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FEDERAL MARITIME COMMISSION

**BEFORE THE
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**

FMC Petition No. P1-10

**COMMENTS OF
THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE
IN SUPPORT OF PETITION FOR AN EXEMPTION**

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August 20, 2010

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The National Industrial Transportation League (“League”) hereby submits these comments in response to the Federal Maritime Commission (“FMC”) Notice of Filing, issued on July 26, 2010, in which the FMC requested comments regarding the petition of Hainan P O Shipping Co., Ltd. (“Hainan”) for an exemption from the first sentence of Section 9(c) of the Shipping Act of 1984, as amended, 46 U.S.C. § 40703 (“Controlled Carrier Act”). Hainan filed its petition with the agency on July 23, 2010. The proposed exemption would allow Hainan to reduce its common carrier tariff rates, charges, classifications, rules or regulations in the United States trades effective upon publication. The League supports a granting of the exemption.

The League believes that granting the exemption would have a pro-competitive impact on the U.S. ocean liner industry by providing Hainan with the same tariff rate reduction rights enjoyed by both other liner carriers not subject to the Controlled Carrier Act, as well as

controlled carriers that have been granted a similar exemption by the FMC.¹ Specifically, the League believes that Hainan should be able to promptly reduce common carrier rates and tariff terms to meet its customers' pricing requirements and to respond to market forces, without adhering to the statutory 30-day waiting period. Granting the petition would increase service options for shippers and provide Hainan with increased flexibility to meet the needs of its customers when market conditions in the United States trades warrant a reduction in rates and charges.

I. BACKGROUND

A. Hainan's Petition

Petitioner Hainan is owned and controlled by the Chinese government and, thus, is subject to the Controlled Carrier Act.² Under that Act, new rates or amended rates in the United States trades that are published in a controlled carrier's tariff are not effective until 30 days after publication.³ Therefore, unlike nearly all of its competitors, Hainan must still wait 30 days to lower its tariff rate below that charged by a competitor. It is this restriction that Hainan seeks to address in its petition.

B. Identity and Interest of the League

Founded in 1907, the League is one of the oldest and largest national associations representing companies involved in the transportation of goods in both domestic and

¹ Under Section 8(e) of the Shipping Act of 1984, a tariff rate reduction made by carriers that are not subject to the Controlled Carrier Act take effect upon publication of the rate. 46 U.S.C. § 40501(e). *See also* *Petition of American President Lines, Ltd. and APL Co., PTE, Ltd.*, Docket No. P5-04, 30 SRR 517 (October 27, 2004); *Petition of China Ocean Shipping (Group) Company*, Docket No. P3-99, 30 SRR 187 (April 1, 2004); *Petition of China Shipping Container Lines Co., Ltd.*, Docket No. P4-03, 30 SRR 193 (April 1, 2004); and *Petition of Sinotrans Container Lines Co., Ltd.*, Docket No. P6-03, 30 SRR 197 (April 1, 2004).

² 46 U.S.C. § 40701 *et seq.*

³ 46 U.S.C. § 40703.

international commerce. League members ship substantial quantities of goods by ocean, rail, truck and air carriage. Its members include not only some of the largest users of the nation's and the world's transportation system, but also smaller companies engaged in the shipment and receipt of goods. In 2002, the League expanded its membership to include carriers and arrangers of transportation services. Thus, although the League's membership is comprised primarily of shippers and receivers of goods, it also includes carriers, third party intermediaries, logistics companies, and others. As League members are substantial purchasers of ocean transportation services in the Trans-Pacific trades, they will be directly impacted by the proposed exemption.

II. COMMENTS IN SUPPORT OF THE PETITION

Granting Hainan's petition would benefit US importers and exporters by enhancing competition between ocean carriers that operate in the Trans-Pacific trade. Granting Hainan's petition for exemption is also appropriate because the carrier has demonstrated that it would satisfy the exemption criteria contained in the Shipping Act of 1984, as amended by The Ocean Shipping Reform Act of 1998 ("OSRA"), as administered and implemented previously by the FMC.

