

4. In March 1983, the State Administration for Industry and Commerce promulgated the Procedures of the State Administration for Industry and Commerce for the Registration and Administration of Resident Representative Offices of Foreign Enterprises (the "Procedures"). Article 3 provides that resident representative offices of foreign enterprises in the PRC shall conduct "indirect business operations" only.
5. Article 15 of the Procedures provides that the State Administration for Industry and Commerce may assess a penalty of not more than 20,000 yuan for representative offices which engage in direct business operations.
6. In July 1979, the National People's Congress of the PRC promulgated the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment. Article 1 of the law permits foreign companies to form joint ventures in the PRC with PRC companies. Under Article 3, joint ventures must apply to the Foreign Investment Commission of the People's Republic of China for authorization of the agreements and contracts concluded between the parties. The joint venture also

shall register with the State Administration for Industry and Commerce in order to be licensed prior to operation.

7. Joint ventures must be managed in cooperation with a PRC partner. As the PRC company remains under direct supervision of PRC governmental authorities, the foreign carrier's control over day-to-day operations of the joint venture is necessarily restricted. Article 6 of the law provides that the chairman of the board of directors of the joint venture shall be appointed by the PRC company.
8. As a result of PRC restrictions on the activities of branch offices, U. S. carriers must employ PRC-controlled agents in order to conduct their business activities, such as signing contracts, issuing bills of lading and cargo reservation documents, and collecting freight charges. The only PRC companies providing such agency services are SINOTRANS and China Ocean Shipping Agency ("PENAVIDEO") .
9. In addition to its status as ocean common carrier and shipping agent in the PRC Trade, SINOTRANS is a PRC freight forwarder and feeder vessel operator. SINOTRANS is subordinate to the Ministry of Foreign Economic Relations and Trade. PENAVIDEO is a subsidiary of COSCO, which is a direct competitor of the U.S. carriers. PENAVIDEO is subordinate to the Ministry of Communications.

10. U.S. carriers are unable to directly control carrier costs and activities in the PRC due to PRC restrictions on direct business operations. As a result, U.S. carriers are unable to control issuance of bills of lading to prevent inaccurate or improper issuance of carrier documents, and are subjected to limits on the use of U.S. feeder vessels and to significantly higher costs of utilizing PRC feeder vessels. In addition, U.S. carriers are subjected to paying charges for agency fees and services which are significantly higher than the costs of performing their own agency and documentation activities, and are denied the opportunity to develop more cost-efficient options for performing agency functions.
11. Similar restrictions on branch office activities do not exist for PRC carriers doing business in the United States.

Recognition of Carriers' Tariffs

1. In May 1990, the PRC Ministry of Communications enacted the Regulations Governing the Management of International Liner Shipping (the "Regulations"). Article 9 of the Regulations provides that all agency work for international shipping companies shall be performed by shipping agencies approved by the Ministry of Communications.

2. In 1990, the PRC also promulgated the Provisions on the Administration of Shipping Agencies for International Ocean Going Ships (the "Provisions"). Article 4 of the Provisions provides that only those shipping agencies approved by the Ministry of Communications are permitted to engage in shipping agency business in the PRC. As the only shipping agencies approved in the PRC, PENAVICO and SINOTRANS operate as state monopolies under PRC law.
3. Article 8 of the Provisions states that the Ministry of Communications can define the scope of the business of a shipping agency. Within that scope, the functions to be fulfilled by a shipping agency are:
 - 1) Attending to the procedure for ship's entry into and departure from port. Arranging ship's berthing and loading/unloading;
 - 2) Arranging custom formalities for ship, cargo and container;
 - 3) Arranging forwarding, transshipment and multi-modal transportation of cargo and container;
 - 4) Signing bills of lading, contracts of affreightment and despatch/demurrage agreements when authorized by shipowner or master of a ship;
 - 5) Attending to passenger's international sea passage;
 - 6) Canvassing cargo and booking shipping space for shippers;
 - 7) Arranging for maritime salvage and attending to cases of marine accident and claims;
 - 8) Collecting and effecting payment for the entrusting party and settling of accounts;
 - 9) Other shipping agency business and services.

