FEDERAL MARITIME COMMISSION

PETITION OF HAINAN P O SHIPPING CO., LTD. FOR AN EXEMPTION FROM THE FIRST SENTENCE OF SECTION 9(C) OF THE SHIPPING ACT OF 1984	Petition No. P1-10

Served: December 9, 2010

BY THE COMMISSION: Richard A. LIDINSKY, Jr., Chairman; Joseph E. BRENNAN, Rebecca F. DYE, Michael A. KHOURI, Commissioners.

Order Granting Petition

By petition filed July 23, 2010, Hainan P O Shipping Co., Ltd. ("Hainan" or "Petitioner") requested that the Federal Maritime Commission ("FMC" or "Commission") exempt it from the first sentence of section 9(c) of the Shipping Act of 1984 ("Shipping Act" or "Act"), currently codified at 46 U.S.C. § 40703. Section 40703 provides that "[n]otwithstanding section 40501(e) of this title and except for service contracts, a rate, charge, classification, rule, or regulation of a controlled carrier may not be effective, without special permission of the Federal Maritime Commission, until the 30th day after publication." 46 U.S.C. § 40703. Notice of the filing was served on July 26, 2010, and published in the Federal Register on July 30, 2010. 75 Fed. Reg. 18406. Comments were due on August 20, 2010. On August 20, 2010, the Commission received comments of the National Industrial Transportation League ("NITL") in support of Hainan's petition for an exemption.

For the following reasons, the Commission has determined to grant the Petition and exempt Hainan from the otherwise applicable provision of section 9(c) of the Shipping Act, 46 U.S.C. § 40703,

which provides that tariff rates of a controlled carrier may not become effective until the 30th day after publication.

The Petition

Hainan seeks to implement reduced tariff rates effective upon publication, rather than be subject to a thirty-day waiting period prescribed in 46 U.S.C. § 40703. Hainan was established in January 2009. The Commission classified Hainan as a controlled carrier on July 23, 2010.

Hainan explains that ocean common carriers, with the exception of controlled carriers,[1] are permitted to reduce their rates effective immediately upon publication.[2] Only controlled carriers are subject to the thirty-day waiting period for reductions in tariff rates, as set forth in section 9(c). Hainan observes that the Commission has granted similar petitions of other carriers.[3]

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[1] Section 3(8) of the Shipping Act defines "controlled carrier" as:

> "an ocean common carrier that is, or whose operating assets are, directly or indirectly, owned or controlled by a government, with ownership or control by a government being deemed to exist for a carrier if --
>
> (A) a majority portion of the interest in the carrier is owned or controlled in any manner by that government, an agency of that government, or a public or private person controlled by that government; or
>
> (B) that government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer, or the chief executive officer of the carrier."

46 U.S.C. §40102(8).

[2] Section 8(d) of the Shipping Act requires that all common carriers, controlled or otherwise, must give thirty days notice for rate increases. 46 U.S.C. § 40501.

[3] *See* Petition No. P3-99, *Petition of China Ocean Shipping (Group) Company for a Partial Exemption from the Controlled Carrier Act*, 30 S.R.R 187 (FMC 2004); Petition No. P4-03, *Petition of China Shipping Container Lines Ltd. for a Permanent Full Exemption from the First Sentence of Section 9(c) of the Shipping Act of 1984*, 30 S.R.R. 193 (FMC 2004); and Petition No. P6-03, *Petition of Sinotrans Container Lines Co., Ltd. (Sinolines) for a Full Exemption from the*

Hainan argues that its request meets the criteria of section 16 of the Shipping Act, 46 U.S.C. § 40103 ("section 16"), as it will neither result in a substantial reduction in competition nor be detrimental to commerce. Hainan notes that the Commission found in 2004 that granting a similar exemption to Sinotrans Container Lines Co. would increase rather than decrease competition. Petition at 3. Hainan argues that, with the number of carriers increasing rates substantially, and with peak season surcharges on top of general rate increases, additional competition by a carrier like Hainan may help ameliorate or temper those increases. *Id.* Hainan also asserts that the exemption would promote commerce by providing shippers with more options than are currently available. *Id.* Moreover, Hainan observes that the Commission instituted Fact Finding Investigation No. 26 into shortages of vessel capacity and equipment in the export and import trades, and Hainan asserts that its additional vessels and equipment should help resolve those issues. *Id.*