A. The Petition is Pro-Competitive and Consistent with OSRA's Market-Based Focus

OSRA marked a fundamental shift in the regulation of ocean shipping by the Commission. The regime created by Congress when it passed OSRA places a greater emphasis on competition and market forces, rather than regulation, to govern ocean carrier practices. The cornerstone of OSRA was granting the right for ocean carriers and shippers to enter into service contracts with confidential rates. OSRA's reforms, including confidential contracting, have

established a more fluid marketplace that requires carriers to be responsive to changing economic conditions and shippers' business requirements.

Although the vast majority of cargo moved in the U.S. trades now moves under confidential service contracts, some shippers still choose to ship using common carrier tariff rates. When performing common carrier service, most other ocean liner carriers are able to decrease their rates immediately to respond to the market upon a new tariff publication. With controlled carriers such as Hainan, this practice is not possible if Hainan wants to create a tariff rate that is below its currently published tariff rate or the rate of its competitor. In that case, Hainan's customer must wait 30 days after Hainan publishes the reduced tariff rate. This delay in today's fast-moving and highly competitive global economy is a severe impediment to efficient business practices. It also places Hainan and its customers at a competitive disadvantage, since many shippers are unwilling or unable to wait 30 days for the rate decrease to take effect, in order to satisfy their own business requirements. Instead, the shipper may be required to pursue the services of another carrier to obtain the lower rate immediately, if possible.

To compete on a level playing field and better service its customers, Hainan needs to be able to offer lower tariff rates as soon as they are published. The exemption sought by Hainan for authority to reduce common carrier tariff rates upon publication of the tariff is pro-competitive and is completely consistent with the Commission's statutory mandate to "promote the growth and development of United States exports through competitive and efficient ocean transportation and by placing a greater reliance on the marketplace."⁴

The League also believes that Hainan has demonstrated in its petition that the exemption satisfies the criteria included in Section 16 of the Shipping Act, 46 U.S.C. § 40103. Under

⁴ 46 U.S.C. § 40101(4).

Section 16, the Commission may grant an exemption when it finds that the exemption “will not result in substantial reduction in competition or be detrimental to commerce.” As noted above, the League believes that the exemption sought by Hainan is pro-competitive and would benefit commerce in the U.S. foreign trades by allowing Hainan to better respond to the needs of its customers and to the marketplace. It also is completely consistent with exemptions granted previously by the FMC to other controlled carriers.

B. The Petition Will Not Affect the Commission’s Substantive Authority Over Hainan’s Tariff Rates

Even if the Commission grants the Petition, the Commission would retain its statutory powers over Hainan pursuant to the Controlled Carrier Act. If the Commission believed that Hainan’s shipping or pricing practices were predatory or having a harmful effect on American companies, the Commission could investigate Hainan as a controlled carrier and prohibit the use of any Hainan tariff rates that are found not to be just and reasonable.

The requested exemption is largely a procedural change. If granted, it would merely change the timing within which reduced tariff rates offered by Hainan may become effective. It does not change the substantive standard that Hainan’s tariff rates must meet. New tariff rates must still be no lower than a “just and reasonable” level that is fully compensatory to Hainan.⁵ Furthermore, the Commission can still suspend a new tariff rate and require Hainan to prove that the new tariff rate meets the just and reasonable standard.⁶ In such a proceeding, the burden of proof would still be on Hainan.

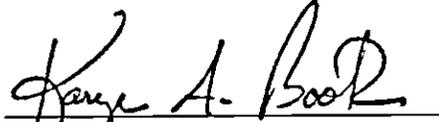
⁵ 46 U.S.C. § 40701(a).

⁶ 46 U.S.C. § 40704.

III. CONCLUSION

For all of the foregoing reasons, the League supports a granting of the exemption requested by Hainan in its petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Karyn A. Booth", written over a horizontal line.

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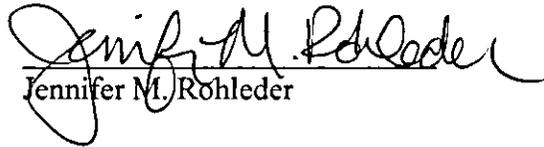
*Counsel for The National Industrial
Transportation League*

August 20, 2010

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2010, I have served a true and accurate copy of the foregoing Comments of The National Industrial Transportation League in Support of the Petition For an Exemption by First Class Mail, postage prepaid, upon Counsel for Petitioner at the address below.

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