4. COSCO states that, of the above, only those functions of executing carrier bills of lading and cargo reservation documents, and collection of ocean freight rates and charges must be performed by PRC shipping agents. It appears, however, that all of the above functions are within the scope of business of a shipping agency, as defined by the Ministry of Communications, and U.S. carrier principals are therefore precluded from conducting such activities.
5. Shipping agencies are required to be a "legal person" of a state-operated enterprise of the People's Republic of China. As a state-operated enterprise under PRC law, COSCO can establish, own and operate subsidiaries for the performance of shipping agency functions. U.S. carriers must contract with PRC companies for the performance of these direct business activities.
6. Article 12 of the Provisions provides that shipping agencies must apply the uniform rates for dues and charges set by the Ministry of Communications.
7. It is the practice of SINOTRANS and PENAVICO that U.S. carriers' tariffs be maintained at a level no higher than those published by the Far East Enterprising Co. (H.K.), Ltd. ("FARENCO"). FARENCO acts as the Hong Kong agent

for SINOTRANS, and is believed to be a subsidiary of SINOTRANS.

8. SINOTRANS and PENAVICO use their control over the authentication of bills of lading to book and rate cargo contrary to the U.S. carriers' tariffs.
9. SINOTRANS and PENAVICO use their control over collection of ocean freight money to assess and collect freight at less than the rates and charges established by the U.S. carriers in their tariffs⁴.
10. Similar restrictions on recognition and observance of carriers' tariffs in the United States/PRC Trade do not exist for PRC carriers doing business in the United States.

⁴Section 10(a)(1) of the Shipping Act of 1984, 46 U.S.C. app. §1709(a)(1), makes it a prohibited act for any person to obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable. The Commission does not intend, however, to address questions of possible Shipping Act violations by these PRC shipping agents on behalf of PRC shippers in the context of the current FSPA proceeding.

Port Service Issues⁵

a) *Port handling charges:*

1. In December 1990, the PRC State Council promulgated the Rules on Control of International Ocean Shipping of Containers (the "Rules on Container Shipping"). Article 20 of the Rules on Container Shipping provides that fees for ocean shipping of international containers and other fees should be charged in accordance with transport prices and rates stipulated by the PRC.
2. Article 32 of the Rules on Container Shipping states that violations of the Rules and state decrees concerning transport fees are subject to punishment by PRC authorities.
3. In March 1990, the Ministry of Communications issued Regulations Governing Collection of Port Dues and Charges on Ocean Going Vessels Engaged in International Trade and on Imported or Exported Cargoes, which publish a single

⁵The Commission's Order of January 29, 1991 sought, inter alia, information concerning the existence and effect of PRC laws restricting the ownership and operation of dockside terminals and terminal handling equipment. Review of the carriers' responses to the Order confirms the existence of PRC laws, rules and regulations restricting the establishment of terminals in the PRC by wholly foreign-owned enterprises. The U.S. carriers make the point, however, that elimination of other major trade restrictions facing the U.S. carriers are seminal to their decisions to construct or operate PRC terminals. Accordingly, the Commission has determined not to address this latter issue in the present FSPA proceeding. The Commission will consider taking action under the FSPA or Section 19 of the Merchant Marine Act, 1920, 46 U.S.C. app. §876, should it later appear that PRC restrictions on terminals and terminal equipment are adversely affecting U.S. carriers.

set of charges for the use of port, terminal or other facilities and equipment applicable to PRC and foreign carriers. Nevertheless, U.S. carriers operating their own feeder vessels to PRC ports are assessed higher charges for the same port services than PRC carriers.

