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October 12, 2004

Via Hand Delivery

Mr. Bryant L. VanBrakle
Secretary
Federal Maritime Commission
800 North Capitol Street, N.W.
Room 1046
Washington, D.C. 20036

Re: FMC Petition No. P5-04; *Petition of American President Lines, Ltd. and APL Co. Pte. Ltd. for a Full Exemption from the First Sentence of Section 9(c) of the Shipping Act of 1984, as Amended*

Dear Mr. VanBrakle:

Enclosed please find for filing the original and fifteen (15) copies of The National Industrial Transportation League's Comments in Support of The Petition for a Full Exemption in the above referenced proceeding.

Also enclosed is an extra copy of the foregoing comments to be returned to our office with your acknowledgement of receipt.

Should you have any questions regarding this filing, please contact the undersigned.

Sincerely,



Nicholas J. DiMichael
Michael H. Higgins
*Counsel for The National Industrial
Transportation League*

Enclosures

cc OS/GC

ORIGINAL

**BEFORE THE
FEDERAL MARITIME COMMISSION**

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**PETITION OF AMERICAN PRESIDENT LINES, LTD.
AND APL CO. PTE. LTD.
FOR A FULL EXEMPTION FROM THE FIRST SENTENCE
OF SECTION 9(c) OF THE SHIPPING ACT OF 1984, AS AMENDED**

FMC Petition No. P5-04

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

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FMC Petition No. P5-04

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

The National Industrial Transportation League (“League”) hereby submits these comments in response to the Federal Maritime Commission’s (“FMC”) Notice of Filing in this proceeding, served on September 23, 2004. This matter concerns a petition filed by American President Lines, Ltd., and APL Co. Pte. Ltd. (collectively “APL”), on September 20, 2004 (“Petition”), in which APL seeks a full exemption from the first sentence of Section 9(c) of the Shipping Act of 1984 (“Act”)¹, as amended, to allow it to reduce its tariff rates, charges, classifications, rules or regulations effective upon publication. As provided herein, the League supports granting the exemption.²

¹ “Notwithstanding section 1707(d) of this title and except for service contracts, the rates, charges, classifications, rules, or regulations of controlled carriers may not, without special permission of the Commission, become effective sooner than the 30th day after the date of publication.” 46 U.S.C. App. § 1708(c).

² The League previously supported similar petitions filed in the following proceedings: *Petition of China Ocean Shipping (Group) Company for a Partial Exemption from the Controlled Carrier Act*, Petition No. P3-99 (filed March 31, 1999); *Petition of China Shipping Container Lines Co., Ltd. for Permanent Full Exemption from the First Sentence of Section 9(c) of the Shipping Act of 1984*, Petition No. P4-03 (filed July 31, 2003); and *Petition of Sinotrans Container Lines Co., Ltd. for a Full Exemption from the First Sentence of Section 9(c) of the Shipping Act of 1984, as Amended*, Petition No. P6-03 (filed August 11, 2003). The Commission granted the requested exemptions for reasons that are fully applicable here.

The League believes that the FMC's approval of APL's requested exemption would benefit competition in the U.S. ocean liner industry because it would put APL on equal footing with other liner carriers not subject to the Controlled Carrier Act³ and three prominent Chinese controlled carriers that recently received nearly identical exemptions.⁴ Specifically, the League believes that the FMC should grant exemption authority to APL so that it may reduce its rates, charges, classifications, rules or regulations in order to meet customer requirements and to respond to market forces, without the delay created by the statutory 30-day waiting period. Granting the Petition would increase service options for shippers and provide APL with increased flexibility to meet the needs of its customers when market conditions warrant a price reduction.

I. IDENTITY AND INTEREST OF THE LEAGUE

The League is one of the oldest and largest national associations representing companies engaged in the transportation of goods in both domestic and international commerce. Founded in 1907, the League currently has over 600 company members. These members include not only some of the largest users of the nation's and the world's transportation network, but also many smaller companies engaged in the shipment and receipt of goods. In 2002, the League added carriers to its membership. Thus, the membership is now representative of all participants in the nation's transportation system, including shippers, carriers, intermediaries, logistics companies, and others. League members are engaged in the domestic and international transportation of substantial quantities of goods by rail, ocean, air, and motor carriage. For nearly 100 years, the

³ Under Section 8(d) of the Act, a change in an existing rate that results in a decreased cost to the shipper may become effective upon publication. 46 U.S.C. App. § 1707(d).