The Commission received one comment concerning the Petition from NITL. NITL supports granting the Petition on the grounds that it is pro-competitive and consistent with the Ocean Shipping Reform Act's market-based focus, and will not affect the Commission's substantive authority over Hainan's tariff rates. NITL believes that granting the exemption will have a pro-competitive impact on the U.S. ocean liner industry by providing Hainan with the same tariff reduction rights enjoyed by other liner carriers not subject to the Controlled Carrier Act. Moreover, NITL believes that Hainan should have the ability to reduce common carrier rates and tariff terms promptly to meet its customers' pricing requirements and to respond to market forces.

First Sentence of Section 9(c) of the Shipping Act of 1984, As Amended, 30 S.R.R. 197 (FMC 2004); Petition No. 05-04, *Petition of American President Lines, Ltd. for a Full Exemption from the First Sentence of Section 9(c) of the Shipping Act of 1984, as Amended*, 30 S.R.R. 517 (FMC 2004); and Petition No. 06-04 *Petition of China Shipping (Hong Kong) Container Lines Co., Ltd. for an Exemption from the First Sentence of Section 9(c) of the Shipping Act of 1984*, 30 S.R.R. 645 (FMC 2005).

Discussion

Section 16 provides that the Commission may exempt any activity of persons subject to the Shipping Act from any requirement of the Act, if it has found that the exemption will not result in substantial reduction in competition or be detrimental to commerce. Section 16 further provides that "[t]he Commission may attach conditions to an exemption and may, by order, revoke an exemption." 46 U.S.C. § 40103(a). Finally, section 16 provides that "[a]n order or regulation of exemption or revocation of an exemption may be issued only if the Commission has provided an opportunity for a hearing to interested persons and departments and agencies of the United States Government." 46 U.S.C. § 40103(b).

1. Substantial Reduction in Competition

Hainan's arguments regarding carrier competition appear to have merit. One of Hainan's burdens as petitioner is to establish that the exemption will not result in a substantial reduction in competition. In each of the five previous controlled carrier requests for similar relief, the Commission has found that granting the exemption would increase rather than decrease competition. Hainan asserts that competition is likely to increase because Hainan has commenced operations in the trade between the People's Republic of China, Vietnam, the Republic of Korea, and the United States. Hainan's assertion is supported by NITL, who represents shippers likely to benefit from this competition. We also note that Hainan has relatively low market share and is not a member of the two rate-discussion agreements in the transpacific trade.

2. Detriment to Commerce

Hainan's uncontested argument that the exemption will not be detrimental to commerce also appears to have validity. Allowing Hainan to reduce tariff rates and charges on less than thirty days notice may allow it to compete more vigorously for time-sensitive

cargo. This would also appear to give shippers more options in a competitive market. No comments were filed to advance the position that granting Hainan's request would be detrimental to commerce. "As we have previously found, the thirty-day requirement of section 9(c) has declined in significance." *Petition of China Shipping (Hong Kong) Container Lines Co., Ltd. for an Exemption from the First Sentence of Section 9(c) of the Shipping Act of 1984*, 30 S.R.R. 645 (FMC 2005).

Conclusion

We find that Hainan's request meets the two-part test of section 16. Therefore, the request for exemption from the first sentence of section 9(c) is granted without a time limit or provision for expiration. Hainan will remain subject to all other applicable provisions of the Shipping Act and the Commission's regulations. The Commission retains its full authority to revoke the instant exemption.

THEREFORE, IT IS ORDERED, That Hainan P O Shipping Co., Ltd. is granted an exemption from the requirements of 46 U.S.C. § 40703 that it wait thirty days to impose tariff rate decreases, and may reduce its tariff rates, charges, classifications, rules or regulations effective upon publication pursuant to 46 C.F.R. Part 520; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

Karen V. Gregory
Secretary