4. COSCO states that the higher port charge for U.S. feeder vessels "compensates" for harbor and energy taxes and contributions. However, U.S. carriers are exempt from harbor and energy taxes and levies under PRC law.
5. Port charges in the United States are not comparable to PRC port charges inasmuch as U.S. port charges are not based on the flag of the vessel being served.
 - b) *Feeder service:*
 6. SINOTRANS, COSCO and other PRC vessel operators provide feeder vessel service between Hong Kong and the PRC ports of Dalian, Qinhuangdao, Xingang, Shanghai, Zhangjiagang, Ninbo, Qingdao, Fuzhou, Nantong, and Nanjing. PRC carriers do not provide feeder service between Hong Kong and the PRC ports of Xiamen, Chiwan and Whampoa. U.S. feeder services operate between the latter ports.
 7. SINOTRANS and PENAVICO, through their control of cargo reservation and issuance of bills of lading, deny export cargo to U.S. feeder vessels, thereby denying U.S. carriers' feeder vessels the opportunity to serve PRC ports other than Xiamen, Chiwan and Whampoa.

8. SINOTRANS and PENAVICO assess U.S. carriers charges for utilizing PRC feeder vessels which are significantly higher than would be the costs of furnishing the same service by U.S. feeder vessel.
9. U.S. laws do not impose restrictions on the ability of PRC carriers to own or operate feeder services between U.S. and foreign ports comparable to PRC restrictions on U.S. carriers.

Intermodal and Related Services

1. PRC laws restrict U.S. carriers from ownership and operation of (a) trucking services for intermodal transport of their own containers, (b) inland CY and CFS terminals, and (c) related warehousing activities.
2. Article 7 of the Rules on Control of International Ocean Shipping of Containers provides that proposals for transshipment and transport stations must be examined and ratified by provincial, autonomous regional, or municipal transport governing authorities.
3. As a state-operated enterprise under PRC law, COSCO can establish, own and operate subsidiaries for the performance of inland terminal CY, CFS and warehousing operations.
4. U.S. carriers must contract with PRC companies for the performance of these business activities. As a result, U.S. carriers are subjected to charges for such services which are significantly higher than the costs of

performing their own trucking, CY, CFS and related warehousing activities, and are denied the opportunity to develop more cost-efficient options for performing these business activities.

4. Sea-Land applied to PRC authorities for a trucking license on behalf of Orient Trucking Limited, a subsidiary of Sea-Land, to permit it to operate within Guangdong and Fujian provinces, adjacent to Hong Kong. No response has been provided to the application by PRC authorities.
5. U.S. laws do not restrict PRC carriers from owning or operating trucking services or inland terminal facilities.

"Doing Business" Costs

1. SINOTRANS and PENAVICO utilize their monopoly control over shipping agency functions in the PRC to assess charges which, for U.S. carriers, are excessively high or discriminatorily applied vis-a-vis PRC carriers. U.S. carriers are denied the opportunity to develop more cost-efficient options for performing agency functions.
2. Among the excessive charges imposed by PRC agents on U.S. carriers are cargo "stuffing charges", loading incentives to achieve higher container capacity utilization, booking commissions, and documentation costs.
3. U.S. laws do not restrict PRC carriers from contracting for shipping agency functions, or from performing agency

and documentation services with respect to the PRC carrier's own cargo.

Based on all the foregoing information, it appears that the practices of the PRC Government, PRC carriers and persons in the PRC providing maritime-related services result in the existence of conditions that adversely affect the operations of U.S. carriers in the U.S. oceanborne trade and that such conditions do not exist for PRC carriers in the United States.

Accordingly, the Commission institutes this investigation under the FSPA to determine whether U.S. carriers have been or will be adversely affected by the PRC laws, practices and policies described above, whether remedial action is required, and, if so, what those remedies should be.

In particular, the Commission directs the parties to address the five major issues as more fully described above: (1) Full branch office status; (2) Recognition of carriers' tariffs; (3) Port service issues; (4) Intermodal and related services; and (5) "Doing business" costs. Additional factual issues that are believed to be relevant to the Commission's examination of these PRC practices under the standards of the FSPA may be raised by any party as well. When facts are asserted, those facts should be set forth in detail in affidavits of knowledgeable persons and should include any documentary evidence in support of such affidavits.