⁴ See *Petition of China Ocean Shipping (Group) Company*, 30 SRR 187 (FMC April 1, 2004); *Petition of China Shipping Container Lines Co., Ltd.*, 30 SRR 193 (FMC April 1, 2004); and, *Petition of Sinotrans Container Lines Co., Ltd.*, 30 SRR 197 (FMC April 1, 2004).

League has worked for a competitive, efficient, and safe transportation system in the United States and throughout the world. The League regularly participates in important regulatory and legislative matters concerning national and international transportation.

II. BACKGROUND

APL is ostensibly subject to the Controlled Carrier Act, 46 U.S.C. App. § 1708,⁵ pursuant to which the rates, charges, classifications, rules, or regulations published in its tariff may not become effective sooner than 30 days after the date of publication.⁶ Therefore, unlike nearly all of its competitors, APL must wait at least 30 days before it can provide lower cost services to customers by publication of new rates, charges, classifications, rules, or regulations, whether to match other carriers' offerings or to implement to its own market-driven pricing decisions. In its petition, APL seeks an exemption from this restriction.

III. COMMENTS IN SUPPORT OF THE PETITION

Granting APL's petition would benefit U.S. shippers by allowing APL to offer prices and services that are more responsive to the marketplace and by furthering competition between ocean carriers. It would serve the interests of American shippers and is appropriate under the Commission's exemption procedures and the Commission's stated policies. Also, the exemption sought by APL is consistent with those recently granted to three major Chinese carriers.⁷

⁵ In its Petition dated September 20, 2004, APL represented that Temasek Holdings (Private) Limited ("Temasek"), an entity owned by the Government of Singapore, would shortly acquire a greater than 50% interest in Neptune Orient Lines Limited ("NOL"), the parent of APL. APL predicted that the FMC would classify it as a controlled carrier within the meaning of the Act at the time Temasek's ownership of NOL exceeded 50%. *See* Petition, at 2-3. The League understands that Temasek's ownership of NOL now exceeds 50%, and therefore assumes that the FMC will classify APL as a controlled carrier within the meaning of the Act.

⁶ 46 U.S.C. App. § 1708(c).

⁷ *See* n.4, *above*.

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

The Ocean Shipping Reform Act of 1998⁸ ("OSRA") marked a fundamental shift in the regulation of ocean shipping by the United States government. Congress's action largely deregulated the industry and placed greater reliance on competition and market forces, rather than federal oversight, to discipline ocean carriers. OSRA's centerpiece was its provision giving ocean carriers and shippers the right to enter into privately negotiated service contracts with confidential rates. OSRA's reforms, including confidential contracting, have thus far created a dynamic marketplace that requires carriers to respond to changing economic conditions and shippers' business requirements.

Although confidential service contracts now cover the vast majority of cargo moved in the U.S. trades, common carrier tariff rates remain important to shippers that, for various reasons, do not use such contracts. In this market, most ocean liner carriers can reduce prices immediately through new tariff publications, if and when changing conditions warrant such reductions. For controlled carriers, like APL, such market-oriented moves are hamstrung by the 30-day waiting period at issue in this exemption proceeding. The waiting period temporarily excludes APL from markets, and shippers lose the benefit of an additional competitor. In today's fast-moving business world, this type of artificial barrier impedes market forces and disrupts efficient business practices. Indeed, it places APL at a competitive disadvantage since many potential customers are unwilling or unable to wait 30 days for APL's published price reductions to take effect. Instead, a shipper is likely to engage another carrier to obtain an attractive price, which still may not be the *best* possible price due to the temporary exclusion of APL. Because APL's exemption would eliminate the foregoing impediment, it is consistent with the OSRA's objectives and its underlying policy.

⁸ Pub. L. 95-258, 112 Stat. 1902 (1998).

To compete on a level playing field and better serve customers, APL requires the ability to apply price reductions upon publication. The exemption sought by APL for authority to make common carrier price reductions effective immediately advances competition and comports 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.”⁹ Thus, the League believes that the exemption at issue should be granted.

B. Harm is Unlikely to Arise Because the Exemption Will Not Affect the Commission’s Substantive Authority over APL’s Prices

Harm is unlikely to arise from granting the relief requested by APL because the Commission will retain its substantive authority to police APL’s pricing practices under the Controlled Carrier Act.¹⁰ If the Commission had reason to believe that APL’s pricing practices were predatory, or otherwise harmful to the American shipping industry, then the Commission could investigate APL and prohibit the use of any tariff rates, charges, classifications, rules, or regulations found unjust or unreasonable.¹¹ In such a proceeding, APL would bear the burden of proof.