Proceedings under the FSPA are conducted within the framework of statutorily-imposed deadlines. Once initiated, the Commission must complete an investigation and render a decision within 120

days unless certain factors warrant a 90-day extension. Because of these time constraints, the proceeding will be limited to two rounds of simultaneous submissions by all parties. There will be an initial filing and a reply filing. Moreover, because of the time constraints, the proceeding will be conducted on the basis of written submissions only, without oral evidentiary hearings and without discovery. Any motions filed will not alter the deadlines established by the procedural schedule set forth below. In its discretion, the Commission may withhold ruling on such motions until a final order.

Any person seeking to participate as an intervenor must file its submissions in accordance with the procedural schedule established below. Moreover, any person interested in participating as an intervenor must file a notice of intention to intervene with the Commission's Secretary and serve such notice on all parties. The purpose of this notice is to ensure that intervenors will be served by all participating parties. The filing of a notice of intention to intervene, however, does not obligate a party to file a written affidavit or memorandum.

NOW THEREFORE, IT IS ORDERED, That pursuant to section 10002(b) of the Foreign Shipping Practices Act of 1988, the Commission hereby initiates an investigation to determine whether any laws, rules, regulations, policies or practices of the PRC Government, or any practices of PRC carriers or other persons providing maritime or maritime-related services in the PRC result in the existence of conditions that adversely affect U.S. carriers

and do not exist for PRC carriers in the United States and, if such adverse conditions are found to exist, what shall be an appropriate remedy or remedies;

IT IS FURTHER ORDERED, That China Ocean Shipping Company and China National Foreign Trade Transportation Corp. are each named PRC carrier parties in this proceeding;

IT IS FURTHER ORDERED, That American President Lines, Ltd. and Sea-Land Service, Inc. are each named United States carrier parties in this proceeding;

IT IS FURTHER ORDERED, That the Commission's Bureau of Hearing Counsel is made a party to this proceeding;

IT IS FURTHER ORDERED, That any person interested in participating in this proceeding shall file a notice of intention to participate as an intervenor with the Commission's Secretary by August 14, 1991;

IT IS FURTHER ORDERED, That such interested persons shall participate in this proceeding in accordance with the filing schedule set forth below;

IT IS FURTHER ORDERED, That the proceeding shall include oral argument in the discretion of the Commission;

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

IT IS FURTHER ORDERED, That the responses to the Commission's January 29, 1991 Order that were filed by the two U.S. carrier parties and the two PRC carrier parties and all comments filed in response to the simultaneous Federal Register Notice shall be made part of the record herein. If any party wishes a portion of those prior responses to be protected from public disclosure, that party shall file a motion requesting such protection by August 5, 1991 and shall identify the specific portions for which such protection is sought, and shall explain in detail why such protection is necessary;

IT IS FURTHER ORDERED, That this Notice and Order of Investigation be published in the Federal Register, and that a copy thereof be served upon the PRC carrier parties and the United States carrier parties;

IT IS FURTHER ORDERED, That this proceeding shall be conducted in accordance with the Commission's Rules in 46 C.F.R. Part 588;

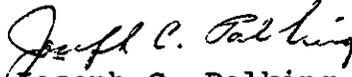
IT IS FURTHER ORDERED, That all documents submitted by any party of record in this proceeding shall be filed in accordance with Rule 118 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.118, as well as being mailed directly to all parties of record;

IT IS FURTHER ORDERED, That all initial affidavits and memoranda of law shall be filed no later than August 26, 1991;

IT IS FURTHER ORDERED, That all reply affidavits and memoranda of law shall be filed no later than September 24, 1991; and

FINALLY, IT IS ORDERED, That pursuant to the terms of the Foreign Shipping Practices Act of 1988 and the Commission's Rules in Part 588, a decision by the Commission in this proceeding shall be issued by November 22, 1991.

By the Commission.


Joseph C. Polking
Secretary