Since the foregoing *substantive* standard would remain in full force and effect, it is clear to the League that the requested exemption essentially amounts to a *procedural* change¹²—albeit one that would bring substantial commercial benefits. APL’s requested relief would simply change the time frame for the effectiveness of price reductions accomplished by published rates, charges, classifications, rules, or regulations. The exemption would eliminate a needless waiting period.

⁹ 46 U.S.C. App. § 1701(4).

¹⁰ 46 U.S.C. App. § 1708(a) and (b).

¹¹ See *Petition of China Shipping Container Lines Co., Ltd.*, 30 SRR at 197 (FMC April 1, 2004) (“[T]he Commission’s substantive authority to review and suspend the use of unreasonably low rates continues to provide important protections for the industry[.]”).

¹² See *Petition of Sinotrans Container Lines Co., Ltd.*, 30 SRR at 200 (FMC April 1, 2004) (finding that the controlled carrier sought “a narrowly-tailored, procedural exemption.”).

C. The Petition Satisfies the Exemption Criteria and is Consistent with Nearly Identical Exemptions that the Commission has Granted Recently.

The League also believes that the petition satisfies the exemption criteria contained at Section 16 of the Act, 46 U.S.C. App. § 1715. Under 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 APL is pro-competitive and would benefit commerce in the U.S. foreign trades by allowing APL to better respond to the needs of its customers and to the marketplace. Accordingly, the statutory standard is met.

Additionally, the League notes that APL seeks an exemption that is nearly identical to those that the Commission granted to certain Chinese carriers on April 1 of this year.¹³ Those carriers, like APL, sought a “narrowly-tailored, procedural exemption”¹⁴ in order to respond better to market forces and to meet the needs of their shipper customers. The same compelling reasons that led the Commission to grant the foregoing exemptions are present here.

D. Granting the Exemption Does Not Expose the United States to the Harms that the Controlled Carrier Act Was Designed to Prevent.

The League believes that despite APL’s status as a controlled carrier, the circumstances of its ownership by the Government of Singapore permit a narrowly circumscribed suspension of the protection otherwise afforded by Section 9(c) of the Act.¹⁵ First, Singapore has a free-market economy, and, by virtue of the United States-Singapore Free Trade Agreement (which entered into force on January 1, 2004) has committed itself to open and competitive markets, and the liberalization of trade. Second, Temasek, in corporate documents issued in connection with the

¹³ See n.4, above. The League notes that in each proceeding, the Commission declined to make the exemption permanent. See, e.g. *Petition of China Shipping Container Lines Co., Ltd.*, 30 SRR at 197. In so far as APL seeks a “permanent” exemption, NITL believes that the petition should be denied in that respect.

¹⁴ See *Petition of China Shipping Container Lines Co., Ltd.*, 30 SRR at 197.

¹⁵ See S. Rep. No. 95-1269, 95th Cong. 2d Sess. at 3-4 (1978), reprinted in 1978 U.S.C.C.A.N. 3536, 3538-39.

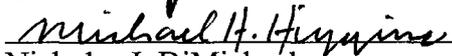
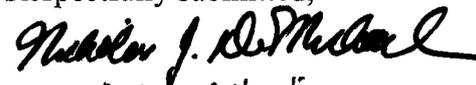
offer to purchase shares of NOL, represented its aim “to maximize long-term shareholder value.” In short, there is no reason to believe that APL will become a foil for the Singapore government to engage in practices that are detrimental to commerce or the U.S. economy.

Finally, the League notes that the Commission would retain its authority to revoke the exemption, if such action was justified under the relevant standard. *See Petition of China Shipping Container Lines Co., Ltd.*, 30 SRR at 197. Indeed, the League continues to endorse the intent and spirit of the Controlled Carrier Act particularly where competition is threatened by controlled carriers or where practices of controlled carriers unfairly manipulate market conditions to the detriment of U.S. trades. However, the League believes there are adequate avenues under the statute to make these determinations and take necessary action as warranted.

IV. CONCLUSION

For all of the foregoing reasons, the FMC should authorize the full exemption from the first sentence of Section 9(c) of the Shipping Act of 1984, as amended, requested by APL in the Petition.

Respectfully submitted,



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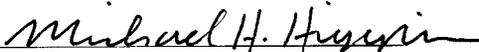
*Counsel for the National Industrial
Transportation League*

October 12, 2004

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2004, I served a true and accurate copy of the foregoing Comments of the National Industrial Transportation League in Support of the Petition for a Full Exemption from the First Sentence of Section 9(c) of the Shipping Act of 1984, as Amended by First Class Mail, postage prepaid, upon Counsel for Petitioner at the address below.

Robert T. Basseches, Esq.
Shea & Gardner
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Washington, D.C. 20036


Michael H. Higgins